

# CARTEL LENIENCY POLICY AND PROCESS GUIDELINES

12 APRIL 2011

## CONTENTS

1	PREFACE	2
2	THE LEGAL FRAMEWORK	3
3	IMMUNITY	3
	→ SCOPE	3
	→ CONDITIONS FOR CONDITIONAL IMMUNITY	4
	→ HYPOTHETICAL ENQUIRIES	6
	→ MARKERS	6
	→ CONDITIONAL IMMUNITY	8
	→ CONTACTING THE COMMISSION: HYPOTHETICAL ENQUIRIES AND APPLICATIONS	8
	→ POSSIBILITY OF REVOCATION	9
	→ CONFIDENTIALITY	9
	→ AMNESTY PLUS	10
	→ USE OF INFORMATION PROVIDED TO THE COMMISSION	10
4	COOPERATION	11
	→ SCOPE	11
	→ FULL, CONTINUING AND COMPLETE COOPERATION	11
	→ RECOMMENDATION FOR REDUCED PENALTIES	11
	→ HOW TO APPLY FOR COOPERATION CONCESSIONS	12

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.

## 1 PREFACE

- 1.01 Cartels involve illegal agreements by competitors not to compete with each other, such as price fixing, the restriction of outputs, the allocation of customers, suppliers or territories, and bid rigging.
- 1.02 Cartels mean consumers pay more for their goods and services, businesses pay more for input products and services, and New Zealand's international competitiveness is undermined. The detection, investigation and prosecution of cartels, under the provisions of the Commerce Act 1986 (the Act), is a priority area for the Commerce Commission (the Commission).
- 1.03 International and New Zealand experience indicates that an effective leniency programme is the single most effective tool available to detect cartels. Cartels usually operate informally and in secret. A crucial element of an effective programme is the availability of conditional immunity from prosecution for the first cartel member to disclose the existence of the cartel by applying to the enforcement agency for conditional immunity and cooperating in the investigation and any subsequent proceedings.
- 1.04 The availability of conditional immunity and concessions for cooperation reflect the exercise of the Commission's discretion as to how it will deal with a cartel member who offers significant assistance in detecting and proving cartel conduct. The Commission has determined that conditional immunity from prosecution is justified where the cooperation and full admission by a party enable the Commission to detect and/or prove the existence of cartel.
- 1.05 Reduced penalties for some cartel participants who do not qualify for immunity are considered appropriate to provide incentives for full cooperation with the Commission. Cooperation allows the Commission's investigation and proceedings to be undertaken more quickly and effectively, and with fewer resources.
- 1.06 The aims of the Commission's Cartel Leniency Policy (Leniency Policy) are to:
- provide an incentive to cartel participants who may qualify for immunity to report their participation to the Commission, to enable the Commission to detect and/or prove more cartels;
  - provide an incentive for cartel participants who do not qualify for immunity to cooperate with the Commission's investigation and proceedings; and
  - provide transparency and certainty on what immunity and cooperation applicants must do, and what they can expect in return.
- 1.07 This Leniency Policy has two parts:
- **Immunity:** Conditional immunity will be granted where an applicant is the first participant in a cartel to apply to the Commission and to meet the prescribed conditions. Immunity is 'conditional' in that the holder must continue to meet the prescribed conditions to maintain their immunity status.
  - **Cooperation:** The Commission may exercise its discretion by taking a lower level of enforcement action, or, in exceptional cases for individuals, no action at all, in exchange for information and full, continuing and complete cooperation throughout a cartel investigation and any subsequent proceedings.<sup>1</sup>
- 1.08 The Commission will seek to apply these guidelines consistently and fairly. If any provision of the policy appears, on a reasonable interpretation, to be unclear or ambiguous, the policy will be interpreted in favour of the applicant.
- 1.09 If a person took no part in the cartel, they are not at risk of breaching the Act, and so are not entitled to conditional immunity. However, any person with information about a cartel should provide that information to the Commission. The Commission welcomes all information in relation to possible breaches of the Act.

1. The Cooperation Policy introduced in November 2004 continues to apply to other types of enforcement action by the Commission under the Commerce Act, and to other legislation enforced by the Commission. However, its application to cartels is replaced by the Cooperation section of this Leniency Policy.

## 2 THE LEGAL FRAMEWORK

- 2.01 Cartels are prohibited under section 27 of the Act. Section 27 prohibits contracts, arrangements or understandings that substantially lessen competition. Under section 30 of the Act, certain provisions of contracts, arrangements or understandings that fix, control or maintain prices are deemed to substantially lessen competition.
- 2.02 The Act provides for substantial financial penalties against companies and individuals for cartel conduct, attempted cartel conduct, and aiding and abetting cartel conduct. The High Court may order the following maximum financial penalty for each contravention:
- in the case of an individual, \$500,000; and
  - in the case of a company, the greater of \$10,000,000; or either:
    - three times the value of any commercial gain resulting from the contravention; or
    - 10 per cent of the turnover of the company and all of its interconnected bodies corporate.
- 2.03 In addition, for offences involving conduct in terms of section 30(1) of the Act (such as price fixing), the Court may order the persons involved to be excluded from the management of a body corporate under section 80C.
- 2.04 There are further provisions that reflect the seriousness of cartel conduct. Section 80A of the Act provides that a company cannot indemnify a director, servant or agent for the costs incurred in defending or settling any liability under section 30. Section 80B of the Act provides that the maximum penalty for doing so is twice the value of the indemnity provided.

## 3 IMMUNITY

### SCOPE

- 3.01 Applications for conditional immunity from proceedings initiated by the Commission may be made by individuals and by companies. These are both referred to below as ‘persons’, except where it is necessary to distinguish individuals from companies. Where an applicant is an individual, they must be, or have been, a director, officer or employee of a company that was a party to the cartel.
- 3.02 Conditional immunity will be available to the first applicant who meets the prescribed conditions outlined below. Applicants will be prioritised by the time of their application. Applicants who do not have sufficient information to qualify immediately for conditional immunity may request a ‘marker’ to confirm, and preserve for a limited time, their position as the first applicant for conditional immunity. Immunity is ‘conditional’ in that the holder must continue to meet the prescribed conditions to maintain their immunity status.
- 3.03 Where conditional immunity is granted to a company, the conditional immunity will usually extend with the same conditions to any current or former director, officer or employee of that company. This is known as ‘derivative conditional immunity’.
- 3.04 However, immunity from Commission-initiated proceedings cannot exclude claims by third parties for compensatory or exemplary damages as a result of the cartel’s activities.
- 3.05 In granting conditional immunity, the Commission will not usually object to companies and/or lawyers representing the persons included within the grant of conditional immunity. If the interests of a company with conditional immunity diverge from those of any of its directors, officers or employees, the Commission recommends that the individuals concerned consider obtaining separate legal representation.

## CONDITIONS FOR CONDITIONAL IMMUNITY

3.06 To qualify for conditional immunity, all of the following seven conditions must be met.

**(i) The person is the first applicant to meet the criteria for conditional immunity.**

Conditional immunity is available only to:

- (a) the first person who applies to the Commission for a marker or conditional immunity, and who meets the required conditions in respect of a cartel that the Commission is not aware of; or,
- (b) the first person who applies to the Commission for a marker or conditional immunity, and who meets the required conditions, in respect of a cartel the Commission is aware of, but does not yet have evidence that is likely to warrant issuing proceedings against a cartel member. (This may be after the Commission has started investigating, including exercising its statutory information-gathering powers.)

If conditional immunity has already been granted any subsequent applicants will be told that it is not available. Subsequent applicants should consider applying to be treated as a cooperating party.

The time and date of applications will be recorded, and this will identify who would next be eligible to obtain a marker or conditional immunity, if the initial marker holder fails to meet the prescribed conditions. If a marker has been issued and conditional immunity not yet granted subsequent applicants will be advised of their place in the queue for a marker or conditional immunity. The availability of conditional immunity or a marker for later applicants in such circumstances is subject to their meeting the condition in paragraph 3.06(i)(b) above.

**(ii) The person is or was a participant in that cartel.**

Any person that took part in a cartel can apply for a marker or conditional immunity. A person who attempted to form a cartel, or who has materially facilitated the operations of a cartel, is a participant, even though they themselves are not engaged in trade of the relevant goods or services.<sup>2</sup>

**(iii) The person admits that they participated in, or are participating in, conduct in respect of that cartel that may constitute a breach of section 27 or section 27 via section 30 of the Act.**

The Commission does not consider that an applicant for conditional immunity is able to cooperate adequately if the applicant wishes to assert that the Act has not been breached. The applicant is required to provide a full admission to the Commission as to its involvement in a cartel.

The Commission will accept applications for conditional immunity where it is satisfied that the conduct by the applicants likely has affected a market in New Zealand, or where the applicant is asserting that the Commission likely has jurisdiction over the cartel.

**(iv) The person has either ceased their involvement in the cartel or has informed the Commission that they will cease their involvement (except in the circumstances outlined below).**

An applicant must confirm that their involvement in the cartel has ceased. This is subject to the proviso that, in appropriate circumstances, the Commission might require the applicant to continue to act in particular ways towards the cartel, for a specified period, to allow necessary evidence to be obtained.

**(v) The person has not coerced others to participate in the cartel.**

Immunity will not be available to any person who has coerced other participants to take part in the cartel. Coercion includes conduct such as threats of physical or serious economic harm, or intimidation, to compel or force persons to take part in the cartel. While coercion is likely to be rare, the Commission considers it inappropriate that any person who has played such a role should be eligible for immunity.

<sup>2</sup> See section 80(1)(a)-(f) of the Act.

The experience of the Commission and of other competition authorities has been that in virtually all cases the participants have willingly been involved in the cartel's activities. Applicants will be required to confirm that they did not coerce the other participants to take part in the cartel. If it is later found that this statement is false, this will constitute grounds for revocation of immunity (see paragraphs 3.30-3.33).

**(vi) In the case of companies, the person makes admissions in relation to actions that are genuinely corporate acts (as opposed to those undertaken by individuals).**

An application for immunity from a company requires that the admissions made, and the cooperation provided, must be a truly corporate act, as opposed to isolated admissions and cooperation by individual representatives.

If a company has qualified for conditional immunity, all its present or former directors, officers or employees who admit their involvement in the cartel, and who cooperate as required with the Commission's investigation, will be covered by the conditional immunity granted to the company ('derivative immunity'). When an application is made by a company, the company must provide the Commission with the names of all current and former directors, officers and employees of the company it is aware of, who it considers appropriate to include in the scope of the conditional immunity. The current or most recent position held by each individual should be stated. Additional names should be added later if the company becomes aware of further relevant individuals.

A company applying for conditional immunity or a marker should not initially inform its current and past directors, officers and employees of the application and their eligibility for conditional immunity, except to the extent necessary to make the application, as required by law, or with the prior written consent of the Commission. If individuals are aware of their company's conditional immunity while the Commission's investigation is still confidential, they could alert other parties to the investigation and thus jeopardise the Commission's investigation. However, current and past directors, officers and employees can be informed when the investigation becomes public or when the Commission consents to disclosure.

In some circumstances, the Commission may specifically exclude a particular person or persons from the scope of the company-based conditional immunity (such as where they were found to have coerced others into participating in the cartel, or where they fail to cooperate appropriately with the Commission's investigation).

Conditional immunity will usually be available for members of a group of companies wholly owned and solely controlled by the applicant. Where members of a group are only partly owned or controlled by the applicant, the Commission will consider the nature of the relationship between the group members, and will exercise its discretion as to whether or not conditional immunity should be accorded to some or all of them. Conditional immunity will usually be available to a company and its subsidiaries.

Where a company has conditional immunity this extends to all of their current and former directors, officers and employees.

**(vii) The person agrees to provide full and continuing cooperation to the Commission in its investigation of the cartel, and any subsequent proceedings.**

The Commission will discuss with each applicant the specific voluntary actions they will be required to undertake to meet the requirement for full and continuing cooperation.

While the exact details of this requirement may vary with circumstances, it will usually include the following:

- An applicant company must identify one individual in the organisation as the primary contact point for all matters related to the investigation, unless otherwise agreed by the Commission. Ideally, the person identified should be available for the duration of the investigation.
- Where the applicant is a company, the Commission may require it to conduct an internal investigation to obtain more detailed information, including on how the cartel was conducted. This could apply where a cartel has been conducted by middle level staff, without the knowledge and participation of top management.
- Commission access to IT systems and relevant IT personnel. Where changes in an IT system are necessary, steps should be taken to preserve the information stored in it and to provide practicable means for access by the Commission.

## HYPOTHETICAL ENQUIRIES

- 3.07 A potential applicant for conditional immunity, or their legal representative, may contact the Commission to ascertain if a marker or conditional immunity is available for a particular cartel. The Commission will ask for sufficient information to ensure that the hypothetical enquiry is genuine, such as the product(s) and/or service(s) involved and the cartel's impact on a market in New Zealand. Enquiries may be anonymous.
- 3.08 The Commission will deal with such enquiries on a 'hypothetical' basis. Any information provided to the Commission in this context will not be used for any purpose other than to provide the requested clarification. The Commission will not take into account knowledge obtained from hypothetical enquiries when determining its 'awareness' when considering any later applications for conditional immunity. Hypothetical enquiries will not be considered to constitute an application for conditional immunity or a marker.
- 3.09 The Commission will not confirm or deny whether an investigation is underway on any particular cartel, unless it considers it is necessary to do this in relation to the possibility of the eligibility of applications made in terms of paragraph 3.06(i)(b) of this Policy.
- 3.10 Early application for conditional immunity by a prospective applicant is strongly recommended, given the importance of obtaining a marker.

## MARKERS

- 3.11 An applicant who considers that it does not have sufficient information to qualify for conditional immunity may request a marker to confirm, and preserve for a limited time, their position as the first applicant for conditional immunity. The value of a marker is that it allows the applicant to approach the Commission as soon as they have decided to apply for conditional immunity, rather than having first to assemble all relevant information and before, for example, undertaking or completing an internal investigation.
- 3.12 A prospective applicant must provide the Commission with sufficient information on the nature of the cartel, such as the product(s) and/or service(s) involved, the main participants, and the impact of the cartel on a market in New Zealand, in order to enable the Commission to assess whether or not there is already an applicant for a marker or conditional immunity and/or whether a breach of section 27 or section 27 via section 30 of the Act is likely. This must be to the best of the applicant's knowledge and belief.

- 3.13 The time and date of the application for the marker will be recorded. Where a marker has been given, or conditional immunity granted, the Commission will inform subsequent applicants that a marker is no longer available. These applicants will not be told the identity of the marker or immunity holder. However, subsequent applicants will be informed of their place in the queue for conditional immunity.
- 3.14 If a marker holder fails to perfect the marker as described in 3.16 below, or if conditional immunity is revoked as described in 3.30 – 3.33 below, the Commission may offer a marker or conditional immunity to the next applicant in the queue, subject to meeting the condition in paragraph 3.06(i)(b) above. The next applicant in the queue will then have to meet the requirements for conditional immunity.
- 3.15 After conditional immunity is granted, subsequent applicants are eligible for cooperation concessions. However, an applicant's place in the queue for conditional immunity relates solely to the possibility of obtaining conditional immunity, and does not correspond to greater or fewer cooperation concessions. As discussed in the Cooperation section of these guidelines, the Commission will assess a number of factors when determining whether to take a lower level of enforcement action, such as the quality, timeliness and relevance of the information provided.
- 3.16 An applicant who has gained a marker must then provide the Commission with a statement on an agreed list of issues, within an agreed time. This statement is called the 'proffer'. Supplying a proffer that complies with the prescribed conditions is called 'perfecting the marker'. The standard time allowed to perfect the marker is 28 calendar days, but a longer or shorter time may be agreed where appropriate. The exact content of a proffer may vary with the circumstances, but its scope must include:
- detailed information and supporting evidence on the cartel activities for which conditional immunity is sought; and
  - the nexus with a market in New Zealand and the supporting evidence to illustrate this.
- More detailed information on the types of information the Commission will usually require from a marker holder is available on the Commission's website [www.comcom.govt.nz/cartel-leniency-policy](http://www.comcom.govt.nz/cartel-leniency-policy)
- 3.17 The Commission may contact the holder of a marker to ascertain the progress being made in compiling the proffer.
- 3.18 If, after the scope of the proffer has been agreed, the marker holder finds it is unlikely to be able to produce the proffer within the agreed time, the marker holder must inform the Commission as soon as possible. The marker holder must provide the Commission with sufficient reason(s) as to why the period for perfecting the marker should be extended. If the Commission agrees that the reasons for an extension are valid, it will agree to a new date. Further extensions may also be granted on application. The marker will expire at the end of the prescribed period(s) unless the Commission has agreed to an extension.
- 3.19 When the holder of a marker submits a proffer, the Commission will assess it to ascertain if it meets the prescribed requirements. If the response is insufficient, the Commission may give the marker holder the opportunity to explain or remedy the proffer's shortcomings within a specified time.
- 3.20 If the Commission concludes that a marker holder has met the prescribed requirements, it will confirm that conditional immunity has been granted.
- 3.21 If a marker expires before it is perfected, other than in exceptional circumstances, the next qualifying applicant in the queue will be eligible for conditional immunity or a marker, subject to meeting the condition in paragraph 3.06(i)(b) above. While the former holder of an expired marker is eligible to re-apply for conditional immunity, its original place in the queue is not protected.

## CONDITIONAL IMMUNITY

- 3.22 Conditional immunity is normally granted following the marker process described above. However, an applicant who is able to provide full information immediately could choose to apply for conditional immunity on their first approach to the Commission. In these circumstances, an applicant will be granted a marker initially and the information provided considered as a proffer. This will be converted to conditional immunity if the Commission determines that the applicant has provided sufficient information and the applicant is eligible for conditional immunity in line with the conditions set out in this Policy. If the applicant provides insufficient information in the view of the Commission, the applicant's marker-holder status will continue and the applicant will be given an agreed amount of time to provide the further details required.
- 3.23 If the Commission decides to conclude a cartel investigation without instituting legal proceedings, a conditional immunity holder will be informed of this. A conditional immunity holder would then have the option of withdrawing from this status or continuing to hold conditional immunity by agreeing to meet any obligations that might arise if the Commission were later to re-open the investigation.
- 3.24 Conditional immunity becomes unconditional when all proceedings have been resolved.

## CONTACTING THE COMMISSION: HYPOTHETICAL ENQUIRIES AND APPLICATIONS

- 3.25 Applications for a marker or conditional immunity, and hypothetical enquiries must be directed to the Competition Branch General Manager of the Commission. The required method of contact is by telephone or in person, during the Commission's working hours: 8.30am to 5pm, Monday to Friday. As telephone messages will not qualify as an application for a marker or conditional immunity, applicants must speak to the Competition Branch General Manager, or authorised delegate if the General Manager is unavailable. The Competition Branch General Manager, or authorised delegate, will respond to any application in a timely manner. The telephone number is +64 (0)4 924 3720. (The acceptable methods of communicating applications for cooperation concessions differ, and are shown in Part 4 of these Guidelines.)
- 3.26 The Competition Branch General Manager will require the following information from callers:
- the purpose of the call (ie, whether it is a hypothetical enquiry, an application for a marker or an application for conditional immunity);
  - the caller's contact details for the next two working days;
  - where the call is a hypothetical enquiry, the product(s) and/or service(s) involved and the impact of the cartel on a market in New Zealand;
  - where the call is an application for a marker, the product(s) and/or service(s) involved, the main participants, the impact of the cartel on a market in New Zealand, and the identity of the applicant if the caller is the applicant's legal representative; and
  - where the call is an application for conditional immunity, the product(s) and/or service(s) involved, the main participants, the impact of the cartel on a market in New Zealand, and the identity of the applicant if the caller is the applicant's legal representative, together with confirmation that the caller considers that they will be able to provide the information required to perfect a marker immediately (see paragraph 3.16 above).
- 3.27 Where an application for a marker or for conditional immunity is made by a company, it must be made by an officer who has authority to represent the company for this purpose, or by the company's authorised legal representative.
- 3.28 At the applicant's request, and where justified, an application can be made, and a marker or conditional immunity given, orally. This is referred to as a 'paperless' process. While the process may be paperless for the applicant, the Commission will create records of its contacts with the applicant and their legal representative(s). The Commission is willing to recognise individual needs, and retains flexibility to allow the specific details of the process to be agreed with the applicant.

- 3.29 When the Commission decides to grant conditional immunity, it will confirm this in writing, except where the Commission has agreed to a paperless process where the communication will be oral. When conditional immunity is granted, the Commission will specify in the immunity agreement the conditions the applicant must meet for conditional immunity to continue to apply. The standard immunity agreement is available on the Commission's website [www.comcom.govt.nz/cartel-leniency-policy](http://www.comcom.govt.nz/cartel-leniency-policy)

## POSSIBILITY OF REVOCATION

- 3.30 To maintain conditional immunity, applicants must continue to meet the requirements for conditional immunity prescribed in the immunity agreement. Failure to do so can lead to revocation of the conditional immunity.
- 3.31 In addition, if, following the grant of conditional immunity, the Commission discovers evidence that the applicant has coerced other participants to take part in a cartel, it will consider revocation.
- 3.32 The possibility of revocation also applies to individuals with derivative conditional immunity resulting from the conditional immunity granted to the company with which they are associated.
- 3.33 If the Commission concludes that a person who has been granted conditional immunity, including an individual with derivative conditional immunity, has failed to provide full and continuing cooperation:
- the Commission will inform the person of this view, initially orally, and will allow five working days for the shortcomings to be remedied;
  - if the shortcomings are not remedied within the prescribed time, the Commission will then give notice of its concerns and will allow the applicant ten working days, or such longer period as the Commission may specify, to remedy the shortcomings; and
  - if the shortcomings are not remedied within the prescribed time, the Commission may revoke the conditional immunity at its sole discretion.

## CONFIDENTIALITY

- 3.34 The Commission and applicants for, and holders of, markers and conditional immunity have obligations in relation to confidentiality. The Commission will endeavour to protect to the fullest extent confidential information provided by holders of a marker or conditional immunity. More detailed information on how the Commission will deal with confidential information is contained in the standard immunity and cooperation agreements. They are available on the Commission's website at [www.comcom.govt.nz/cartel-leniency-policy](http://www.comcom.govt.nz/cartel-leniency-policy)
- 3.35 The Commission will answer hypothetical questions about the availability of a marker for a particular cartel, but will not disclose the identity of any marker holder or the identity of successful and unsuccessful applicants for conditional immunity.
- 3.36 In relation to international cartels, the Commission will not share confidential information provided by an applicant, including the applicant's identity, with other competition authorities without the consent of the applicant. However, the Commission may request a waiver from the applicant to enable the Commission to share information with other competition authorities, and for them to be given a waiver to share information with the Commission. Confidential information may also be disclosed where the Commission considers this necessary for purposes of the investigation or proceedings. In the event the Commission proposes to make such disclosure, an obligation of confidence will be imposed on the recipient of the information to the extent possible.
- 3.37 Information about the cartel obtained by the Commission from other sources may be shared with other competition authorities where the Commission considers this desirable. The purpose of this information exchange is to improve the efficiency and effectiveness of the Commission's actions, and to reduce the timeframe required for investigation.

- 3.38 Applicants for, or holders of, conditional immunity, including holders of derivative immunity, must not disclose to any third party, except as required by law, or in relation to leniency applications to other competition authorities, or otherwise with the prior written consent of the Commission:
- the person's conditional immunity or marker application;
  - any request by the person for clarification regarding the conditional immunity or marker application;
  - any grant of conditional immunity or a marker by the Commission;
  - any information provided by that person to the Commission in connection with the conditional immunity or marker application; and
  - communications from, or information created by, the Commission by reason of, or as a consequence of, the person's conditional immunity application.
- 3.39 A grant of conditional immunity may become public when the Commission issues proceedings against other cartel participants, or when officers or employees of a company that has been granted conditional immunity give evidence in such proceedings.
- 3.40 The Commission will not waive any privilege that it may hold in relation to the information, except to the extent that it is necessary for the purposes of conducting the investigation or proceedings. In particular, the Commission will not waive any privilege that it may hold in relation to the information in the event that any applications are made by third parties to discover such information.

## AMNESTY PLUS

- 3.41 A person who is not granted conditional immunity in respect of their participation in a cartel being investigated by the Commission, but who informs the Commission of their participation in a separate cartel of which the Commission was unaware or where the Commission does not yet have evidence that is likely to warrant taking legal action against the cartel, may be eligible for Amnesty Plus.
- 3.42 The key issue for the Commission to consider when granting Amnesty Plus is whether the evidence provided by the cooperating party in the first cartel relates to a completely separate cartel. The Commission will assess this on a case-by-case basis.
- 3.43 Under Amnesty Plus, an applicant will be entitled to:
- conditional immunity for their participation in the second cartel, through the marker process; and
  - an additional recommended penalty concession in respect of the first cartel where they do not qualify for immunity, but admit to the conduct.
- 3.44 The conditions that apply to the granting of conditional immunity for the second cartel are the same as those outlined in this policy in respect of markers and conditional immunity.

## USE OF INFORMATION PROVIDED TO THE COMMISSION

- 3.45 Information provided to the Commission to support an application for conditional immunity will be received on the basis that it will not be used as evidence in proceedings against the applicant, a related company, or an individual who would qualify for derivative immunity, in respect of the cartel to which the information refers. Information provided by the holder of a marker to perfect the marker will be considered as information provided 'to support an application for conditional immunity'. Such information may, however, be retained by the Commission and used against other persons.
- 3.46 Where conditional immunity is revoked because of the holder's failure to meet the prescribed conditions, or a marker is not perfected, the Commission will be entitled to use the information provided as evidence in proceedings against the person concerned. Where conditional immunity has been revoked, the Commission is likely to continue its investigation.

## 4 COOPERATION

### SCOPE

- 4.01 Commission investigations can derive considerable assistance from the input of individuals and companies. Cooperation can consist of providing evidence and/or information, or admitting to the cartel conduct, or both. The Commission seeks to encourage such cooperation. Cooperation can be particularly valuable for the investigation of cartels, as their secretive nature may present major challenges. It allows the Commission to make more effective use of the resources available to it for the investigation of cartels.
- 4.02 Only the first cartel participant to apply to the Commission and meet the required criteria is eligible for conditional immunity. However, a subsequent applicant may be able to obtain conditional immunity later if the first applicant fails to meet the prescribed conditions agreed with the Commission. In addition, it is possible for the Commission to recognise significant assistance by other cartel participants who are not eligible for conditional immunity, by recommending a lower level of penalty.
- 4.03 A cartel participant who is too late to obtain a marker or conditional immunity may inform the Commission of its willingness to cooperate fully with the investigation. This will open the possibility of obtaining cooperation concessions. Cooperation is available throughout the Commission's investigation. However, applicants that cooperate with the Commission as early as possible are likely to obtain greater concessions from cooperation.

### FULL, CONTINUING AND COMPLETE COOPERATION

- 4.04 To qualify for the exercise of a lower level of enforcement action, the information provided must add significant value to the investigation. The cooperation provided must be full, continuing and complete.
- 4.05 Mere compliance, where the Commission exercises its statutory powers under the Act, does not fulfil this requirement. Information provided early in an investigation will be of more value than the same information provided at a much later stage.
- 4.06 The number of the parties who seek to cooperate with the Commission will also affect the value of the information they can provide. Typically, the cooperation provided by the second and third participants to contact the Commission may be of appreciably more value than that offered later by any other participants.
- 4.07 If an individual or company has agreed to cooperate with the Commission's investigation, but fails to provide the agreed cooperation without reasons that the Commission considers adequate, the Commission may withdraw its indication that it would seek a lesser penalty under the cooperation provisions of the Leniency Policy.

### RECOMMENDATION FOR REDUCED PENALTIES

- 4.08 In exercising its prosecutorial discretion, the Commission may recommend a reduced penalty to the Court based on the contribution the information provided has made to the investigation and subsequent legal proceedings. The Commission may consider recommending reductions in the penalty that might otherwise be considered appropriate in the range of 25 per cent to 40 per cent, and potentially 50 per cent, depending on the value of the information provided. In the case of companies, the maximum discount for cooperation the Commission is likely to recommend would be 50 per cent of the penalty that would otherwise apply. The Commission considers that it is necessary to ensure that the value of conditional immunity is not compromised by any greater reductions in corporate penalties.

- 4.09 In exceptional circumstances, the Commission may exercise its prosecutorial discretion by deciding to take no enforcement action against an individual whose assistance is considered critical to the successful outcome of an investigation and proceedings, even where that person does not qualify for conditional immunity.
- 4.10 A decision to proceed with a lower level of enforcement action is at the Commission's sole discretion, and will reflect an assessment of the relevant circumstances.
- 4.11 As stated in paragraph 3.06(v), conditional immunity will not be available to any person who has coerced other participants to take part in the cartel. However, concessions from cooperation may still be available. The Commission will consider the fact that the cooperating party coerced others into taking part in the activity, together with that party's level of cooperation, when recommending a reduced penalty.
- 4.12 While the Commission can determine how it will approach its recommendations to the Court on setting penalties, the penalties to be imposed are determined by the Court alone.
- 4.13 Cooperation with the Commission with regard to Commission-initiated proceedings cannot exclude claims for compensatory or exemplary damages by third parties who may have suffered loss as a result of the cartel's activities.
- 4.14 Where possible, the Commission will keep confidential the identity of the individual or company in respect of which a lower level of enforcement action is under consideration. The Commission will not reveal the details of any approach to the Commission unless it is necessary to do so. The confidentiality provisions referred to in paragraphs 3.34-3.40 above apply also to information received from cooperation applicants.

## HOW TO APPLY FOR COOPERATION CONCESSIONS

- 4.15 A cartel participant who is not eligible for a marker or conditional immunity may inform the Commission of its willingness to cooperate fully with the investigation by contacting the Competition Branch General Manager of the Commerce Commission. This can be by telephone (+64 (0)4 924 3720), email, fax or post.
- 4.16 Written notices may be sent to any of the following addresses:
- Email: [gm.competition@comcom.govt.nz](mailto:gm.competition@comcom.govt.nz)
  - Street address: Level 6, 44 The Terrace, Wellington 6011
  - Postal address: PO Box 2351, Wellington 6140
  - Fax: +64 (0)4 924 3700
- 4.17 If the Competition Branch General Manager is unavailable when an applicant for cooperation telephones, the applicant should leave a recorded message that includes at least the following information:
- a statement that the message is an application for cooperation concessions;
  - the identity of the caller (and of the applicant, if the caller is the applicant's legal representative);
  - the contact details for the caller for the next two working days, should the Commission wish to call back;
  - sufficient information on the nature of the cartel, such as the product(s) or service(s) involved and the main participants; and
  - the time the call is made (specifying the location if it is not in New Zealand).

Where notification is by email, fax or letter, the minimum information required is the first four points above.

ISBN 978-1-869451-46-2