

JUNE 2018

# Cartel Leniency Policy and Guidelines



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# 1 Cartels harm consumers, businesses and the economy

- 1 Cartels are illegal agreements between competitors not to compete with each other. Cartels are prohibited under section 30 of the Commerce Act 1986 (the Act). Cartel conduct includes price fixing; limiting or restricting production, capacity and/or supply; allocating customers, suppliers or territories; and bid rigging.<sup>1</sup> Most cartel agreements are also prohibited under section 27, which prohibits contracts, arrangements or understandings that substantially lessen competition. We use 'agreement' in this policy as shorthand for contract, arrangement or understanding. An agreement can be informal (a 'nod and a wink') and still be illegal.
- 2 Cartels cause consumers and businesses to pay more for their goods and services, and undermine New Zealand's ability to compete internationally. Detecting and taking action against cartels is a priority for the Commerce Commission (the Commission/we/us) because competition benefits New Zealanders through lower prices, greater consumer choice, increased business innovation, better product quality, and more investment.

## Cartel conduct attracts substantial financial penalties

- 3 The Act provides for substantial financial penalties against companies and individuals for cartel conduct, attempted cartel conduct, and aiding and abetting cartel conduct. The following maximum financial penalties apply:
  - For an individual, \$500,000; and
  - For a company, the greater of:
    - \$10 million;
    - three times the value of the commercial gain resulting from the cartel conduct (if it can be readily ascertained); or
    - 10% of the turnover of the company and all of its interconnected bodies corporate in each accounting period in which the contravention occurred.
- 4 The Court may also exclude individuals who have contravened section 30 from directing, promoting or managing a body corporate in New Zealand and Australia.
- 5 It is illegal for a company to indemnify a director, servant or agent for the costs of defending or settling any enforcement action we take in respect of cartel conduct. The maximum penalty for doing so is twice the value of the indemnity provided.

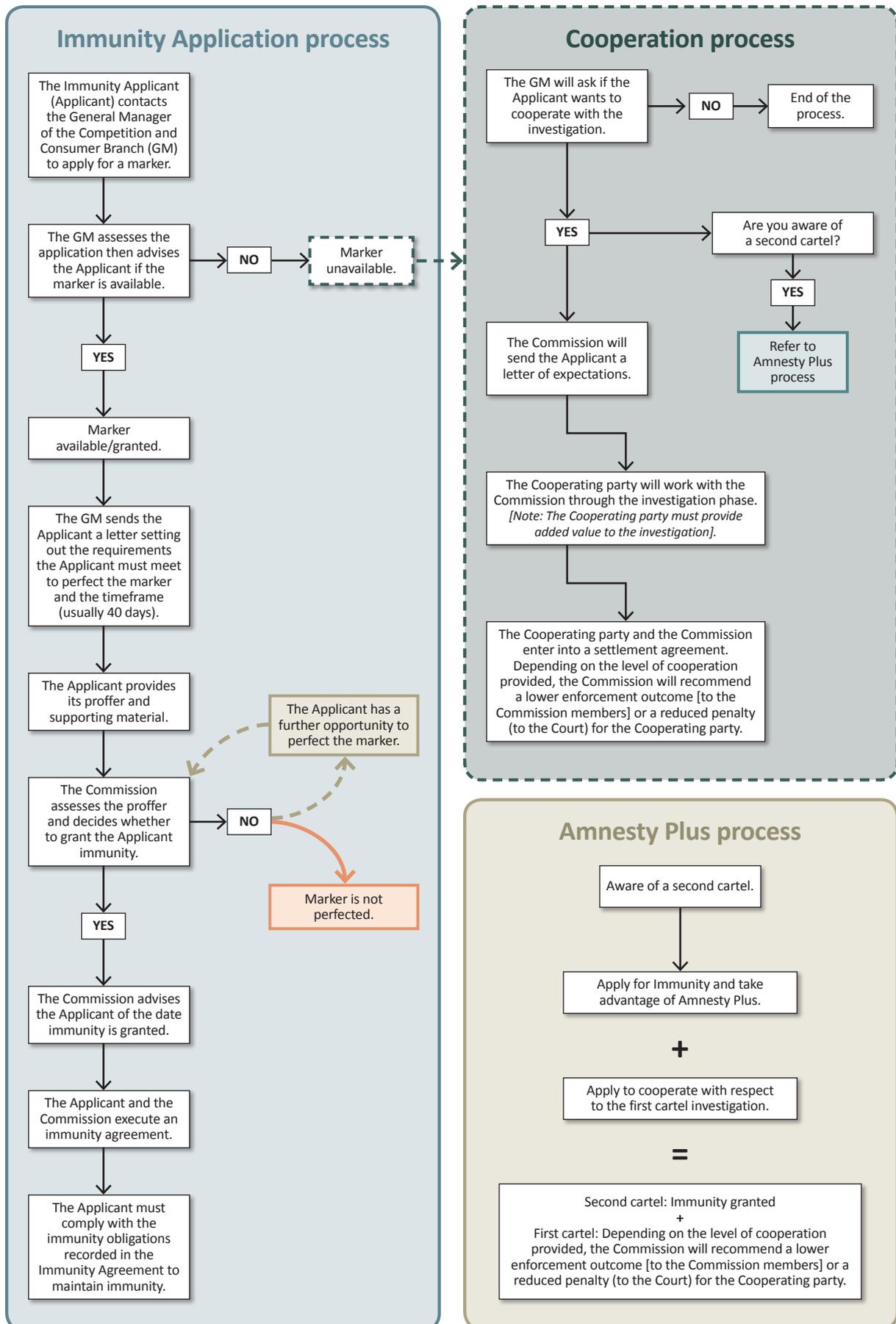
## A leniency policy helps to detect cartels

- 6 International and New Zealand experience shows that a leniency policy is the single most effective tool available to detect cartels. Cartels usually operate informally and in secret. A crucial element of an effective leniency policy is providing incentives to cartel participants to disclose the existence of a cartel, to assist in proving cartel conduct, and to cooperate with investigations and legal proceedings. Immunity is not a reward for applicants.
- 7 Without detection through parties coming forward to apply for conditional immunity, more cartels would continue to operate and harm the New Zealand economy.

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1. Bid rigging concerns securing contracts for products or services at a pre-determined price or agreeing not to bid for a contract for products or services. While not explicitly covered in section 30A of the Commerce Act 1986, bid rigging is caught by the other three types of cartel conduct under that section.

# Immunity and Cooperation application process



## Immunity and Cooperation under the Leniency Policy

- 8 This Leniency Policy has two parts.
  - **Immunity:** Conditional immunity will be granted where an applicant is the first cartel participant<sup>2</sup> to apply to the Commission and 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>3</sup>
- 9 We offer conditional immunity from legal proceedings to the first cartel participant to disclose the existence of a cartel that we are either not aware of, or we do not yet have sufficient evidence about to justify legal proceedings. Conditional immunity from proceedings is justified where the cooperation and full admission by a cartel participant enables us to detect or prove the existence of a cartel.
- 10 Immunity from Commission-initiated proceedings does not exclude third parties from making claims against the immunity holder for compensatory or exemplary damages as a result of the cartel's activities. An immunity holder can also be prosecuted for criminal offences, such as obstruction, regardless of whether or not they have been granted conditional immunity.
- 11 If you are not eligible for conditional immunity you can apply for formal status as a cooperating party in relation to a cartel investigation. The Commission may take a lower level of enforcement action against a co-operating party, including by recommending an increased penalty discount for the co-operating party to the court. Cooperation allows us to investigate and take appropriate action more quickly and effectively, and with fewer resources.
- 12 We intend for this Leniency Policy to provide transparency and certainty on what immunity and cooperation applicants must do and what they can expect in return, and we 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.
- 13 A person who took no part in the cartel is not at risk of breaching the Act, and so is not entitled to conditional immunity. However, any person with information about a cartel should provide that information to the Commission. We welcome all information about possible breaches of the Act. We recognise that informants can put themselves at significant risk by providing information to the Commission.
- 14 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 under our Confidential Informants Policy.<sup>4</sup>



2. A participant of a cartel includes anyone who is involved in a cartel, as well as anyone who aids, abets, counsels or procures anyone to participate in a cartel.
3. Our Cooperation Policy, introduced in November 2004, applies to other types of enforcement action by the Commission, but no longer applies to cartels. Cartels are now covered by the Cooperation section of this Leniency Policy.
4. [www.comcom.govt.nz/cartel-leniency-policy](http://www.comcom.govt.nz/cartel-leniency-policy)

## 2 Qualifying for conditional immunity

- 15 As mentioned above, we offer conditional immunity from legal proceedings to the first cartel participant to disclose the existence of a cartel that we are either not aware of or we do not yet have sufficient evidence about to issue proceedings.
- 16 Applications for conditional immunity may be made by individuals<sup>5</sup> or by companies. These are both referred to below as ‘applicants’, except where it is necessary to distinguish individuals from companies. All applicants for conditional immunity will receive a marker from the Commission to either enable the Commission to assess whether conditional immunity is available or for the applicant to provide sufficient evidence that it has engaged in cartel conduct. This is referred to as the ‘marker stage’, and the process is set out in section 3 below.
- 17 Where conditional immunity is granted to a company, the conditional immunity will usually extend to any current or former director, officer or employee of that company involved in the cartel conduct. This is known as ‘derived conditional immunity’. Those individuals must meet similar conditions.

### All applicants must meet certain conditions

- 18 For an applicant to qualify for conditional immunity, the following six conditions must be met by all parties. For company applicants, there are an additional three requirements.

*1. The applicant must be the first party to qualify for conditional immunity.*

Conditional immunity is available only to an applicant who is:

- the first to apply to us for conditional immunity, and
- part of a cartel that we are either not aware of or do not yet have sufficient evidence of to issue proceedings (an applicant may meet these criteria even when we are already investigating the cartel, including exercising our statutory information-gathering powers.)

*2. The applicant is or was a participant in that cartel.*

Anyone who took part in a cartel can apply for conditional immunity. An applicant is considered a participant if they attempted to form a cartel, or materially facilitated (or were knowingly concerned in) the operation of a cartel even if they are not engaged in supplying the relevant goods or services.<sup>6</sup>

*3. The applicant admits that the cartel conduct may breach the Act.*

The applicant must provide a full admission to the Commission about their involvement in the cartel conduct. They will be required to give a comprehensive and accurate account of their involvement in, and awareness of, the conduct and admit that the conduct may breach the Act.

*4. The applicant has either ceased, or promises to cease, their involvement in the cartel.*

An applicant must confirm that it has ceased taking steps in furtherance of the cartel, save where lawfully directed or permitted to by the Commission or a partner agency for the purposes of gathering evidence.

*5. The applicant has not coerced others to participate in the cartel.*

The applicant must not have coerced other participants to take part in the cartel. Coercion includes threats of physical or serious economic harm or intimidation to force others to take part in the cartel. Applicants will be required to confirm that they did not coerce the other participants to take part in the cartel. A false statement in relation to this constitutes grounds for immunity to be revoked.

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5. Including partnerships.

6. See section 80(1) of the Act.

6. *The applicant agrees to provide full and continuing cooperation during the investigation of the cartel and any subsequent proceedings.*

The applicant must provide full and continuing cooperation during the investigation of the cartel and any subsequent proceedings. We will discuss with each applicant the specific actions they must undertake to meet the requirement for full and continuing cooperation. The exact details of this requirement will be set out in the immunity agreement that the applicant signs. [See Template agreement at Attachment A]

## Further requirements for corporate applicants

- 19 An application for immunity from a company requires that the admissions made are a truly corporate act, based on the actions of the company's employees, directors, servants or agents, rather than isolated confessions by individual representatives.
- 20 A company applying for conditional immunity must provide us with the names of all current and former directors, officers, agents and employees of the company who were involved in the conduct. The current or most recent position held by each individual must be stated. The company must provide additional names if it later becomes aware of more individuals being involved in the conduct.
- 21 A corporate applicant must do the following, unless agreed otherwise:
  - Identify one individual in the organisation or an external lawyer as the primary contact point for all matters related to the investigation, unless we agree otherwise. Ideally, the person identified should be available for the duration of the investigation; and
  - Commit to giving us unfettered access (to the best of their ability) to their personnel and information, and swiftly respond to our queries.

## The scope of conditional immunity for a company

- 22 Conditional immunity will usually be available for members of a group of companies that are wholly owned and solely controlled by the applicant. We may exercise our discretion to decide whether or not to grant conditional immunity to members of a group of companies that are only partly owned or partly controlled by the applicant.
- 23 If a company has qualified for conditional immunity, all its current and former directors, officers, agents or employees who cooperate as required with our investigation, will be covered by the conditional immunity granted to the company.
- 24 In some circumstances, we may specifically exclude or remove a person from the scope of the company-based conditional immunity. For example, a person found to have coerced others into participating in the cartel or who fails to cooperate appropriately with our investigation may be removed.
- 25 When a company has made a conditional immunity application, key individuals from that company should be made aware (during the marker phase) of their obligations to obtain or maintain conditional immunity, unless we have specifically requested that certain individuals are not advised of the application. Key individuals will be those who were directly involved in the cartel conduct or who hold particularly relevant information in relation to the cartel conduct.



## Individuals involved in cartel conduct must fully cooperate with the investigation and subsequent proceedings

- 26 To maintain derived conditional immunity, key individuals must admit their involvement in the cartel and give a comprehensive and accurate account of their involvement and awareness of the cartel conduct, during the marker phase (see 37 for more detail).
- 27 To maintain derived conditional immunity during the Commission's investigation, an individual must fully cooperate and proactively assist with the Commission's investigation. Key individuals will receive a letter from the Commission setting out these requirements, which they must sign.
- 28 Individuals covered by derived conditional immunity can usually be represented by the company or the company's lawyers. However, if the interests of the company diverge from those of any of its directors, officers or employees, we recommend that the individuals concerned obtain separate legal representation.
- 29 If the Commission decides to issue legal proceedings at the end of the investigation, key individuals must sign an acknowledgement letter setting out what is expected from them during the legal proceedings, including whether they are expected to give evidence in the legal proceedings.
- 30 As noted above, in some circumstances, we may specifically exclude or remove a person from the scope of the company- based conditional immunity. For example, a person found to have coerced others into participating in the cartel or who fails to cooperate during the marker phase or investigation.

## 3 The process for securing conditional immunity

- 31 All applications for conditional immunity and hypothetical enquiries must be directed to the General Manager of the Competition and Consumer Branch at the Commission. Details of the specific steps and information required are set out in section 7 below.
- 32 A potential applicant for conditional immunity, or their legal representative, may contact the Commission to make a hypothetical enquiry about whether a marker or conditional immunity is available for a particular cartel. Enquiries may be anonymous.
- 33 We will ask for sufficient information to ensure that the hypothetical enquiry is genuine, such as the product(s) and service(s) involved and the cartel's connection to a market in New Zealand. Any information provided to us in this context will only be used to provide the requested clarification. We will not take into account knowledge obtained from hypothetical enquiries when considering subsequent applications for conditional immunity.
- 34 In relation to a hypothetical enquiry, we will only confirm or deny whether an investigation is under way on a particular cartel if it is necessary to clarify eligibility.
- 35 Hypothetical enquiries will not constitute an application for conditional immunity or a marker. Given the importance of obtaining a marker, however, we recommend prospective applicants apply early for conditional immunity.

## How the marker process works

- 36 An applicant 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 us as soon as they have decided to apply for conditional immunity, rather than having first to assemble all relevant information.

37 A prospective applicant must provide us with sufficient information, to the best of their knowledge and belief, on the:

- nature of the cartel, such as the product(s), service(s) involved;
- main participants; and
- impact of the cartel on a market in New Zealand.

This information will enable us to assess whether an application already exists for a marker or conditional immunity in relation to this cartel and whether there may have been a breach of the Act.

38 If a marker or conditional immunity has already been granted, subsequent applicants will be told that a marker or conditional immunity is not available. They will not be told the identity of the marker or conditional immunity holder. The time and date of the application will be recorded. Applicants will be told their place in the queue for a marker or conditional immunity.

## How to convert a marker into conditional immunity

39 An applicant who has requested and been granted a marker must then provide the Commission with a statement including a detailed description of the cartel conduct, key individuals, and key parties, within an agreed time. This statement is called the 'proffer'. Supplying a proffer that complies with the prescribed conditions is called 'perfecting the marker'.<sup>7</sup> The standard time allowed to perfect the marker is 40 calendar days, but a longer or shorter time may be agreed where appropriate.<sup>8</sup>

40 The Commission will send the applicant a letter detailing the types of information we require from the marker holder in the proffer in order to perfect the marker. The exact content of a proffer may vary, but it must include:

- detailed information and supporting evidence on the cartel activities for which conditional immunity is sought; and
- evidence to support the connection with a market in New Zealand, which is particularly important for international applicants.

41 If the applicant is a company, we may seek direct evidence from relevant individuals in the company who were involved in the cartel conduct, before we decide whether to perfect the marker. Obtaining direct evidence from individuals, in the form of interviews or statements, will also help us determine whether these individuals are eligible for derived conditional immunity and are complying with their particular obligations (as detailed in the marker letter).

42 We may contact the marker holder to check the progress being made in compiling the proffer.

43 If the marker holder is unable to produce the proffer within the agreed time and comply with the Commission's request to interview individuals, the marker holder must inform the Commission as soon as possible. A marker holder can request an extension of time to produce the proffer, but as part of that request must give the reasons for seeking an extension, along with a proposed timeframe for the extension. If we agree that these reasons are valid, we may agree to a new date. Further extensions may also be granted on a similar basis. Without an extension, the marker will expire at the end of the prescribed period.



7. The detailed information that is required in the proffer will be set out in the letter confirming the granting of a marker.

8. This 40 day period will normally include a period for the Commission to review and assess the information provided in support of the application.

## Assessing the marker holder's information

- 44 We will aim to assess whether the proffer and the information provided by the applicant meets the prescribed requirements. We will respond within 10 working days, or longer if agreed with the applicant, with a decision on whether or not conditional immunity will be granted. If the proffer is insufficient or individuals have not provided the necessary information, we will discuss these shortcomings with the marker holder and give them the opportunity to explain or remedy the proffer's shortcomings within a specified time.
- 45 If we conclude that a marker holder has met the prescribed requirements, we will confirm that the marker holder has been granted conditional immunity. We will also confirm whether the individuals involved in the conduct have been granted derived conditional immunity.
- 46 We may offer a marker or conditional immunity to the next qualifying applicant in the queue if a marker expires before it is perfected; the marker holder fails to perfect the marker; or conditional immunity is revoked (see below). The next applicant will then have the opportunity to meet the requirements for a marker or conditional immunity. The former holder of an expired marker is eligible to re-apply for conditional immunity, but its original place in the queue is not protected. The former marker holder may also apply for cooperation.

## Entering into a conditional immunity agreement

- 47 We will advise the applicant if we decide to grant conditional immunity. We will then enter into a conditional immunity agreement with the successful applicant, specifying the conditions the applicant must meet for conditional immunity to continue. Key individuals will receive a letter which they must sign setting out the obligations they need to comply with to maintain derived conditional immunity.

## Options for ongoing immunity status

- 48 We will inform a conditional immunity holder if we decide to conclude a cartel investigation without bringing legal proceedings. A conditional immunity holder would then have the option to relinquish their conditional immunity or continue to hold conditional immunity by agreeing to meet any obligations that might arise if the investigation is re-opened.
- 49 Conditional immunity becomes unconditional when all enforcement action has been completed.

## We may revoke conditional immunity

- 50 The Commission may revoke conditional immunity if the holder of conditional immunity or an individual with derived conditional immunity, has failed to continue to meet the requirements for conditional immunity prescribed in their immunity agreement or the requirements in the Commission's letter for individuals.
- 51 If we conclude that an immunity holder has failed to meet the conditions for conditional immunity or derived conditional immunity, we will take the following steps.
  - We will inform the immunity holder of this view, initially verbally, and will allow them five working days to remedy the shortcomings.
  - If the shortcomings are not remedied within five working days, we will give written notice of our concerns and will allow the immunity holder 10 working days (or a longer period we may specify) to remedy the shortcomings.
  - If the immunity holder does not remedy the shortcomings within the prescribed time, we may revoke the conditional immunity at our sole discretion.

- 52 If a company's conditional immunity has been revoked, an individual with derived conditional immunity can either:
- apply for conditional immunity in their own right, following the steps described in section 3 above; or
  - apply for the formal status of a cooperating party in relation to a cartel investigation.
- 53 If the Commission issues legal proceedings in respect of the cartel conduct, we may decide to use our enforcement discretion not to issue legal proceedings against any individuals that lost derived conditional immunity through no fault of their own and became a cooperating party in relation to the investigation.

## How the Commission may use the information

- 54 Information provided to the Commission to perfect a marker will be received on the basis that it will not be used as evidence in proceedings against the applicant or an individual who would qualify for derived conditional immunity from that applicant. We may, however, use this information against other cartel participants. Where a marker is not perfected, the Commission will not use the information provided as evidence in cartel proceedings against the applicant. However, the Commission will be entitled to use such information to pursue our investigation, and in criminal proceedings where we consider the applicant has attempted to deceive, or knowingly mislead, the Commission.
- 55 Where conditional immunity has been revoked, the Commission may continue its investigation and will be entitled to use the information provided as evidence in proceedings against the former conditional immunity holders.

## 4 Applicants may be eligible for amnesty plus

- 56 An applicant may be eligible for amnesty plus if they do not qualify for conditional immunity for their participation in a cartel we are investigating, but inform us of their participation in a separate cartel that we are unaware of, or about which we do not yet have sufficient evidence to take legal action.
- 57 The key issue we consider when granting amnesty plus is whether the two cartels are completely separate. We assess this on a case-by-case basis.
- 58 Under amnesty plus, an applicant will be entitled to:
- conditional immunity for their participation in the second cartel; and
  - be given the formal status of a cooperating party for the first cartel if they do not qualify for immunity but agree to cooperate with the Commission in accordance with the requirements detailed in section 5 below.
- 59 To secure conditional immunity for the second cartel, the applicant must meet the same conditions as those set out in 18 above, as well as 19 to 21 if the applicant is a company.



## 5 We encourage applicants to cooperate when immunity is not available

- 60 A cartel participant who is too late to obtain a marker or conditional immunity, or who is not eligible for conditional immunity (for example, if they coerced other participants), may inform the Commission of their willingness to cooperate fully with the investigation. This will open the possibility of obtaining cooperation concessions – for Commission-initiated proceedings only – in the form of a lower level of enforcement action or a recommendation to the Court for a reduced penalty. Cooperation with the Commission cannot exclude claims for compensatory or exemplary damages by third parties who may have suffered loss as a result of the cartel conduct.
- 61 Cooperation concessions are available throughout our investigation. However, cartel participants who cooperate with us as early as possible are likely to obtain greater concessions. This is because information provided early in an investigation is more valuable than the same information provided at a much later stage. The number of cartel participants who seek to cooperate with us will also affect the value of the information.
- 62 To qualify for cooperation concessions, a cartel participant must provide information that adds significant value to the investigation. The cooperation must be full and continuing. Mere compliance, where the Commission requests information on a voluntary basis or exercises its statutory powers under the Act, does not fulfil this requirement.
- 63 If an individual or company has agreed to cooperate with our investigation, but fails to provide the agreed cooperation without adequate reasons, we may withdraw our offer to seek a reduced penalty or proceed with a lower level of enforcement.

### How cooperation can affect enforcement action

- 64 While cooperation will not, except in special circumstances, entitle any person (company or individual) to immunity, the public benefits of co-operation are commonly recognised by the Courts when imposing a penalty on the cooperating party for its unlawful conduct, and may result in a penalty discount.
- 65 Usually, a cooperating party will enter into a settlement agreement with the Commission, in which they make relevant admissions.
- 66 For cartel participants who have coerced other participants to take part in the cartel (and therefore are not eligible for conditional immunity), cooperation concessions may still be available. When recommending a reduced penalty in such a case, we will take into account that the cooperating party coerced others into taking part in the cartel conduct, together with the party's level of cooperation in the investigation.
- 67 A decision to proceed with a lower level of enforcement action is at the Commission's sole discretion, and will reflect how we assess the relevant conduct.
- 68 In exceptional circumstances, we may exercise our enforcement 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 if that person does not qualify for conditional immunity.
- 69 The penalty or penalty range that the Commission is prepared to agree will depend on the usual sentencing considerations, including principally the value of the information provided by the cooperating party and its contribution towards the investigation and any resulting litigation. While the courts are willing to receive such recommendations, the court is the decision-maker and can impose penalties or recognise discounts that differ from the agreed recommendation. In previous cases, the courts have typically recognised cooperation discounts of 25-50%, but this indication should not be treated as a commitment by the Commission in any specific case.

## 6 Dealing with confidential information

- 70 The Commission, applicants, marker and conditional immunity holders and cooperating parties have obligations in relation to confidentiality. We will try to protect to the extent possible confidential information provided by holders of a marker or conditional immunity, and cooperating parties. Detailed information on how we deal with confidential information is contained in the immunity agreement and cooperation agreements available on our website at [www.comcom.govt.nz/cartel-leniency-policy](http://www.comcom.govt.nz/cartel-leniency-policy). More information is also contained in the [Competition and Consumer Investigation Guidelines](#) on our website.

### The Commission's confidentiality obligations

- 71 We will answer hypothetical questions about the availability of a marker for a particular cartel, but will only confirm or deny whether an investigation is under way on a particular cartel if it is necessary to clarify eligibility. We will not disclose the identity of any marker holder or applicant for conditional immunity.
- 72 Similarly, where possible, we will keep confidential the identity of any individual or company that has approached us about cooperation or is being considered for a lower level of enforcement action.
- 73 A grant of conditional immunity may become public when we issue proceedings against other cartel participants, or when officers or employees of a company granted conditional immunity give evidence in such proceedings. Similarly, the identity of a cooperating party will be disclosed when we reach a settlement agreement with that party and the Court imposes a penalty.
- 74 We may use information we receive from the marker or conditional immunity holder for the purposes of our investigation. If the Commission receives a third party request for disclosure of information, whether pursuant to the Official Information Act 1982 (OIA), a request for discovery in any court, or otherwise, the Commission will to the extent reasonably possible, give the marker or conditional immunity holder an opportunity to:
- make submissions to the Commission regarding the proposed release of the information; and
  - take such action as the marker or conditional immunity holder considers necessary to resist the request.
- 75 We will not share confidential information about international cartels that has been provided by an applicant,<sup>9</sup> including the applicant's identity, with other competition authorities without the applicant's consent. However, we may request a waiver from the applicant to enable us to share information provided by the applicant with other competition authorities.
- 76 Information we obtain about the cartel from non-applicant sources may be shared with other competition authorities if we consider that this will improve the efficiency or effectiveness of our investigation.

### Applicants' confidentiality obligations

- 77 Applicants must not disclose to any third party:
- that they have enquired about conditional immunity, a marker application or gaining formal status of a cooperating party in relation to a cartel;
  - their application;
  - any information that they have provided to the Commission for their application;
  - that they have been granted a marker, conditional immunity or cooperation; and
  - communications from, or information created by, the Commission.
- 78 The only exceptions are if disclosure is required by law, if disclosure is for the purposes of making a leniency application to another competition authority, or if the applicant has our prior written consent.

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9. An applicant includes a party that has a marker for conditional immunity, a party that holds conditional immunity, a holder of derived conditional immunity, and a party that has the formal status of a cooperating party in relation to a cartel investigation.

## The 'paperless' process

- 79 At the applicant's request, and where justified, an application can be made, and a marker or conditional immunity granted, verbally. This is called a 'paperless' process. While the process may be paperless for the applicant, we will create records of our communications with the applicant and their legal representatives. Even if the Commission agrees to a paperless process, pre-existing evidence of the conduct (in particular, documentary evidence), must still be provided.

## 7 Contacting us about applications, statements, and hypothetical enquiries

- 80 Applications for a marker or conditional immunity, applications for cooperation, and hypothetical enquiries must be directed to the General Manager of the Competition and Consumer Branch at the Commerce Commission.
- 81 For applications for a marker or conditional immunity, contact should be made during the Commission's working hours (8.30am to 5pm, Monday to Friday) either via:
- telephone (+64 (0) 4 924 3720),
  - email ([gm.competition@comcom.govt.nz](mailto:gm.competition@comcom.govt.nz)); or
  - in person (Level 9, 44 The Terrace, Wellington 6011).
- 82 In all instances, the General Manager of the Competition and Consumer Branch will need to be advised whether it is an application for a marker, a statement of willingness to cooperate with the Commission, or a hypothetical enquiry, as well as the caller's contact details for the next two working days. Further information (depending on the type of application set out below) will also be required for the General Manager to respond.
- Application for a marker: the product(s) and service(s) involved, the main participants, the connection of the cartel to a market in New Zealand, and the identity of the applicant if the caller is the applicant's legal representative.
  - Statement of willingness to cooperate: sufficient information on the nature of the cartel, such as the product(s) and service(s) involved and the main participants, the identity of the applicant if the caller is the applicant's legal representative.
  - Hypothetical enquiry: the product(s) and service(s) involved and the impact of the cartel information on a market in New Zealand.
- 83 Applications for either a marker or conditional immunity will be treated in the order they are received. Telephone messages will not qualify as an application for conditional immunity; applicants must speak directly to the General Manager of the Competition and Consumer Branch or an authorised delegate. The General Manager of the Competition and Consumer Branch, or authorised delegate, will respond promptly to any application.
- 84 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.

# Attachment A

## Immunity Agreement

### Parties

**Commerce Commission** (Commission), a body corporate established under section 8 of the Commerce Act 1986 (“the Commerce Act”)

and

**[Company name]** (*abbreviated company name*), a **[company incorporated under the Companies Act 1993/registered Overseas ASIC Company/Overseas Non-ASIC Company/Company number x]** and having its registered office at **[registered office as listed in the Companies Office register]**

(together, the **parties**)

### Preamble

This agreement records the terms on which the Commission grants continuing immunity to **[Company]** and any eligible individual. Immunity will continue provided **[Company]** and any eligible individual comply with their obligations under this agreement.

### Interpretation

- 1 For the purposes of this agreement:
  - 1.1 **civil proceedings** means any Commission initiated court proceedings or other enforcement action relating to the conduct or arising out of the investigation under Part 2 of the Commerce Act;
  - 1.2 **conduct** means the activities described in clause 2;
  - 1.3 **eligible individual** means a natural person who is a current or former director, officer, contractor, agent or employee of the **[Company]** or its interconnected bodies corporate;
  - 1.4 **immunity** means the Commission’s undertaking not to bring any civil proceedings in relation to the conduct, subject to **[Company]**, its interconnected bodies corporate, and any eligible individual’s compliance with their obligations under this agreement;
  - 1.5 **information** includes documents as defined in section 2(1) of the Commerce Act, statements, and evidence of any kind whatsoever, including all oral, written and electronic material;
  - 1.6 **interconnected bodies corporate** has the definition set out in section 2(7) of the Commerce Act;
  - 1.7 **investigation** means the Commission’s inquiry into the conduct or any related activities, including any possible breaches of section 103 of the Commerce Act, or any related offences under the Crimes Act 1961;
  - 1.8 **other proceedings** means any Commission initiated criminal proceedings or other enforcement action arising out of the investigation, including criminal proceedings for breaches of section 103 of the Commerce Act, or any related offences under the Crimes Act 1961;
  - 1.9 **person** includes a local authority, and any association of persons whether incorporated or not; and
  - 1.10 **working day** has the definition as set out in section 2(1) of the Commerce Act.

[Add any additional definitions that apply to this investigation]

## Admission of conduct

- 2 [Company] admits *[briefly detail the contravening conduct/agreement and substance of the conduct/agreement and state the applicant's role, eg. [Company] entered into an agreement with [party/ies] from [date] until [date] concerning [xx] which may breach section 27, or section 27 via section 30, of the Commerce Act].*
- 3 [Company] warrants and represents that it:
  - 3.1 has ceased, or will immediately on the Commission confirming to [Company] that it should cease, any involvement in the conduct;
  - 3.2 did not coerce any person not qualifying for immunity under clause 4 of this agreement to participate in the conduct; and
  - 3.3 has reported to the Commission any and all conduct of which it is currently aware that may constitute a breach of the Commerce Act.

## Scope of immunity

- 4 Subject to their continued compliance with their obligations under this agreement, the Commission grants immunity to:
  - 4.1 [Company];
  - 4.2 any of [Company]'s interconnected bodies corporate; and
  - 4.3 any eligible individual.

## Immunity conditions for [Company]

- 5 Unless the Commission advises [Company] in writing, [Company] will:
  - 5.1 maintain continuous, complete and expeditious cooperation with the Commission throughout the investigation and any civil proceedings;
  - 5.2 provide the Commission promptly and voluntarily with all information available to it regarding the conduct (including its formation, scope, existence and operation);
  - 5.3 preserve, and assist the Commission to retrieve, all information related to the conduct or the investigation;
  - 5.4 use its best endeavours to secure the complete and truthful cooperation of eligible individuals, including by informing key eligible individuals (as notified by the Commission) of their obligations under clauses 6 and 18 of the agreement;
  - 5.5 inform the Commission of any employees involved in the conduct [Company] knows are going to leave [Company];
  - 5.6 encourage and facilitate eligible individuals to voluntarily provide the Commission with any information requested, and to appear for interviews and to give evidence in Court as requested by the Commission, even if the eligible individuals are working or residing outside New Zealand (the interviews will usually be conducted in person at the Commission's Wellington or Auckland offices unless otherwise agreed by the Commission and [Company]);
  - 5.7 act as directed by the Commission in relation to the conduct; and
  - 5.8 meet its own expenses incurred in the course of complying with its obligations under this agreement, including any reasonable and necessary expenses incurred by any eligible individual, provided the eligible individual complies with their obligations under this agreement. For the avoidance of doubt, nothing in this clause requires [Company] to pay any legal costs incurred by an eligible individual in connection with this agreement or the conduct.

## Immunity conditions for eligible individuals

- 6 To gain, and maintain, the benefit of immunity, an eligible individual must:
  - 6.1 admit their role in the conduct (to the best of his or her knowledge);
  - 6.2 maintain continuous, complete and expeditious cooperation with the Commission throughout the investigation and any civil proceedings;
  - 6.3 when requested, provide the Commission promptly and voluntarily with all information available to them regarding the existence, activities and operation of the conduct;
  - 6.4 preserve, and assist the Commission to retrieve, all information relating to the conduct;
  - 6.5 make available to the Commission any personal information which is relevant, or which the Commission considers may assist the investigation or the civil proceedings;
  - 6.6 make themselves available for interviews and respond fully and truthfully to all the Commission's inquiries in relation to the investigation and promptly inform the Commission of any changes in their employment situation and/or contact details;
  - 6.7 comply with clause 18 of this Agreement;
  - 6.8 appear as a witness in any civil proceedings and provide full, frank and truthful evidence as to all matters within their knowledge, if required to do so by the Commission; and
  - 6.9 act as directed by the Commission in relation to the conduct.
- 7 The obligations in clause 6 are continuing obligations and only cease when the Commission releases the eligible individual from those obligations in writing.

## Immunity conditions for interconnected bodies corporate

- 8 To gain, and maintain, the benefit of immunity, an interconnected body corporate must:
  - 8.1 admit its role in the conduct;
  - 8.2 maintain continuous, complete and expeditious cooperation with the Commission throughout the investigation and any civil proceedings;
  - 8.3 when requested, provide the Commission promptly and voluntarily with all information available to it regarding the existence, activities and operation of the conduct;
  - 8.4 preserve, and assist the Commission to retrieve, all information relating to the conduct;
  - 8.5 when requested, use its best endeavours to secure the complete and truthful cooperation of its eligible individuals;
  - 8.6 encourage and facilitate its eligible individuals to voluntarily provide the Commission with any information requested, to appear for interviews, and to give evidence in Court as requested by the Commission;
  - 8.7 make available to the Commission any information relating to the conduct or the investigation;
  - 8.8 comply with clause 18 of this Agreement;
  - 8.9 act as directed by the Commission in relation to the conduct; and
  - 8.10 meet its own expenses incurred in the course of complying with its obligations under this agreement, including any reasonable and necessary expenses incurred by any eligible individual, provided any such eligible individual complies with their obligations under this agreement. For the avoidance of doubt, nothing in this clause requires [Company] to pay any legal costs incurred by an eligible individual in connection with this agreement or the conduct.
- 9 The obligations in clause 8 are continuing obligations and only cease when the Commission releases the interconnected body corporate from those obligations in writing.

## Termination of immunity

- 10 If the Commission decides on reasonable grounds that [Company] has:
  - 10.1 failed to meet any of the conditions of this agreement that apply to it;
  - 10.2 made false statements to the Commission in this agreement; or
  - 10.3 materially misled the Commission as to any matter relevant to the investigation or civil proceedings;the Commission will:
  - 10.4 outline to [Company] in writing the issues which provide a basis for contemplating termination of [Company]'s immunity, and allow ten working days (or such longer period if agreed), for [Company] to respond satisfactorily to any issues the Commission identifies; and
  - 10.5 if [Company] does not satisfactorily respond to (and, if required by the Commission, rectify) the Commission's issues, set out the shortcomings in writing, and allow [Company] a further ten working days, or such longer period as the Commission may specify, to respond to (and, if required by the Commission, rectify) the Commission's issues satisfactorily.
- 11 If having regard to any responses made by [Company] under clause 10.5, the Commission decides to give notice to [Company] that its immunity is terminated, it will do so in writing.
- 12 If the Commission has given notice under clause 11:
  - 12.1 the Commission may initiate civil proceedings against [Company]; and
  - 12.2 the Commission may use any information provided by [Company] under this agreement, for the purpose of conducting the investigation or civil proceedings.
- 13 In the event of the Commission commencing civil proceedings under clause 12.1, [Company] agrees to waive any right it may otherwise have to assert that any civil proceedings brought against it by the Commission arising out of or in connection with the conduct are time-barred for purposes of any applicable limitation period under the Commerce Act, for a period of three years from the date of termination of the immunity.
- 14 If the Commission decides on reasonable grounds that an eligible individual has:
  - 14.1 failed to meet any of the conditions of this agreement that apply to it;
  - 14.2 made false statements to the Commission in this agreement; or
  - 14.3 materially misled the Commission as to any matter relevant to the investigation or civil proceedings;the Commission will:
  - 14.4 outline to the eligible individual in writing the issues which provide a basis for contemplating termination of the eligible individual's immunity, and allow ten working days (or such longer period if agreed), for the eligible individual to respond satisfactorily to any issues the Commission identifies; and
  - 14.5 if the eligible individual does not satisfactorily respond to (and, if required by the Commission, rectify) the Commission's issues, set out the shortcomings in writing, and allow the eligible individual a further ten working days, or such longer period as the Commission may specify, to respond to (and, if required by the Commission, rectify) the Commission's issues satisfactorily.
- 15 If having regard to any responses made by the eligible individual under clause 14.5, the Commission decides to give notice to the eligible individual that their immunity is terminated, it will do so in writing.
- 16 If the Commission has given notice under clause 15:
  - 16.1 the Commission may initiate civil proceedings against the eligible individual; and
  - 16.2 the Commission may use any information provided by the eligible individual under this agreement, for the purpose of conducting the investigation or civil proceedings.

- 17 In the event of the Commission commencing civil proceedings under clause 16.1, the eligible individual agrees to waive any right it may otherwise have to assert that any civil proceedings brought against it by the Commission arising out of or in connection with the conduct are time-barred for purposes of any applicable limitation period under the Commerce Act, for a period of three years from the date of termination of the immunity.

## Confidentiality

- 18 [Company], eligible individuals and any interconnected bodies corporate will:
- 18.1 not, without the consent of the Commission, disclose the fact of, or the content of the immunity application, the investigation or civil proceedings, or any details regarding the immunity application, the investigation or civil proceedings, except as required by law and/or the rules of its stock exchange; and
  - 18.2 inform the Commission at the earliest reasonable opportunity if it intends to make a disclosure as required by law and/or the rules of its stock exchange.
- 19 If the fact of, or the content of, the immunity application or the Commission's investigation becomes public other than as a result of [Company] breaching its obligations under this agreement, [Company] will be entitled to:
- 19.1 disclose that it was the immunity applicant; and
  - 19.2 correct any incorrect or misleading statements or respond to media inquiries, providing it has first given the Commission not less than 24 hours' notice in writing (unless a shorter time is agreed with the Commission) of what it proposes to say and makes any changes to its proposed statement that the Commission reasonably requests.

## Disclosure and use of information by the Commission

- 20 The Commission may disclose any information provided by [Company], an eligible individual, or an interconnected body corporate for the purpose of:
- 20.1 conducting the investigation;
  - 20.2 conducting any civil proceedings or other proceedings;
  - 20.3 obtaining legal and other expert advice in relation to the investigation, civil proceedings or other proceedings;
  - 20.4 informing relevant Ministers and/or their advisers (subject to an obligation of confidence);
  - 20.5 carrying out the Commission's functions;
  - 20.6 complying with the law; or
  - 20.7 as the Commission otherwise considers necessary or desirable with [Company's] prior written consent.
- 21 If the Commission receives a third party request for disclosure of information, whether pursuant to the Official Information Act 1982 (the OIA), a request for discovery in any court, or otherwise, the Commission will to the extent reasonably possible, give [Company] an opportunity to:
- 21.1 make submissions to the Commission regarding any proposed release of the information; and
  - 21.2 take such action as [Company] considers necessary to resist the request.
- 22 The obligations imposed on the Commission in clauses 20 and 21 survive termination unless [Company] releases the Commission from these obligations in writing.

## Company's continuing obligations

- 23 [Company]'s obligations in clause 5 are continuing obligations and only cease when the Commission, by notice in writing, advises [Company] that the investigation or civil proceedings have been concluded (whichever is the later) and releases [Company] from those obligations.
- 24 [Company]'s obligations in clauses 18 and 19 survive termination unless the Commission releases [Company] from these obligations in writing.

## General

- 25 This agreement, including any attachments, is the entire agreement between the parties and supersedes all prior agreements, arrangements, representations or understandings whether oral or written between the parties.
- 26 No amendment to this agreement will be effective unless it is in writing and signed by the parties.
- 27 The failure of a party to enforce any provision of this agreement at any time shall not operate as a waiver of that provision in respect of the particular act or omission or any other act or omission.
- 28 The parties represent and warrant to each other that the signatories to this agreement have the necessary authority and capacity to bind them.
- 29 The parties agree that the New Zealand courts shall have jurisdiction to determine any civil proceedings arising out of or in connection with this agreement and the matters to which it relates.
- 30 The parties represent and agree that they are each voluntarily entering into this Agreement after having received legal advice.
- 31 The parties may enter into this agreement by signing any number of counterparts, each of which will be treated as an original. All of the counterparts taken together will constitute a single document. A party's delivery of a signed facsimile or pdf counterpart of this agreement will have the same legal effect as that party's delivery of a signed original counterpart.
- 32 Any written notice or communication pursuant to this agreement shall be delivered as follows:

### If to the Commerce Commission, to:

Commerce Commission  
Level 9, 44 The Terrace  
PO Box 2351  
Wellington 6011  
New Zealand

For the attention of [lead investigator] or by email to: [lead investigator's email address]  
(or such other person or address as the parties may agree)

### If to [Company], to:

For the attention of [ ]  
(or to such other person or address as the parties may agree)

## Execution

Signed by and on behalf of the Commerce Commission on

[Date]

\_\_\_\_\_  
Authorised signatory

\_\_\_\_\_  
Name

In the presence of:

Witness Name:

Witness Address:

Witness Occupation:

Signed by and on behalf of

[Company] on

[Date]

\_\_\_\_\_  
Authorised signatory

\_\_\_\_\_  
Name

In the presence of:

Witness Name:

Witness Address:

Witness Occupation:

ISBN 978-1-869451-46-2

This is a guideline only and reflects the Commission's view. It is not intended to be definitive and should not be used in place of legal advice. You are responsible for staying up to date with legislative changes.

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Contact us with information about possible breaches of the laws we enforce:

**Phone:** 0800 943 600

**Write:** Enquiries Team, PO Box 2351, Wellington 6140

**Email:** [contact@comcom.govt.nz](mailto:contact@comcom.govt.nz)

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