



International
Competition
Network

**ANTI-CARTEL
ENFORCEMENT
TEMPLATE**

**CARTELS WORKING GROUP
Subgroup 2: Enforcement Techniques**

**New Zealand
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ICN ANTI-CARTEL ENFORCEMENT TEMPLATE

IMPORTANT NOTES:

This template is intended to provide information for the ICN member competition agencies about each other's legislation concerning hardcore cartels. At the same time the template supplies information for businesses participating in cartel activities about the rules applicable to them; moreover, it enables businesses which suffer from cartel activity to get information about the possibilities of lodging a complaint in one or more jurisdictions.

Reading the template is not a substitute for consulting the referenced statutes and regulations. This template should be a starting point only.

1. Information on the law relating to cartels

<p>A. Law(s) covering cartels:</p>	<p>The law prohibiting cartels is contained in the Commerce Act 1986 (the Act). Cartels are not mentioned specifically, but section 27 of the Act prohibits contracts, arrangements or understandings that have the purpose, or effect or likely effect of substantially lessening competition in a market.</p> <p>Section 30 of the Act provides that contracts, arrangements or understandings that have the purpose or effect, or likely effect, of fixing, controlling or maintaining prices are deemed to substantially lessening competition in a market.</p> <p>A summary (in English) of the legislation enforced by the Commerce Commission (the Commission) is available on www.comcom.govt.nz/TheLegislation/Overview.aspx.</p> <p>The Act is available, in English only, at www.legislation.govt.nz.</p>
<p>B. Implementing regulation(s) (if any):</p>	<p>No regulations were required for the implementation of the Act.</p>
<p>C. Interpretative guideline(s) (if any):</p>	<p>Relevant Commission publications include:</p> <ul style="list-style-type: none"> • Cartel Leniency Policy http://www.comcom.govt.nz/cartel-leniency-policy • Leniency Policy for Cartels Fact Sheet http://www.comcom.govt.nz/leniency-policy-for-cartels-fact-sheet-2/

	<ul style="list-style-type: none"> • Cease and Desist Guidelines http://www.comcom.govt.nz/cease-and-desist-guidelines/ • Enforcement Criteria http://www.comcom.govt.nz/enforcement-criteria/ <p>These publications are available at http://www.comcom.govt.nz/anti-competitive-practices/.</p> <p>All of these publications are in English.</p>
<p>D. Other relevant materials (if any):</p>	<p>The Commission has also published a series of relevant factsheets and guidelines available at http://www.comcom.govt.nz/guidelines-and-fact-sheets/. These include:</p> <ul style="list-style-type: none"> • Avoiding illegal agreements. • Guidelines for procurers - how to recognise and deter bid rigging- a guideline for procurers. • Price fixing and cartels. • Trade associations. <p>Exemptions under the Commerce Act.</p>

2. Scope and nature of prohibition on cartels

<p>A. Does your law or case law define the term “cartel”?</p> <p>If not, please indicate the term you use instead.</p>	<p>The Act does not define or mention the term “cartel”. The Act only provides for the prohibition of “contracts, arrangements or understandings” that have the purpose or effect or likely effect, of substantially lessening competition in a market (section 27).</p> <p>Provisions that have the purpose or effect or likely effect, of (or providing for) fixing, controlling or maintaining prices are deemed to substantially lessen competition in a market (section 30).</p>
<p>B. Does your legislation or case law distinguish between very serious cartel behaviour (“hardcore cartels” – e.g.: price fixing, market sharing, bid rigging or production or sales quotas¹) and other types of “cartels”?</p>	<p>The Act does not differentiate between very serious cartel behaviour and other types of collusive behaviour. However, fixing, controlling or maintaining prices is a per se offence in terms of section 30. Other types of conduct are prohibited only if their purpose or effect or likely effect, is to substantially lessen competition in a market.</p>
<p>C. Scope of the prohibition of hardcore cartels:</p>	<p>Price fixing is exempt if it is pursuant to a joint venture arrangement (section 31). A small number of exemptions to the prohibition of restrictive trade practices apply. For example, conduct is exempt if it is specifically authorised by another</p>

¹ In some jurisdictions these types of cartels are regarded as particularly serious violations. These types of cartels are generally referred to as “hardcore cartels”. Hereinafter this terminology is used.

	statute, if it constitutes an arrangement between interconnected bodies, or if it relates exclusively to international shipping (section 43 and 44).
D. Is participation in a hardcore cartel illegal <i>per se</i>?	Fixing, maintaining or controlling prices is illegal <i>per se</i> (section 30).
E. Is participation in a hardcore cartel a civil or administrative or criminal offence, or a combination of these?	Civil offence.

3. Investigating institution(s)

A. Name of the agency, which investigates cartels:	The Commerce Commission
B. Contact details of the agency:]	PO Box 2351 Wellington 6140 New Zealand Ph: (+64- 4) 924 3600 Fax: (+64- 4)924 3700 Website: http://www.comcom.govt.nz/
C. Information point for potential complainants:	www.comcom.govt.nz
D. Contact point where complaints can be lodged:	Potential complainants can: <ul style="list-style-type: none"> • Telephone the Commission's Contact Centre during office hours (8:30am-5:30pm, Monday - Friday) on 0800 94 3600 (domestic) or +64-4 924 3600 (international). • Write to the Commission at Contact Centre, PO Box 2351, Wellington, 6140, New Zealand. • Complete an online form at http://www.comcom.govt.nz/online-complaint-form/. • Send an email to contact@comcom.govt.nz.
E. Are there other authorities which may assist the investigating agency? If yes, please name the authorities and the type of assistance they provide.	In some cases the New Zealand Police may assist the Commission in relation to provisions which have criminal penalties, such as misleading the Commission (section 103).

4. Decision-making institution(s)² [to be filled in only if this is different from the investigating agency]

<p>A. Name of the agency making decisions in cartel cases:</p>	<p>Cartels are investigated by the Commission, but the Commission has no power to apply sanctions.</p> <p>Decisions on whether the Act has been breached by the operation of a cartel, and on whether sanctions will be imposed, may be made only by the High Court of New Zealand.</p> <p>There is no specialised competition court.</p>
<p>B. Contact details of the agency:</p>	<p>The judges and associate judges of the High Court are based in the three largest New Zealand cities: Auckland, Wellington and Christchurch, and travel on circuit to several other cities and towns.</p> <p>Information on the High Court is available at http://www.justice.govt.nz/courts/high-court</p>
<p>C. Contact point for questions and consultations:</p>	<p>Questions on the investigation of cartels should be addressed to the Commission, contact details for which are given elsewhere on this template.</p>
<p>D. Describe the role of the investigating agency in the process leading to the sanctioning of the cartel conduct.</p>	<p>Alleged cartels are investigated by the Commission which has a range of powers discussed elsewhere in this template that strengthen its ability to undertake investigations.</p> <p>If a Commission investigation leads it to conclude that the Commerce Act has been breached by the operation of a cartel the Commission will apply its enforcement criteria to decide whether legal proceedings should be instituted in the High Court. The Commission has discretion to decide which cases will result in enforcement action.</p> <p>Only the Commission may seek pecuniary penalties, or orders excluding certain persons from the management of a body corporate, as sanctions for restrictive trade practices.</p> <p>The Commission, or any other person, may seek injunctions from the court in respect of restrictive trade practices.</p> <p>Private actions for damages or exemplary damages may be made by the person affected.</p>
<p>E. What is the role of the investigating agency if cartel cases belong under criminal proceedings?</p>	<p>Not applicable (i.e. cartels are civil breaches).</p>

² Meaning: institution taking a decision on the merits of the case (e.g. prohibition decision, imposition of fine, etc.)

5. Handling complaints and initiation of proceedings

A. Basis for initiating investigations in cartel cases:	Cartel investigations may be initiated as a consequence of a leniency application, following a complaint or as a proactive investigation by the Commission.
B. Are complaints required to be made in a specific form (e.g. by phone, in writing, on a form, etc.)?	Complaints are not required to be in a specific form.
C. Legal requirements for lodging a complaint against a cartel:	There are no legal requirements for lodging a complaint against a cartel.
D. Is the investigating agency obliged to take action on each complaint that it receives or does it have discretion in this respect?	The Commission has a discretion as to which complaints it investigates further. In making this decision, the Commission relies on its enforcement criteria and considers the extent of detriment, the seriousness of the conduct and the public interest.
E. If the agency intends not to pursue a complaint, is it required to adopt a decision addressed to the complainant explaining its reasons?	The Commission applies its enforcement criteria to decide whether a complaint should be pursued. A conclusion that a particular complaint should not be pursued is not a formal Commission decision. However, as a matter of practice, the Commission explains to complainants its reasons for not investigating further.
F. Is there a time limit counted from the date of receipt of a complaint by the competition agency for taking the decision on whether to investigate or reject it?	There is no time limit by which a decision about whether to investigate a complaint must be made. However, under section 80(5) of the Act, the Commission must commence legal proceedings within 3 years after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered. Under this same section the Commission cannot commence proceedings more than 10 years after the matter giving rise to the contravention.

6. Leniency policy³

A. What is the official name of your leniency policy (if any)?	Commerce Commission Cartel Leniency Policy and Process Guidelines. The policy is publicly available at http://www.comcom.govt.nz/cartel-leniency-policy .
B. Does your jurisdiction offer full leniency as well as partial leniency (i.e. reduction in the sanction	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

³ For the purposes of this template the notion of ‘leniency’ covers both full leniency and a reduction in the sanction or fines. Moreover, for the purposes of this template terms like ‘leniency’ ‘amnesty’ and ‘immunity’ are considered as synonyms.

/ fine), depending on the case?	<p>agreed with the Commission.</p> <p>The Commission can also recognise significant cooperation by other cartel participants who are not eligible for conditional immunity, by recommending a lower level of penalty.</p> <p>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.</p>
C. Who is eligible for full leniency?	<p>The Commission only offers full immunity to the first applicant in relation to that cartel who meets the required criteria.</p> <p>Subsequent cartel members that apply to the Commission may be eligible for reduced penalties in exchange for information, and full, continuing, complete cooperation throughout a cartel investigation and any subsequent proceedings. This is at the discretion of the Commission.</p>
<p>D. Is eligibility for leniency dependent on the enforcing agency having either no knowledge of the cartel or insufficient knowledge of the cartel to initiate an investigation?</p> <p>In this context, is the date (the moment) at which participants in the cartel come forward with information (before or after the opening of an investigation) of any relevance for the outcome of leniency applications?</p>	<p>Eligibility for conditional immunity from Commission initiated proceedings is not dependent on the Commission having either no knowledge of the cartel or insufficient knowledge of the cartel to initiate an investigation.</p> <p>The Commission may grant conditional immunity to:</p> <ul style="list-style-type: none"> • The first person who applies to the Commission for a marker or conditional immunity in respect of a cartel that the Commission is not aware of; or, • The first person to apply for a marker or conditional immunity for 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.
E. Who can be a beneficiary of the leniency program (individual / businesses)?	Both individuals and companies can benefit from the Leniency Policy.
F. What are the conditions of availability of full leniency:	<p>To be eligible for conditional immunity an applicant must meet the following conditions:</p> <ul style="list-style-type: none"> • Is the first applicant to meet the criteria for conditional immunity. • Is or was a participant in that cartel. • 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 30 of the Act. • Has either ceased their involvement in the cartel or has informed the Commission that they will cease their involvement. In some circumstances the Commission may require the applicant to continue to act in particular ways towards the cartel, for a specific period, to allow necessary evidence to be obtained.

	<ul style="list-style-type: none"> • Has not coerced others to participate in the cartel. • In the case of companies, makes admissions in relation to actions that are genuinely corporate acts (as opposed to those undertaken by individuals). • Agrees to provide full and continuing cooperation to the Commission in its investigation of the cartel, and any subsequent proceedings.
<p>G. What are the conditions of availability of partial leniency (such as reduction of sanction / fine / imprisonment):</p>	<p>The Commission is able to exercise its discretion to take a lower level of enforcement action, or no action at all, in exchange for information and full and continuing cooperation.</p> <p>To be eligible for reduced penalties the information provided by a person must add significant value to the investigation. The cooperation must be full, continuing and complete. 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.</p>
<p>H. Obligations for the beneficiary after the leniency application has been accepted:</p>	<p>For both an individual and a company, the beneficiary must provide full, continuing and complete cooperation. The Commission will discuss with each applicant the specific voluntary actions they will be required to undertake to fulfil this requirement.</p> <p>While the exact details of this requirement may vary with circumstances, it will usually include the following:</p> <ul style="list-style-type: none"> • 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 do 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.
<p>I. Are there formal requirements to make a leniency application?</p>	<p>Applications for a marker, or conditional immunity, and hypothetical enquiries must be directed to the General Manager of the Competition Branch 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.</p> <p>Telephone messages will not qualify as an application for a marker or conditional immunity. Applicants must speak to the General Manager Enforcement, or authorised delegate if the General Manager is unavailable.</p>

	<p>The telephone number is +64-4 924 3720.</p> <p>A list of the information the General Manager will require from callers is listed in the Cartel Leniency Policy and Process Guidelines available at http://www.comcom.govt.nz/cartel-leniency-policy-and-process-guidelines/</p>
<p>J. Are there distinct procedural steps within the leniency program?</p>	<p>The Commission's procedure for leniency applications is as follows:</p> <p>Enquiry</p> <p>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 deal with such enquiries on a 'hypothetical basis'. Hypothetical enquiries do not constitute an application for conditional immunity or a marker.</p> <p>Formal application</p> <p>A prospective applicant must provide the Commission with sufficient information on the nature of the cartel in order to enable the Commission to assess whether or not conditional immunity or a marker for conditional immunity are available. The information required will include:</p> <ul style="list-style-type: none"> • Information about the product(s) and/or service(s) subject to the cartel. • The main participants of the cartel. • The impact of the cartel on a market in New Zealand. <p>The time and date of the application will be recorded. Subsequent applicants will be advised by the Commission if conditional immunity or a marker is no longer available. These applicants will not be told the identity of the conditional immunity or marker holder but will be informed of their place in the queue for conditional immunity.</p> <p><i>Application for marker for conditional immunity</i></p> <p>An applicant who considers that they do not have sufficient information to qualify for conditional immunity may request a marker. This marker confirms, and preserves for a limited time, their position as the first applicant for conditional immunity.</p> <p>An applicant who has gained a marker must 'perfect the marker' by providing the Commission with a statement on an agreed list of issues, within an agreed time. This statement is called the proffer. The standard time allowed to perfect the marker is 28 calendar days, but a longer or shorter period can be agreed upon.</p> <p>The exact content of the proffer will vary but its scope must include detailed information and supporting evidence on the cartel activities for which conditional immunity is sought. It must also include the nexus with a market in New Zealand and the supporting evidence to illustrate this.</p> <p>If a marker expires before it is perfected, the next qualifying applicant in the queue may be eligible for conditional immunity or a marker subject to meeting the other conditions outlined in the</p>

	<p>leniency policy.</p> <p><i>Application for conditional immunity</i></p> <p>An applicant may choose to apply for conditional immunity on their first approach to the Commission if they are able to provide full information immediately. In these circumstances, an applicant will be granted a marker initially and the information provided will be considered as a proffer.</p> <p>The marker will be converted to conditional immunity if the Commission determines that the applicant has provided sufficient information. The applicant must also meet the other conditions outlined in the leniency policy.</p> <p>Conditional grant of immunity</p> <p>If the Commission concludes that a marker holder has met the prescribed requirements, it will confirm that conditional immunity has been granted. Immunity is 'conditional' in that the holder must continue to meet the prescribed conditions to maintain their immunity status.</p> <p>The Commission will confirm its decision to grant conditional immunity in writing except where the Commission has agreed to a paperless process. In this situation 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. A copy of the standard immunity agreement is available at http://www.comcom.govt.nz/cartel-leniency-policy-and-process-guidelines/</p> <p>Final immunity</p> <p>Conditional immunity becomes unconditional when all proceedings have been resolved.</p>
<p>K. At which time during the application process is the applicant given certainty with respect to its eligibility for leniency, and how is this done?</p>	<p>The person applying for leniency is given certainty on eligibility for conditional immunity when the Commission concludes that a marker holder has met the prescribed requirements and perfected their marker. As noted in 6J above, the Commission will confirm its decision to the applicant in writing in the form of an immunity agreement.</p>
<p>L. What is the legal basis for the power to agree to grant leniency? Is leniency granted on the basis of an agreement or is it laid down in a (formal) decision? Who within the agency decides about leniency applications?</p>	<p>The Commission has discretion in terms of who it decides to prosecute. The provision of leniency is an exercise of that discretion. Leniency is granted on the basis of an agreement and is not laid down in a formal decision. The grant of leniency is automatic if the conditions in the leniency policy are met.</p>
<p>M. Does your legislation have a marker system? If yes, please describe it.</p>	<p>Yes, as described in 6J above.</p>

<p>N. Does the system provide for any extra credit⁴ for disclosing additional violations?</p>	<p>Yes, Amnesty Plus is available to 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. The Commission must be unaware of this cartel or not yet have evidence that is likely to warrant taking legal action against the cartel.</p> <p>Under Amnesty Plus an applicant will be entitled to:</p> <ul style="list-style-type: none"> • Conditional immunity for their participation in the second cartel, through the marker process. • An additional recommended penalty concession in respect of the first cartel where they do not qualify for immunity, but admit to the conduct.
<p>O. Is the agency required to keep the identity of the beneficiary confidential? If yes, please elaborate.</p>	<p>The Commission will endeavour to protect to the fullest extent confidential information provided by holders of a marker or conditional immunity. 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.</p>
<p>P. Is there a possibility of appealing an agency's decision rejecting a leniency application?</p>	<p>There is no formal prescribed review process, but parties may seek a judicial review of the decision.</p>
<p>Q. Contact point where a leniency application can be lodged [telephone and fax including the country code, plus out of hours contacts (if any)]:</p>	<p>As described in 6I applications for leniency must be made by phone or in person to the Commission's General Manager of the Competition Branch:</p> <p>Kate Morrison Direct Dial: +64-4 924 3720</p>
<p>R. Does the policy address the possibility of leniency being revoked? If yes, describe the circumstances where revocation would occur. Can an appeal be made against a decision to revoke leniency?</p>	<p>Yes, 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. The Commission can revoke conditional immunity at any time if it concludes that an applicant has failed to provide full and continuing cooperation.</p> <p>Where conditional immunity is revoked because of the holder's failure to meet the prescribed conditions, the Commission will be entitled to use the information provided as evidence in proceedings against the person concerned.</p>
<p>S. Does your policy allow for "affirmative leniency", that is the possibility of the agency approaching potential leniency applicants?</p>	<p>The policy does not specifically deal with "affirmative leniency". However, it is open to the Commission to grant leniency in these circumstances.</p> <p>Where the Commission becomes aware of potential collusive conduct for which it has not received an application for leniency, the Commission may request information from parties and make them aware that conditional immunity is available.</p>

⁴ Also known as: "leniency plus", "amnesty plus" or "immunity plus". This category covers situations where a leniency applicant, in order to get as lenient treatment as possible in a particular case, offers to reveal information about participation in another cartel distinct from the one which is the subject of its first leniency application.

7. Investigative powers of the enforcing institution(s)⁵

<p>A. Briefly describe the investigative measures available to the enforcing agency such as requests for information, searches/raids⁶, electronic or computer searches, expert opinion, etc. and indicate whether such measures requires a court warrant.</p>	<p>Section 98 (a) and (b) notices</p> <p>Where the Commission considers it necessary or desirable for the purposes of carrying out its functions and exercising its powers under the Act, the Commission can issue statutory notices under section 98 (a) and (b) of the Act. These notices require parties to provide the Commission with information and documents by a specified date.</p> <p>Section 98 (c) interviews</p> <p>The Commission can also require persons to attend a formal interview under section 98 (c) of the Act.</p> <p>Search warrants</p> <p>The Commission can apply to a District Court judge (or certain other judicial officers) for a search warrant under section 98A of the Act.</p> <p>Expert opinions</p> <p>It is open to the Commission to seek expert opinion.</p>
<p>B. Can private locations, such as residences, automobiles, briefcases and persons be searched, raided or inspected? Does this require authorisation by a court?</p>	<p>Private locations including residences, automobiles and briefcases can be searched. Individuals cannot be searched. Search warrants require authorisation from the District Court.</p>
<p>C. May evidence not falling under the scope of the authorisation allowing the inspection be seized / used as evidence in another case? If yes, under which circumstances (e.g. is a post-search court warrant needed)?</p>	<p>The general rule is that information obtained under compulsion (including information obtained under a search warrant) is confidential and can be used only for the purposes for which it was obtained. This means that such material should not be disclosed to third parties (including the complainant). It also means that information obtained under a search warrant cannot be used:</p> <ul style="list-style-type: none"> • As evidence in a prosecution for an offence (or other Court action) under the same Act which was not contemplated by the warrant, or is unrelated to the warrant. • As evidence in a prosecution for an offence (or other Court action) under a different Act (for situations where claims under multiple Acts are anticipated). • To assist the Commission in any of its

⁵ “Enforcing institutions” may mean either the investigating or the decision-making institution or both.

⁶ “Searches/raids” means all types of search, raid or inspection measures.

	<p>investigations or other functions not related to the search warrant and to give to another agency for use by them in their investigations or other functions.</p>
<p>D. Have there been significant legal challenges to your use of investigative measures authorized by the courts? If yes, please briefly describe them.</p>	<p>Search warrants</p> <p>There has been one significant challenge to the Commission's search warrant powers <i>Tranz Rail v District Court</i>, at Wellington [2002] 10 TCLR 552.</p> <p>The Court of Appeal considered the implications of the Commission's failure to disclose its prior co-operative communications with Tranz Rail to the Registrar of the District Court when applying for a warrant.</p> <p>The Court of Appeal held that this fact was clearly relevant as to whether the issue of a warrant was necessary. The concept of necessity must imply some consideration of what other investigative tools, such as a statutory information gathering notice, are reasonably available before a warrant is issued. The Court held a notice was a reasonable alternative and the warrant was not necessary in this instance.</p> <p>Further, the Court held that the nature of the contravention at issue was not adequately described. A simple reference to conduct possibly contravening sections 27 and 36 of the Commerce Act was not enough. Accordingly the warrant was too widely drawn and invalid on account of its generality.</p> <p>There have been no court decisions on this issue since the Tranz Rail case.</p> <p>Section 100 confidentiality orders</p> <p>There has been one significant challenge to the Commission's ability to issue section 100 confidentiality orders <i>Commerce Commission v Air New Zealand Limited</i> [2011] 13 TCLR 243 (CA).</p> <p>Air New Zealand asked the High Court in March 2009 to review the Commission's decision to impose section 100 confidentiality orders on witnesses in the cartel case. The orders prevented the witnesses from speaking about their Commission interviews with third parties. The aim of the order was to prevent Air New Zealand staff from disclosing the Commission's lines of enquiry revealed in witness interviews in the air cargo price-fixing case.</p> <p>The Court of Appeal ruled that the Commission correctly applied its powers under section 100 of the Commerce Act.</p> <p>In its decision, the Court of Appeal provided guidance on the proper scope of confidentiality orders under section 100. The Court clarified that confidentiality orders can, in appropriate cases, survive, or be issued, after the commencement of litigation where the investigation is continuing. The Court also ruled that questions posed by the Commission in a witness interview can be covered by confidentiality orders.</p>

8. Procedural rights of businesses / individuals

<p>A. Key rights of defence in cartel cases:</p>	<p>The Court ultimately determines whether a breach of the Act has occurred and, if so, what penalty should be imposed. Given that the cartel offence is civil, the usual rights available to civil defendants apply.</p>
<p>B. Protection awarded to business secrets (competitively sensitive information): is there a difference depending on whether the information is provided under a compulsory legal order or provided under informal co-operation?</p>	<p>The Commission has power to make orders prohibiting the publication or communication of any information, document or evidence which is given to, or obtained by, the Commission in the course of an investigation (section 100 of the Act).</p> <p>In the context of civil legal proceedings, confidential information still needs to be disclosed. However, the parties can agree on the conditions under which confidential information may be disclosed to a limited group of people (e.g., legal counsel and experts).</p> <p>The Commission is an independent Crown entity, and persons can obtain information from the Commission under the Official Information Act 1982. However, information may be withheld if its disclosure would reveal a trade secret, or would be likely to prejudice the commercial position of a person who supplied it or who is the subject of the information, or for certain other reasons (section 9(2) of the Official Information Act).</p> <p>http://legislation.govt.nz/act/public/1982/0156/latest/DLM64785.html</p>

9. Limitation periods and deadlines

<p>A. What is the limitation period (if any) from the date of the termination of the infringement by which the investigation / proceedings must begin or a decision in the merits of the case must be made?</p>	<p>Proceedings must be commenced within three years after the conduct was discovered or ought reasonably to have been discovered (section 80(5) of the Act). Where the behaviour is giving effect to (rather than the entering into) an arrangement the limitation period is three years from the last occasion of giving effect to the arrangement. No proceedings can be commenced 10 years or more after the matter giving rise to the contravention.</p>
<p>B. What is the deadline, statutory or otherwise (if any) for the completion of an investigation or to make a decision in the merits?</p>	<p>There is no time limit for investigations. However, given the limitation period for commencing proceedings outlined in 9A above, the Commission must complete its investigation in time to allow for instituting legal proceedings, where it decides to take this course.</p>
<p>C. What are the deadlines, statutory or otherwise (if any) to challenge the commencement or completion of an investigation or a decision regarding sanctions?</p>	<p>Parties affected by a Commission investigation may seek a judicial review of the Commission's processes. There is no specific deadline for seeking a judicial review, but the Court has discretion to refuse relief where there has been an unjust delay in bringing an application.</p> <p>Where sanctions have been imposed by a court in relation to restrictive trade practices that breached the Act, the affected</p>

	parties may lodge an appeal within 20 working days after the date of the decision against which the party wishes to appeal.
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10. Types of decisions

A. Please list which types of decisions on the merits of the case can be made in cartel cases under the laws listed under Section 1.	<p>The Commission has a number of enforcement options including:</p> <ul style="list-style-type: none"> • Issuing compliance advice to the parties. • Warning the parties that their conduct is likely to be in breach of the Act. • Entering into a settlement with the parties requiring them to cease the conduct and comply with other appropriate terms. • Commencing proceedings against the parties under the Commerce Act. • Issuing cease and desist orders (sections 74A-74D of the Act). <p>If the Commission commences proceedings under the Act, the Court can impose penalties on the defendant (section 80). The Court may also order that persons be excluded from management of a company (section 80C). The Court has power to grant an injunction restraining a person from engaging in contravening conduct (section 81). Other affected parties may also take legal action for damages (section 82).</p>
B. Please list which types of decisions on the merits of the case can be made in hardcore cartel cases under the laws listed under Section 1 (if different from those listed under 10/A).	Same as above.
C. Can interim measures⁷ be ordered during the proceedings in cartel cases? (if different measures for hardcore cartels please describe both⁸.) Which institution (the investigatory / the decision-making one) is authorised to take such	<p>The Commission may issue cease and desist orders (section 74A).</p> <p>The Commission may also apply to the Court for an injunction restraining a person from engaging in contravening conduct (section 81).</p>

⁷ In some jurisdictions, in cases of urgency due to the risk of serious and irreparable damage to competition, either the investigator or the decision-making agency may order interim measures prior to taking a decision on the merits of the case [e.g.: by ordering the immediate termination of the infringement].

⁸ Only for agencies which answered “yes” to question 2.C. above

decisions? What are the conditions for taking such a decision?	
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11. Sanctions for procedural breaches (non-compliance with procedural obligations)⁹

A. Grounds for the imposition of procedural sanctions / fines:	<p>In general, it is an offence to deceive or knowingly mislead the Commission (section 103(2)). In relation to the Commission's information gathering powers it is an offence to fail to comply with a notice or to give false or misleading information (section 103(1) without reasonable excuse).</p> <p>In relation to search warrants it is an offence to resist, obstruct or delay a Commission employee (section 103(1)).</p> <p>In terms of compulsory interviews under section 98(c) it is an offence to fail to appear, to refuse to take an oath or make an affirmation, or to refuse to answer any question or produce any document (section 103(3)), without reasonable excuse.</p>
B. Type and nature of the sanction (civil, administrative, criminal, combined):	Criminal.
C. On whom can procedural sanctions be imposed?	Both individuals and companies
D. Criteria for determining the sanction / fine:	Determined by the Court.
E. Are there maximum and / or minimum sanctions / fines?	<p>Maximum fines are NZ\$10,000 for an individual and NZ\$30,000 for a company (section 103(4)).</p> <p>The section does not provide minimum penalties.</p>

12. Sanctions on the merits of the case

A. Type and nature of sanctions in cartel cases (civil, administrative, criminal, combined):	<p>Civil.</p> <p>Pecuniary penalties can be imposed on companies and on individuals.</p>
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⁹ In some jurisdictions non-compliance with procedural obligations (e.g. late provision of requested information, false or incomplete provision of information, lack of notice, lack of disclosure, obstruction of justice, destruction of evidence, challenging the validity of documents authorizing investigative measures, etc.) can be sanctioned.

On whom can sanctions be imposed?	A body corporate cannot indemnify a director, servant or agent of the body corporate in respect of payment of pecuniary penalties.
B. Criteria for determining the sanction / fine:	Determined by the Courts.
C. Are there maximum and / or minimum sanctions / fines?	<p>Section 80(2B) of the Act provides that the Courts may impose the following maximum pecuniary penalties:</p> <ul style="list-style-type: none"> • in the case of an individual, NZ\$500,000; and • in the case of a company, the greater of NZ\$10,000,000; or either: <ul style="list-style-type: none"> a. three times the value of any commercial gain resulting from the contravention; or b. 10 percent of the turnover of the company. <p>No minimum penalties are provided.</p> <p>The Court may also order a person to pay exemplary damages (section 82A).</p>
D. Guideline(s) on calculation of fines:	<p>While the Commission may recommend to the Court that a particular financial penalty be imposed, the decision on the level of the penalty is solely determined by the Court.</p> <p>In determining whether to award exemplary damages, the Court must have regard to:</p> <ul style="list-style-type: none"> • Whether a pecuniary penalty has been imposed for a contravention involving the conduct concerned in the claim for exemplary damages. • If so, the amount of the pecuniary penalty (section 82A). <p>In the past, Courts have considered the nature and gravity of the breach, the particular defendant's situation, financial resources, background and industry (<i>Commerce Commission v Ophthalmological Society of New Zealand</i> (2004) 11 TCLR 226).</p> <p>The Commission has also included in its leniency policy a section showing how it would calculate the pecuniary penalties that it would recommend to the Court.</p>
E. Does a challenge to a decision imposing a sanction / fine have an automatic suspensory effect on that sanction / fine? If it is necessary to apply for suspension, what are the criteria?	No.

13. Possibilities of appeal

<p>A. Does your law provide for an appeal from a decision that there has been a violation of a prohibition of cartels? If yes, what are the grounds of appeal, such as questions of law or fact or breaches of procedural requirements?</p>	<p>Sanctions for cartel offences (pecuniary penalties, the exclusion of persons from the management of a body corporate, injunctions and damages) may be imposed only by the Court. The parties on whom sanctions have been imposed have the normal appeal rights to a higher court on questions of law and of fact.</p> <p>In relation to the conduct of an investigation by the Commission, those affected have the right to seek a judicial review of the processes followed by the Commission.</p>
<p>B. Before which court or agency should such a challenge be made?</p>	<p>N/A</p>