

APRIL 2021

Cartel Leniency and Immunity Policy



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Foreword from the Chair

On 8 April 2021, the Commerce (Criminalisation of Cartels) Amendment Act 2019 will come into force. Section 82B of the Commerce Act 1986 will create a criminal offence relating to agreements containing a cartel provision. Businesses and individuals found to have engaged in cartel conduct will be liable for criminal conviction and may be subject to significant fines. Individuals may also be liable for up to seven years' imprisonment. While cartel conduct is currently unlawful and subject to civil pecuniary penalties, this will represent a significant change in New Zealand's competition law framework, and will bring us into line with many of our major trading partners.

Since November 2004 the Commission has operated a Cartel Leniency Policy. Participants in cartel conduct could report it to the Commission, and co-operate with the resulting investigation, in return for the Commission's agreement not to bring civil proceedings against them. Because its covert nature can make it difficult to detect, the Cartel Leniency Policy has been one of the Commission's most important tools in its work involving cartel conduct.

The Commission's policy has reflected international practice in this area, going at least as far back as the US Department of Justice Antitrust Division's 1993 Corporate Leniency Policy. The key elements of that policy and those that followed it were that:

- 1 leniency was automatic for qualifying companies if there is no pre-existing investigation when the cartel conduct is reported;
- 2 leniency may still be available where cooperation begins after the investigation is underway; and
- 3 all officers, directors, and employees who come forward with the company and cooperate are also protected.

Those key features can still be seen today in the Commission's approach. However, some modification has been required to reflect New Zealand's arrangements in relation to criminal prosecutions.

The Commission will continue to consider applications for leniency in relation to its ability to bring civil proceedings for cartel conduct. However, the Solicitor-General is responsible for the oversight of all public prosecutions. Only the Solicitor-General can grant immunity from criminal prosecution, and does so in accordance with the Solicitor-General's Prosecution Guidelines. Nevertheless, the Solicitor-General recognises that the ability to grant immunity from prosecution is an essential tool in the detection and elimination of cartels. The Solicitor-General also recognises that clarity, predictability and transparency are critical, and intends to publish guidelines on immunity from prosecution for cartel offences.

This Cartel Leniency and Immunity Policy explains how the Commission will continue to grant leniency in respect of civil proceedings, and how it will make recommendations to the Solicitor-General to grant immunity from criminal prosecution for cartel offences.

The Policy will assist the Commission to detect and take action against cartel conduct. Our work in this area will continue to be one of our enduring priorities, reflecting the role of competition in supporting markets that work well in the interests of all New Zealanders. It also provides a useful reference tool for those wanting to speak with the Commission about relevant conduct.

Finally, the development of this Policy was significantly assisted by consultation with practitioners, colleagues, and other stakeholders in New Zealand and overseas. Thank you for the time you took to provide us with your valuable contributions.



Anna Rawlings

Chair of the Commerce Commission

7 April 2020

1 Introduction

- 1 This policy sets out the Commission's approach to applications for leniency, immunity and cooperation in the context of cartel conduct. Cartel conduct is an offence under the Commerce Act 1986 (the Act). Any individuals and/or businesses¹ involved in cartel conduct can apply to the Commerce Commission (the Commission/we/us) for criminal immunity and civil leniency, or formal status as a cooperating party.
- 2 The Commission is the primary point of contact for all applications for criminal immunity, civil leniency, amnesty plus or cooperation relating to cartel conduct. The Commission is responsible for making decisions about civil leniency and cooperation. The Solicitor-General is responsible for granting criminal immunity.² Applicants can obtain criminal immunity and civil leniency for the same cartel conduct.
- 3 **Criminal immunity ('Immunity')**: The Commission may make a recommendation to the Solicitor-General to grant Immunity to an applicant. The Commission will make a recommendation to the Solicitor-General where the Immunity recommendation criteria specified in this policy are met (which includes those specified in the Guidelines on Immunity for Prosecution for Cartel Offences and the Solicitor-General's Prosecution Guidelines).
- 4 The Solicitor-General will exercise their independent discretion when considering the Commission's recommendation. If the Solicitor-General decides to grant Immunity, the Solicitor-General will provide an undertaking to the applicant to stay any criminal prosecution (by the Commission or otherwise) commenced in respect of the applicant's involvement in the cartel conduct.
- 5 The undertaking will be subject to specified conditions which impose ongoing obligations on the Immunity recipient. Notwithstanding the undertaking, an Immunity holder can be prosecuted for non-cartel criminal offences, such as obstruction of justice.
- 6 The Solicitor-General is empowered to grant immunity outside of this policy. The Solicitor-General intends that any applications for Immunity in relation to cartel conduct will be made to the Commission in the first instance. Any Immunity application made directly to the Solicitor-General will be immediately referred to the Commission.
- 7 **Civil leniency ('Leniency')**: Leniency means that the Commission will not take civil enforcement action against the recipient for their part in the notified cartel conduct. The Commission assesses applications for Leniency against the conditions specified in this policy. If the Commission decides to grant Leniency it will enter into a conditional Leniency agreement with the applicant. Leniency agreements specify conditions that the recipient must continue to comply with in order to maintain Leniency.
- 8 Leniency granted by the Commission and/or a grant of Immunity by the Solicitor-General does not exclude third parties from making claims in the civil courts against the Leniency or Immunity holder for compensatory or exemplary damages or other remedies as a result of the cartel conduct.
- 9 **Cooperation**: If a person is not eligible for Immunity and/or Leniency, the person can apply for formal status as a cooperating party in relation to a cartel investigation. The Commission may exercise its discretion to take a lower level of enforcement action, or, in exceptional cases, no action at all, in exchange for the person providing information and full and continuing cooperation throughout a cartel investigation and any subsequent proceedings.³ Cooperation allows us to investigate and take appropriate action more quickly and effectively, and with fewer resources.

1. In this policy, we use the term business to refer to any natural or legal person or any entity, including sole traders, companies, all forms of partnership and any other business or corporate entities.

2. See the Solicitor-General's draft guidelines for immunity from prosecution for cartel offences available on our website at: www.comcom.govt.nz/cartel-leniency-and-immunity-policy.

3. Our Cooperation Policy, introduced in November 2004, applies to other types of enforcement action by the Commission, but no longer applies to cartels. Cooperation in relation to cartels is now covered by the Cooperation section of this Leniency Policy.

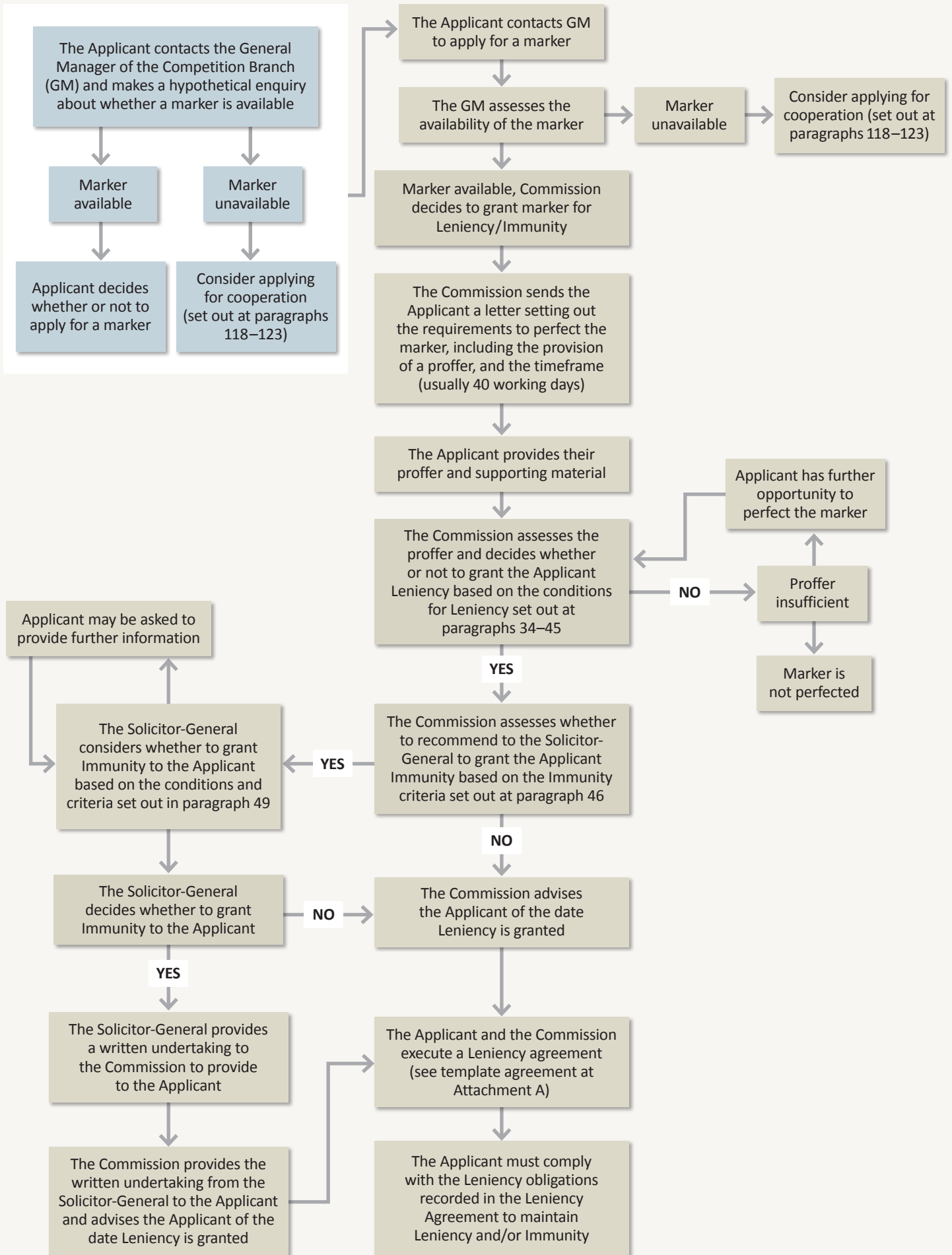
- 10 **Amnesty Plus:** If, in the course of an investigation into cartel conduct, a person under investigation notifies the Commission of separate cartel conduct the Commission may grant Leniency and/or recommend Immunity be granted in relation to the newly notified cartel conduct. To be successful in an application for Amnesty Plus, an applicant will need to demonstrate, among other things, that the newly notified cartel conduct is separate from the cartel conduct the Commission is already investigating. We will assess this on a case-by-case basis.
- 11 We intend for this policy to provide transparency and certainty on what people that have been involved in cartel conduct must do to apply for Immunity, Leniency and/or Cooperation. The policy cannot provide guidance on every possible factual scenario. The Commission has prepared a list of Frequently Asked Questions that provide a plain English explanation of the key aspects of this policy. This is available from the Commission's website.⁴ 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.
- 12 The language used in this policy refers to a single applicant application, relating to an instance of cartel conduct. These terms should be read as including the plural, where applicable. In general, the Commission intends that a single application will be made in respect of notified conduct, for both Immunity and/or Leniency.
- 13 Cartel conduct can, however, involve numerous arrangements, participants and interactions and some or all of the conduct reported to the Commission by an applicant may be eligible for Immunity and/or Leniency. If Immunity and/or Leniency are not available for some or all of the conduct, cooperation or Amnesty Plus may be otherwise available.
- 14 A person who took no part in cartel conduct is not at risk of breaching the Act and does not need to apply for Immunity and/or Leniency. 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. 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 as a confidential informant.
- 15 We recognise there are situations where someone who has knowledge or specific information about cartel conduct might be reluctant to report it for fear of negative consequences or reprisals. However, this knowledge may be key to detecting and breaking up cartels.
- 16 The Commission has a secure anonymous whistleblowing tool which uses encryption methods to allow a person to submit a report anonymously. The information provided through this online tool cannot be traced back to the submitter, as long as no information that identifies the person is provided.⁵



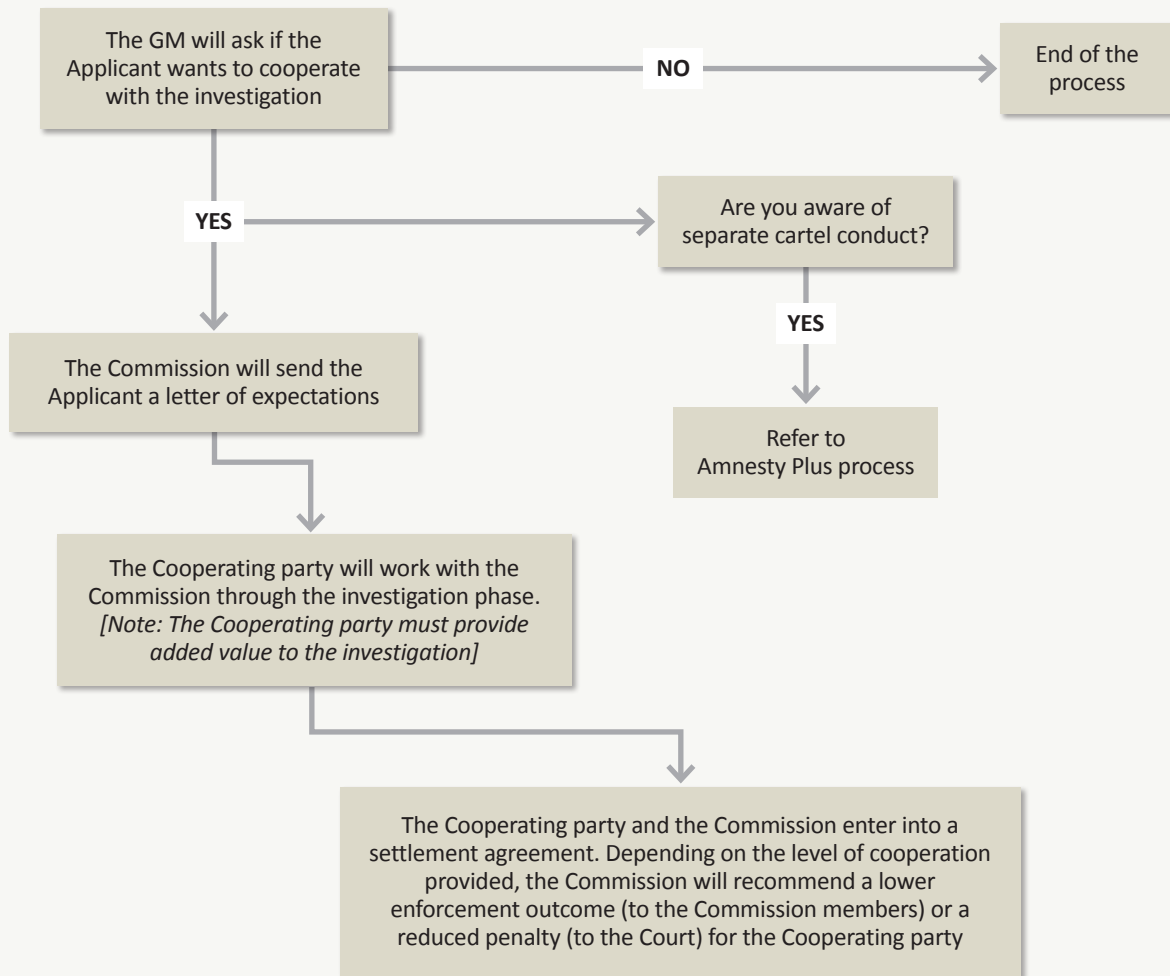
4. <https://comcom.govt.nz/cartel-leniency-and-immunity-policy/faq>.

5. Further detail about the Commission's anonymous whistle-blower tool can be found at: www.comcom.govt.nz/business/avoiding-anti-competitive-behaviour/what-is-a-cartel/reporting-cartel-conduct

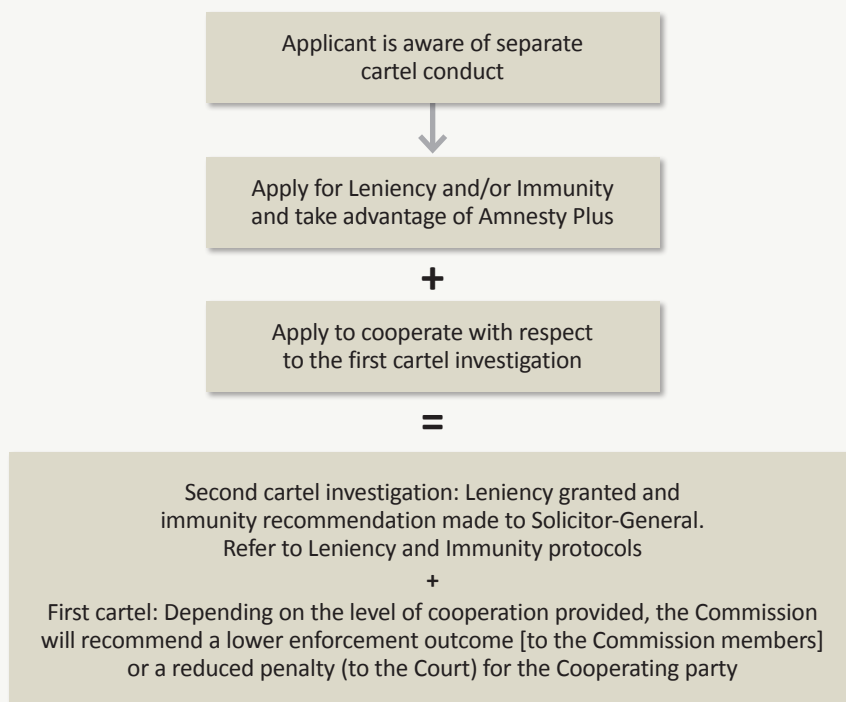
Leniency and Immunity application process



Cooperation process



Amnesty Plus process



2 Cartel conduct harms consumers, businesses and the economy

- 17 Cartels are illegal agreements between competitors to not compete with one another. Cartels are prohibited under section 30 of the Act.
- 18 Cartel conduct includes price fixing; limiting or restricting production, capacity and/or supply; and allocating customers, suppliers or territories; and bid rigging.⁶ Most cartel provisions are also prohibited under section 27, which prohibits contracts, arrangements or understandings that have the purpose, or have or are likely to have the effect, of substantially lessening competition in a market.
- 19 19. Agreements that breach section 27 of the Commerce Act 1986 alone are not covered by this policy. The Commission's Cooperation Policy applies to section 27 conduct: <https://comcom.govt.nz/about-us/our-policies-and-guidelines/leniency-and-cooperation/cooperation-policy>.
- 20 We use 'agreement' in this policy to refer to a contract, arrangement or understanding. An agreement can be informal (a 'nod and a wink') and still be illegal.
- 21 Cartels cause consumers and businesses to pay more for their goods and services and undermine New Zealand's ability to compete internationally. Competition benefits New Zealanders through lower prices, greater consumer choice, increased business innovation, better product quality, and more investment. Detecting and taking action against cartels is a priority for the Commission.

A leniency policy helps to detect cartels

- 22 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. An effective leniency policy provides incentives to cartel participants to disclose the existence of cartel conduct. Immunity and/or Leniency is not a reward for applicants. Applicants are required to cooperate with the Commission's investigation and provide assistance in any legal proceedings.
- 23 Without detection through parties coming forward to apply for Immunity and/or Leniency, more cartels would continue to operate and harm the New Zealand economy and consumers.

Cartel conduct attracts substantial penalties

- 24 The Act provides for substantial penalties against companies and individuals who engage in cartel conduct,⁷ attempted cartel conduct, and aiding and abetting cartel conduct. The following maximum penalties apply, per offence:
 - 24.1 For an individual:
 - 24.1.1 a fine not exceeding \$500,000; and/or
 - 24.1.2 imprisonment for a term not exceeding seven years.
 - 24.2 For a business, the greater of:
 - 24.2.1 \$10 million;
 - 24.2.2 three times the value of the commercial gain resulting from the cartel conduct (if it can be readily ascertained); or
 - 24.2.3 10% of the turnover of the company and all of its interconnected bodies corporate in each accounting period in which the contravention occurred.

6. Bid rigging concerns securing contracts for products or services at or above 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 cartel provisions under that section.

7. The penalty provisions of the Commerce (Criminalisation of Cartels) Amendment Act 2019 apply from 8 April 2021.

- 25 The Court may also exclude individuals who have contravened section 30 from directing, promoting or managing a body corporate in New Zealand and Australia for a period not exceeding 5 years.
- 26 It is illegal for a business to indemnify a director, servant or agent for the costs of any proceedings where a pecuniary penalty is imposed in any civil or criminal enforcement action we take in respect of cartel conduct. The maximum penalty for doing so is twice the value of the indemnity provided. This does not preclude a business from covering the costs incurred by its directors, servants or agents in the course of the Commission's investigation.

3. Immunity and Leniency

- 27 Immunity and Leniency are available to the first eligible cartel participant to notify the Commission of the existence of cartel conduct that we are either:
 - 27.1 not aware of; or
 - 27.2 that we are aware of, but where the cartel participant is able to meet the requirements in paragraphs 33 -41 (as well as 42 -45 if the applicant is a business).
- 28 Applications for Immunity and/or Leniency may be made by individuals⁸ or by businesses (both referred to below as 'applicants' or 'persons', except where it is necessary to distinguish individuals from businesses).
- 29 The first step in the process of seeking Immunity and/or Leniency is to apply for a "marker" from the Commission. A party will be eligible for a marker if they meet the requirements prescribed in paragraphs 33–41 (as well as 42–45 if the applicant is a business). A description of the process for granting a marker is set out in section 4 below.
- 30 Providing an applicant with a marker enables:
 - 30.1 the Commission to assess whether Immunity and/or Leniency is available for the notified cartel conduct; and
 - 30.2 the applicant to collate and provide to the Commission sufficient evidence that it has engaged in cartel conduct.
- 31 Where the applicant is a business, any Immunity and/or Leniency that is subsequently granted will usually extend to any current or former director, officer or employee of that business involved in the cartel conduct. This is known as 'derived Immunity/derived Leniency'.
- 32 All persons who benefit from derived Immunity and/or derived Leniency must continue to meet similar conditions to the applicant. If, for whatever reason, derived Immunity and/or derived Leniency does not capture all of the cartel conduct that an individual has participated in and disclosed to the Commission, the Commission will usually grant Leniency and consider recommending Immunity for all of the individual's involvement in the cartel conduct.⁹

8. Including partnerships.

9. For example, if an applicant informs the Commission about cartel conduct that took place over several years, it is possible that one of its employees had worked at another business engaged in the cartel conduct. In these circumstances, the conditional derived Immunity would apply to that employee's period of employment at the applicant. However, if the individual fully cooperates with the Commission in relation to their involvement in the whole of the relevant period of the cartel conduct, including while working at another business engaged in the same cartel conduct, any Immunity and/or Leniency for that individual will usually extend to the whole of the relevant period.

All applicants must meet Leniency conditions

- 33 For an applicant to be eligible for Immunity and/or qualify for Leniency, the following six conditions must be met, including by any persons who are eligible for derived Immunity and/or Leniency. For business applicants, there are an additional four requirements.

1. The applicant must be the first party to qualify for Immunity and/or Leniency.

- 34 Immunity and/or Leniency is available only to an applicant who is:
- 34.1 the first to qualify for Immunity and/or Leniency; and
 - 34.2 a participant in cartel conduct that we are either:
 - 34.2.1 not aware of; or
 - 34.2.2 aware of but do not yet have sufficient evidence about to issue proceedings. In this scenario the applicant must be able to provide valuable evidence that could not be reasonably obtained elsewhere. An applicant may meet these criteria even when we are already investigating the cartel conduct, including under the exercise of our statutory information-gathering powers.
- 35 For the purposes of paragraph 34.2.1:
- 35.1 the Commission considers that where it is not aware of the cartel conduct, the applicant's evidence will be valuable and not be able to be reasonably obtained elsewhere.
- 36 For the purposes of paragraph 34.2.2:
- 36.1 when determining whether the evidence is valuable the Commission will consider whether it is admissible evidence that significantly strengthens the Commission's case;
 - 36.2 when determining whether the evidence is not reasonably obtainable elsewhere the Commission will consider whether:
 - 36.2.1 there are other witnesses or sources of evidence that are already available to the Commission to provide the same, or substantially similar, evidence without the grant of Immunity and/or Leniency; and
 - 36.2.2 there are, in the circumstances, reasonable investigative steps that the Commission has not taken that, if taken, would be highly likely to produce other witnesses or sources of evidence that could provide substantially the same evidence without the grant of Immunity and/or Leniency.

2. The applicant is, or was, a participant in cartel conduct.

- 37 Anyone who took part in cartel conduct can apply for Immunity and/or Leniency. An applicant is considered a participant even if they have attempted to engage in cartel conduct. An applicant may also participate in cartel conduct by aiding, abetting, or inciting cartel conduct or materially facilitating (or by being knowingly concerned in) cartel conduct even if they are not engaged in supplying the relevant goods or services.¹⁰

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

- 38 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.

10. See section 80(1) of the Act, and s 66 Crimes Act 1961.

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

- 39 An applicant must confirm that it has ceased involvement in the cartel conduct, other than where lawfully directed or permitted to do so 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 conduct.

- 40 The applicant must not have coerced other participants to take part in the cartel conduct. 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 conduct. A false statement in relation to this constitutes grounds for Immunity and/or Leniency to be revoked, and may result in proceedings under s 103 of the Act, and/or the Crimes Act 1961.

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

- 41 The applicant must provide full and continuing cooperation during the investigation of the cartel conduct 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. Full and continuing cooperation includes compliance with any requirements imposed by the Solicitor-General and/or panel prosecutor assigned to any proceedings.¹¹ The details of this requirement will also be set out in the Leniency agreement that the applicant signs. See the Template Agreement at Attachment A.

Further Leniency conditions for corporate applicants

- 42 An application for Immunity and/or Leniency by a business requires an admission that the notified conduct is conduct it is liable for, due to the actions of the business's directors, officers, contractors, agents or employees (rather than independent, isolated acts by individuals).
- 43 A business applying for Immunity and/or Leniency must provide us with the names of all current and former directors, officers, contractors, agents or employees of the business who were involved in the conduct. The current or most recent position held by each individual must be stated. The business must provide additional names if it later becomes aware of more individuals being involved in the conduct. The business must take all reasonable steps to ensure that those involved in the conduct cooperate fully with the Commission's investigation and any resulting enforcement action.
- 44 A business applying for Immunity and/or Leniency must also provide us with the registered names of all wholly owned and solely controlled companies that were involved in the conduct and that it intends to benefit from derived Immunity and/or Leniency. The business must advise the Commission of subsequent any changes to corporate structure. The business must take all reasonable steps to ensure that the companies involved in the conduct cooperate fully with the Commission's investigation and any resulting enforcement action.
- 45 A corporate applicant must do the following, unless agreed otherwise:
- 45.1 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
- 45.2 Commit to giving us unfettered access (to the best of their ability) to its personnel, information, and documents, and swiftly respond to our queries.

11. This includes requirements specified in the leniency agreement and/or Guidelines on Immunity from Prosecution for Cartel Offences (April 2021).

Criteria for recommendation of Immunity

- 46 The Commission will make a recommendation to the Solicitor-General that Immunity be granted to an applicant where:
 - 46.1 all of the Leniency conditions outlined in paragraphs 33 -41 (as well as 42 -45 if the applicant is a business) are met; and
 - 46.2 the following additional Immunity recommendation criteria are satisfied:
 - 46.2.1 some or all of the reported cartel conduct is likely to be prioritised for further investigation; and
 - 46.2.2 there is a prospect that criminal proceedings may be brought in relation to the prioritised conduct, including because it is serious.
- 47 For the purposes of paragraph 46.2.2, the Commission's assessment of whether the conduct is serious will take into account the considerations set out in the Commission's Enforcement Response Guidelines, Enforcement Criteria¹² and the Solicitor-General's Prosecution Guidelines.
- 48 The recommendation will be accompanied by a formal opinion on the merits of Immunity prepared by a cartel panel prosecutor or a senior legal staff member of the Commission.
- 49 The Solicitor-General's decision will be made based on the criteria set out in the Solicitor-General's Prosecution Guidelines, read in accordance with the Guidelines on Immunity for Prosecution for Cartel Offences.¹³
- 50 The Solicitor-General will exercise an independent discretion when considering an Immunity recommendation by the Commerce Commission and when considering whether the public interest is served by granting Immunity.

The scope of Leniency and/or Immunity for a business and individuals

- 51 Derived Immunity and/or Leniency will usually be extended to the members of a group of companies that are wholly owned and solely controlled by the applicant.
- 52 We will exercise our discretion to decide whether or not to grant derived Leniency to members of a group of companies that are only partly owned or partly controlled by the applicant.
- 53 On the Commission's recommendation, the Solicitor-General will exercise their discretion to decide whether or not to grant derived Immunity to members of a group of companies that are partly owned or partly controlled by the applicant.
- 54 Any companies that obtain derived Immunity and/or Leniency as described in the two preceding paragraphs will be subject to the same conditions as the applicant.
- 55 If a business qualifies for Leniency from the Commission, all its current and former directors, officers, contractors, agents or employees who cooperate as required with our investigation, will usually be covered by derived Leniency. If we recommend that the Solicitor-General grant Immunity, we will usually include in our recommendation all current and former directors, officers, agents or employees of the business, who cooperate as required with our investigation.

12. <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-criteria>

13. Solicitor-General's Prosecution Guidelines 2013, <https://www.crownlaw.govt.nz/publications/prosecution-guidelines/> and Solicitor-General's draft guidelines for immunity from prosecution for cartel offences available on our website at www.comcom.govt.nz/cartel-leniency-and-immunity-policy.

- 56 In some circumstances, we may specifically exclude or remove a person (business or individual) from the scope of the derived Leniency and/or make a recommendation to the Solicitor-General to this effect, for Immunity. Exclusion or removal of a person from derived Leniency/Immunity will be decided by reference to the Leniency conditions and/or Immunity recommendation criteria. For example, this may arise where the Commission has reason to believe that the person is unlikely to cooperate with the investigation.
- 57 Where a business has made an application for Immunity and/or Leniency, key individuals from that business should be made aware (during the marker phase) of their obligations to obtain or maintain derived Immunity and/or Leniency, 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.
- 58 It is the Solicitor-General's expectation that all applicants for Immunity will receive legal advice in advance of making the application.
- 59 In some circumstances, we may specifically exclude or remove a business or individual from the scope of the derived Leniency and/or make a recommendation to the Solicitor-General to this effect, in relation to derived Immunity. Exclusion or removal of a person from derived Leniency and/or Immunity will be decided by reference to the Leniency conditions and/or Immunity recommendation criteria. For example, this may arise where the Commission has reason to believe that the person is unlikely to cooperate with the investigation.

Derived Leniency/Immunity holders must fully cooperate with the investigation and subsequent proceedings

- 60 To obtain derived Immunity and/or Leniency, throughout the marker phase, all persons must admit their involvement in the cartel conduct and give a comprehensive and accurate account of their involvement and awareness of the cartel conduct (see paragraph 75-84 for more detail).
- 61 To maintain derived Immunity and/or Leniency during the Commission's investigation, all persons must fully cooperate and proactively assist with the Commission's investigation. Following the perfection of the marker by the applicant, all persons with derived Immunity and/or Leniency will receive a letter (**'Commission's Letter to Derived Leniency Holders'**) confirming their obligations. The recipients will be asked to confirm that they have understood and accepted the obligations.
- 62 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 and a confirmation certifying that they have provided all relevant evidence as set out in paragraph 78 (certifying all evidence provided).

4 The process for securing Immunity and/or Leniency

- 63 All applications for Immunity and/or Leniency and hypothetical enquiries must be directed to the General Manager of the Competition Branch at the Commission.¹⁴ Details of the specific steps and information required are set out in section 8 below.
- 64 Applications for Immunity and/or Leniency and hypothetical enquiries must be made according to the specified methods of contacting the General Manager, Competition Branch outlined in paragraphs 150–156 below. Applications for Immunity and/or Leniency and hypothetical enquiries made outside of the specified methods of communication, or to any other person at the Commission, will be disregarded.
- 65 A potential applicant for Immunity and/or Leniency, or their legal representative, may contact the Commission to make a hypothetical enquiry about whether a marker is available for cartel conduct. Enquiries may be anonymous.
- 66 To be able to confirm the position in relation to a hypothetical enquiry, or whether a marker is available, the Commission may request further information.
- 67 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 conduct's connection to a market in New Zealand. Any information provided to us in this context will only be used to determine the applicant's eligibility for a marker. We will not take into account knowledge obtained from hypothetical enquiries when considering subsequent applications for Immunity and/or Leniency.
- 68 In relation to a hypothetical enquiry, we will only confirm or deny whether an investigation is under way in relation to the defined cartel conduct if it is necessary to clarify eligibility.
- 69 Hypothetical enquiries will not constitute an application for Immunity and/or Leniency or a marker. Given the importance of obtaining a marker, we recommend prospective applicants apply early for Immunity and/or Leniency following the procedures described in this guideline.

How the marker process works

- 70 A prospective applicant may request a marker to confirm, and preserve for a limited time, their position as the first applicant for Immunity and/or Leniency. The value of a marker is that it allows the applicant to approach us as soon as they have decided to apply for Immunity and/or Leniency, rather than having first to assemble all relevant information. An applicant should apply to the Commission for a marker as soon as possible after identifying the cartel conduct.
- 71 To be granted a marker, a prospective applicant must provide us with sufficient information, to the best of their knowledge and belief, on the:
 - 71.1 nature of the cartel conduct, such as the product(s), service(s) involved, likely duration and geographic scope;
 - 71.2 main participants; and
 - 71.3 impact of the cartel conduct on a market in New Zealand.
- 72 If the information provided is insufficient, the Commission may seek further information. If the information available is insufficient the Commission may decline to grant a marker to the applicant.
- 73 The Commission will grant a marker where, for the notified conduct:
 - 73.1 a marker does not already exist;
 - 73.2 there is not already a holder of Immunity and/or Leniency; and
 - 73.3 the Commission does not already have sufficient evidence to issue proceedings.

14. Includes any authorised delegate of the General Manager, Competition Branch.

- 74 If a marker or Immunity and/or Leniency has already been granted for the relevant conduct, subsequent applicants will be told that a marker for Immunity and/or Leniency is not available. Subsequent applicants will not be told the identity of the marker or Immunity and/or Leniency holder. The time and date of each subsequent application will be recorded. Subsequent applicants will be told their place in the queue for a marker for Immunity and/or Leniency.

How to convert a marker into Leniency and/or a recommendation for Immunity

- 75 An applicant who has been granted a marker must comply with the Leniency conditions.
- 76 An applicant who has been granted a marker must provide the Commission with a statement including a detailed description of the persons involved in the cartel conduct, key individuals, and key parties, within an agreed time. This statement is called the ‘proffer’.
- 77 Supplying a proffer that complies with the prescribed conditions is called ‘perfecting the marker’.¹⁵ The standard time allowed to perfect the marker is 40 working days, but a longer or shorter time may be agreed where appropriate.¹⁶
- 78 The Commission will send the marker holder a letter detailing the types of information we require in the proffer in order to perfect their marker (**‘marker letter’**). The exact content of a proffer may vary, but it must include:
- 78.1 detailed information and supporting evidence of the cartel conduct for which Immunity and/or Leniency is sought, including:
 - 78.1.1 the product(s) and/or service(s) affected by the conduct;
 - 78.1.2 the annual value of the market(s) affected by the conduct;
 - 78.1.3 the identities and roles of the persons (companies and individuals) involved in the conduct and their locations (if possible);
 - 78.1.4 the geographic scope and duration of the conduct;
 - 78.1.5 a description of how the cartel operated;
 - 78.1.6 a description of how the cartel arrangements were given effect to; and
 - 78.1.7 a description of how any persons were affected by the cartel arrangements; and
 - 78.2 all records and documents available that provide evidence of the existence of cartel agreements between the cartel members, including:
 - 78.2.1 summaries of witness statements (ie, “will say” briefs, or similar);
 - 78.2.2 copies of relevant communications including, but not limited to, telephone records, email communications and instant messages;
 - 78.2.3 copies of relevant meeting records, including any meeting minutes, expense accounts, travel records, calendar entries;
 - 78.2.4 copies of any internal documentation of the relevant arrangements; and
 - 78.2.5 copies of any information detailing how the agreements were given effect to, including relevant tender documentation, pricing records, supply agreements.
 - 78.3 evidence to support the connection with a market in New Zealand, which is particularly important for international applicants.

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

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

- 79 If the applicant is a business, we may seek direct evidence from relevant individuals in the business who were involved in the cartel conduct, before we decide whether the marker has been perfected by the applicant. Obtaining direct evidence from individuals, in the form of interviews or statements, will also help us determine whether these individuals are eligible for derived Immunity and/or Leniency and are complying with their obligations (as detailed in the marker letter).
- 80 We may also require direct access to the applicant's premises and documents before we determine whether the applicant has perfected their marker. This may include the applicant conducting physical and electronic searches as directed by the Commission, including according to particular keywords. Under the Leniency condition of continued cooperation, it also may include the preservation of, providing the Commission access to and assistance with, all records, IT systems and equipment under the applicant's power or control.
- 81 We may contact the marker holder to check the progress being made in compiling the proffer.
- 82 If the marker holder is unable to produce the proffer within the agreed time or comply with a Commission request to interview individuals, the marker holder must inform the Commission as soon as possible.
- 83 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 the reasons provided are valid, we may agree to an extension. Further extensions may also be granted on a similar basis.
- 84 Without an extension, the marker will expire at the end of the prescribed period.

Assessing the marker holder's information

- 85 We will assess whether the proffer and the information provided by the applicant meets the prescribed conditions for Leniency and/or a recommendation of Immunity. If the proffer is insufficient or individuals have not provided the necessary information, we will discuss these shortcomings with the marker holder and give the marker holder the opportunity to explain or remedy the proffer's shortcomings within a specified time.
- 86 If we conclude that a marker holder has met the prescribed conditions for Leniency, consideration will also be given to whether a recommendation should be made to the Solicitor-General for the grant of Immunity. This is discussed at paragraphs 89 - 94. If no Immunity recommendation is to be made to the Solicitor-General, the Commission will advise the applicant of the outcome of its Leniency application.
- 87 If the marker holder fails to perfect the marker, or the marker expires before it is perfected by the marker holder, the offer of a marker for Immunity and/or Leniency may move to the next qualifying applicant in the queue. The next Immunity and/or Leniency applicant in the queue will then have the opportunity to meet the requirements for a marker and Immunity and/or Leniency.
- 88 The former holder of an expired marker is eligible to re-apply for Immunity and/or Leniency, but its original place in the queue is not protected. The former marker holder may also apply for cooperation.

Recommendation to the Solicitor-General to grant Immunity

- 89 If the Commission is satisfied that an applicant is eligible for Leniency, the Commission will recommend that the Solicitor-General grants Immunity where the Immunity recommendation criteria specified in paragraph 46 are met. The Commission's recommendation will cover any persons that are eligible for derived Immunity.
- 90 If the Immunity recommendation criteria are not met, the Commission will advise an applicant that it does not intend to make an immunity recommendation, at that time. The Commission may make an Immunity recommendation at any stage in the course of its investigation.
- 91 The Solicitor-General will exercise their independent discretion to decide whether to grant Immunity to the applicant, and any potential beneficiaries of derived Immunity. The Solicitor-General may require further information from an applicant to make their decision. The decision of the Solicitor-General will be communicated to the Commerce Commission promptly and in accordance with any timeframe agreed with the Commission.
- 92 If the Solicitor-General decides to grant Immunity from prosecution, they will provide an undertaking staying any prosecution in relation to the cartel conduct. Immunity will be subject to conditions and on-going obligations (see paragraphs 33- 41 (also paragraphs 42- 45 if the applicant is a business)) on the applicant for the duration of the Commission's investigation and until the conclusion of any civil or criminal proceedings against other cartel participants.
- 93 The Commission will hold a written copy of the Solicitor-General's undertaking and is responsible for providing the document to the applicant (in writing or verbally).
- 94 Where the Commission has made an Immunity recommendation, the Solicitor-General's decision will generally be provided to the applicant at the same time as we communicate our decision in relation to Leniency.

Entering into a leniency agreement

- 95 We will enter into a Leniency agreement with a successful applicant, specifying the conditions the applicant must meet for Immunity and Leniency to be preserved. See the Template Agreement at Attachment A.
- 96 The Commission does not intend significant departures from the form of the Template Agreement at Attachment A.
- 97 As noted above at paragraph 61, the Commission's Letter to Derived Leniency Holders will be sent to persons who benefit from derived Immunity and/or Leniency setting out the obligations they need to comply with to maintain derived Leniency.
- 98 In fulfilment of the terms outlined in this letter, at the end of the investigation phase, Immunity and/or Leniency holders and any persons benefitting from derived Immunity and/or Leniency will be required to certify in writing that they have fully complied with their obligations.
- 99 Individuals may be required to expressly certify that they have made all reasonable endeavours to provide evidence of the cartel conduct, including by providing to the Commission all information and documents within their power, custody or control. Typically, for individuals, this will form part of their witness statement that is to be used during any criminal or civil proceedings.

Options for ongoing Immunity and/or Leniency status

- 100 We will inform an Immunity and/or Leniency holder if we decide to conclude a cartel investigation without bringing legal proceedings.
- 101 In this scenario, an Immunity and/or Leniency holder can retain their Immunity and/or Leniency status by agreeing to meet certain obligations.
- 102 Immunity and/or Leniency becomes unconditional when all enforcement action has been completed, although there will be ongoing conditions relating to confidentiality.

Revocation of Immunity and/or Leniency

- 103 The Commission may revoke Leniency and recommend that the Solicitor-General revoke Immunity if the holder of Immunity and/or Leniency or a person with derived Immunity and/or Leniency, has failed to continue to meet the requirements prescribed in:
 - 103.1 their Leniency agreement, including any requirements of the Solicitor-General and/or panel prosecutor; or
 - 103.2 the requirements specified in the Commission's Letter to Derived Leniency Holders.
- 104 If we reach a view that a person has failed to meet the conditions for Immunity and/or Leniency or derived Immunity and/or Leniency, we will take the following steps:
 - 104.1 We will inform the person of this view and will allow 10 working days for the person to remedy the shortcomings identified, including by making any necessary submission to the Commission.
 - 104.2 If the shortcomings are not remedied within 10 working days, we will give written notice of our concerns and will allow the person a further 10 working days (or a longer period we may specify) to remedy the shortcomings, including by making any necessary submission to the Commission.
 - 104.3 If the person is granted Leniency only and does not remedy the shortcomings within the prescribed time, we may revoke Leniency at our sole discretion.
 - 104.4 If the person has been granted Immunity and Leniency and does not remedy the shortcomings within the prescribed time, we may:
 - 104.4.1 revoke Leniency at our sole discretion;
 - 104.4.2 recommend that the Solicitor-General revoke Immunity, in accordance with the Guidelines on Immunity from Prosecution for Cartel Offences. The Solicitor-General will exercise their independent discretion when considering the Commission's recommendation to revoke Immunity; and
 - 104.4.3 communicate the Solicitor-General's decision and the Commission's decision to the Immunity and Leniency holder.
- 105 If a business's Immunity and/or Leniency has been revoked, a person with derived Immunity and/or Leniency can either apply for:
 - 105.1 Immunity and/or Leniency in their own right, following the steps described in section 3 above; or
 - 105.2 the formal status of a cooperating party in relation to a cartel investigation.
- 106 Persons that have lost derived Immunity and/or Leniency through no fault of their own will retain the position as first place applicant for 20 working days from the date the Commission notifies the applicant of its decision(s) to revoke Immunity and/or Leniency. If no application is made within that time Immunity and/or Leniency will be available to the next in time applicant.

- 107 If the Commission issues civil legal proceedings in respect of the cartel conduct, we may decide to use our enforcement discretion not to issue legal proceedings against any persons that lost derived Leniency (through no fault of their own) and became a cooperating party in relation to the investigation.
- 108 In respect of any criminal proceedings, we will make a recommendation to the cartel panel prosecutor as to whether immunity should be preserved, or any prosecution should be stayed, for any persons that lost derived Immunity (through no fault of their own).

How the Commission may use the Applicant's information

- 109 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 a person who would qualify for derived Immunity and/or Leniency from that applicant. We may, however, use this information against other participants in the cartel conduct.
- 110 Where a marker is not perfected, the Commission will not use the information provided by the applicant in the course of attempting to perfect the failed marker as evidence in criminal or civil proceedings against the applicant under the Act other than in any criminal proceedings commenced because we consider the applicant has attempted to deceive, or knowingly mislead, the Commission. The Commission may nevertheless use the information to pursue our investigation or criminal or civil proceedings against other parties involved in the conduct.
- 111 Once an applicant is granted Leniency, the Commission will not use information (including witness statements) provided by the applicant as evidence in criminal or civil proceedings against the applicant under the Act except in criminal proceedings filed because we consider the applicant has attempted to deceive, or knowingly mislead, the Commission.
- 112 Where Immunity and/or Leniency has been revoked, the Commission will be entitled to use any information provided, by the party who no longer holds Immunity and/or Leniency, to:
 - 112.1 progress its investigation;
 - 112.2 initiate civil proceedings against the party which has had Immunity and/or Leniency revoked;
 - 112.3 initiate criminal proceedings against the party which has had Immunity and/or Leniency revoked where the person attempted to deceive or knowingly mislead the Commission; and
 - 112.4 initiate criminal and/or civil proceedings against any other parties involved in the conduct.

5 Applicants may be eligible for Amnesty Plus

- 113 An applicant may be eligible for “Amnesty Plus” if they do not qualify for Immunity and/or Leniency for their participation in cartel conduct we are investigating, but notify us of their participation in separate cartel conduct that we are unaware of.
- 114 To be successful in an application for Amnesty Plus, an applicant will need to demonstrate that the newly notified cartel conduct is separate from the cartel conduct the Commission is already aware of. We assess this on a case-by-case basis.
- 115 Under Amnesty Plus, an applicant may be eligible for:
- Immunity and/or Leniency for their participation in the newly notified cartel conduct; and
 - the formal status of a cooperating party for the cartel conduct already under investigation, provided the applicant agrees to cooperate with the Commission in accordance with the requirements detailed in section 6 below.
- 116 To secure Immunity and/or Leniency for the newly notified cartel conduct, the applicant must apply to the Commission as outlined in Part 4 above, and meet the same conditions as those set out in paragraphs 33–41 above, as well as 42 to 45 if the applicant is a business.
- 117 The decision to award Immunity from criminal prosecution for the newly notified cartel conduct will be made by the Solicitor-General exercising their discretion based on a recommendation from the Commission, in accordance with the Guidelines on Immunity from Prosecution for Cartel Offences.



6 Cooperation: we encourage applicants to cooperate when Immunity and/or Leniency is not available

- 118 A participant in cartel conduct that is:
- 118.1 too late to obtain a marker or Immunity and/or Leniency, or
 - 118.2 not eligible for Immunity and/or Leniency (for example, if they coerced other participants),
- may inform the Commission of their willingness to cooperate fully with the investigation.
- 119 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 the Commission making a submission to the Court for a reduced penalty. Cooperation in the context of civil and criminal proceedings is described below.
- 120 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.
- 121 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 likely to be 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.
- 122 To qualify for cooperation concessions, a cartel participant must provide information and evidence that is of significant value to our investigation. The cooperation must be full and continuing throughout any investigation and proceedings. Mere compliance, where the Commission requests information on a voluntary basis or exercises its statutory powers under the Act, will not fulfil this requirement.
- 123 If an individual or business has agreed to cooperate with our investigation but fails to properly cooperate, without adequate reasons, we may withdraw our offer to seek a reduced penalty or proceed with a lower level of enforcement.

Cooperation in civil proceedings

- 124 While Cooperation will not, except in special circumstances, entitle any person (business or individual) to Leniency, the public benefits of cooperation 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.
- 125 Usually, a cooperating party will enter into a settlement agreement with the Commission, in which the party will make relevant admissions.
- 126 For cartel participants who have coerced other participants to take part in the cartel (and therefore are not eligible for conditional Immunity and/or Leniency), 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.
- 127 A decision to proceed with a lower level of enforcement action¹⁷ is at the Commission's sole discretion and will reflect how we assess the relevant Cooperation.
- 128 In exceptional circumstances, we may exercise our enforcement discretion and decide to take no civil enforcement action against a person whose assistance is considered critical to the successful outcome of an investigation and proceedings, even if that person does not qualify for Leniency.

17. <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines>

- 129 The penalty or penalty range that the Commission is prepared to agree will depend on the considerations usually taken into account by a court when setting a penalty, including principally the value of the information provided by the cooperating party and its contribution towards the investigation and any resulting proceedings.
- 130 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.

Cooperation in criminal proceedings

- 131 In exceptional circumstances the Commission may recommend that the Solicitor-General grant Immunity to a cooperating party who meets the criteria set out in paragraph 12 of the Solicitor-General's Prosecution Guidelines.
- 132 We may decide not to take criminal enforcement action against a person whose assistance is considered critical to the successful outcome of an investigation and proceedings, even if that person does not qualify for Immunity.
- 133 If proceedings are commenced, it is a matter for the Court to determine the appropriate sanction to be imposed on a party convicted of engaging in cartel conduct in criminal proceedings, including the extent of any discount to be given for cooperation.
- 134 Depending on the value of the information provided by a cooperating party and its contribution to the investigation, the Commission may consider making a submission to the court in relation to any discount to be given.

7 Dealing with confidential information

- 135 The Commission, applicants, marker and Immunity and/or Leniency holders and cooperating parties have obligations in relation to confidentiality.
- 136 The Commission will treat information provided by holders of a marker for Immunity or Leniency, or cooperating parties, as confidential to the extent permitted by law.
- 137 A breach of an applicant's confidentiality obligations may be regarded as a failure to comply with the conditions of Immunity and/or Leniency. Failure to comply may result in revocation of Leniency and/or a recommendation that Immunity be revoked.
- 138 Detailed information on how we deal with confidential information is contained in the template Leniency agreement attached as Attachment A.
- 139 More information is also contained in the Competition and Consumer Investigation Guidelines on our website.

The Commission's confidentiality obligations

- 140 We will answer hypothetical questions about the availability of a marker for notified cartel conduct but will only confirm or deny whether an investigation already exists into that cartel conduct if it is necessary to clarify eligibility. We will not disclose the identity of any marker holder or applicant for Immunity and/or Leniency.
- 141 Similarly, where possible, we will keep confidential the identity of any individual or business that has approached us about cooperation.¹⁸
- 142 A grant of Immunity and/or Leniency may become public when we issue proceedings against other cartel participants, or when officers or employees of a business granted Immunity and/or Leniency give evidence in such proceedings. Similarly, the identity of a cooperating party may be disclosed if we reach a settlement agreement with that party and the Court imposes a penalty.
- 143 We may use information we receive from the marker or Immunity and/or Leniency holder for the purposes of our investigation. If the Commission receives a request for disclosure of information provided in the course of an investigation, 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 Immunity and/or Leniency holder an opportunity to:
 - 143.1 make submissions to the Commission regarding the proposed release of the information; and
 - 143.2 take such action as the marker or Immunity and/or Leniency holder considers necessary to resist the request.
- 144 We will not share confidential information about an international cartel provided by the applicant with other competition authorities,¹⁹ including the applicant's identity, without the applicant's consent. However, we may request a waiver from the applicant to enable us to share confidential information provided by the applicant with other competition authorities.

18. In any proceedings before the courts, the Commission will be required to disclose the fact and identity of any Leniency, Immunity and/or cooperation granted.

19. In this context an applicant includes a party that has a marker for Immunity and/or Leniency, a party that holds Immunity and/or Leniency, a holder of derived Immunity and/or Leniency, and a party that has the formal status of a cooperating party in relation to a cartel investigation.

Applicant's confidentiality obligations

- 145 An applicant must not disclose to any third party:
- 145.1 that they have enquired about Immunity and/or Leniency;
 - 145.2 their marker application;
 - 145.3 any information that they have provided to the Commission for their application;
 - 145.4 that they have been granted a marker, Immunity and/or Leniency or cooperation;
 - 145.5 that they have gained formal status of a cooperating party in relation to cartel conduct; and
 - 145.6 communications from, or information created by, the Commission.
- 146 The only exceptions are:
- 146.1 disclosure to the person's legal counsel, for the purposes of seeking legal advice;
 - 146.2 if disclosure is required by law;
 - 146.3 if disclosure is for the purposes of making a Leniency application to another competition authority; or
 - 146.4 if the applicant has our prior written consent. This is required for advisors other than the person's legal counsel (eg, accountants).

The 'paperless' process

- 147 At the applicant's request, and where justified, an application can be made, and a marker or Immunity and/or Leniency granted, verbally. This is called a 'paperless' process.
- 148 While the process may be paperless for the applicant, we will create records of our communications with the applicant and their legal representatives. We will also create paper records of our recommendations to the Solicitor-General, including:
- 148.1 our communications with the Solicitor-General; and
 - 148.2 any communications from the Solicitor-General relating to the grant of Immunity including provision of an undertaking in writing to stay any criminal prosecution (as set out at paragraphs 92 and 93, in the case of a paperless process the Commission will communicate the undertaking to an Immunity applicant verbally).
- 149 Even if the Commission agrees to a paperless process, pre-existing evidence of the conduct (in particular, documentary evidence), must still be provided to the Commission by an applicant.

8 Contacting us about hypothetical enquiries, applications for a marker and applications for cooperation

- 150 Hypothetical enquiries, applications for a marker, and/or applications for cooperation must be directed to the General Manager of Competition at the Commerce Commission.
- 151 For applications for a marker or Immunity and/or Leniency, contact must be made during the Commission's working hours (8.30am to 5pm, Monday to Friday) via one of the following methods of contacting the General Manager, Competition:
- telephone (+64 (0) 4 924 3720),
 - email (gm.competition@comcom.govt.nz); or
 - in person (Level 9, 44 The Terrace, Wellington 6011).
- 152 As set out at paragraph 64, enquiries made via any other method of communication will be disregarded.
- 153 In all instances, the General Manager of Competition will need to be advised whether it is an application for a marker for Immunity and/or Leniency, 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. The following further information (depending on the type of application, as set out below) will also be required for the General Manager to respond.
- 153.1 Application for a marker: the good(s) and/or service(s) involved, geographic scope and duration of the conduct (if available), the main participants, the connection of the cartel conduct to a market in New Zealand, and the identity of the applicant if the caller is the applicant's legal representative.
- 153.2 Statement of willingness to cooperate: sufficient information on the nature of the cartel, such as the good(s) and/or service(s) involved and the main participants, the identity of the applicant if the caller is the applicant's legal representative.
- 153.3 Hypothetical enquiry: the good(s) and/or service(s) involved and the connection of the cartel conduct to a market in New Zealand.
- 154 Applications for a marker for Immunity and/or Leniency will be treated in the order they are received.
- 155 Recorded telephone messages will not qualify as an application for Immunity and/or Leniency; applicants must speak directly to the General Manager of Competition or an authorised delegate. The General Manager of Competition, or authorised delegate, will respond within five working days or otherwise within a time frame agreed with the applicant.
- 156 Where an application for a marker or for Immunity and/or Leniency is made by a business, it must be made by an officer who has authority to represent the business for this purpose, or by the business's authorised legal representative.

Attachment A

Template Leniency 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 **enforcement proceedings** means any Commission initiated criminal or civil 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 company** means a [wholly owned or controlled subsidiary of **[Company]**], any company listed in Schedule 1, and any company that the Commission and **[Company]** agree in writing is included;
 - 1.4 **eligible individual** means any natural person who is a current or former director, officer, contractor, agent or employee of the **[Company]** an eligible company, any natural persons listed in Schedule 1, and any natural persons that the Commission and **[Company]** agree in writing is included;
 - 1.5 **eligible person** means any eligible individual or eligible company;
 - 1.6 **leniency** means the Commission’s undertaking not to bring any civil enforcement proceedings in relation to the conduct, subject to **[Company]** and any eligible person’s compliance with their obligations under this agreement;
 - 1.7 **immunity** means the grant of immunity from criminal prosecution in relation to the conduct awarded by the Solicitor-General;
 - 1.8 **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;
 - 1.9 **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;
 - 1.10 **application** means any application made for immunity and/or leniency in relation to the conduct, including amended or multiple applications;

- 1.11 **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;
- 1.12 **person** includes a local authority, and any association of persons whether incorporated or not; and
- 1.13 **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]

- 2 For the purposes of the conditions specified in clauses 6 to 10 below (the leniency agreement conditions) a reference to the Commission includes a reference to the Solicitor-General or any person acting on behalf of the Solicitor-General, such as a panel prosecutor appointed under section 107 of the Commerce Act.

Admission of conduct

- 3 [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 via 30¹, section 30 or section 82B of the Commerce Act]*.
- 4 [Company] warrants and represents that it:
- 4.1 have ceased, or will immediately on the Commission confirming to [Company] that it should cease, any involvement in the conduct;
 - 4.2 did not coerce any person to participate in the conduct; and
 - 4.3 has reported to the Commission all conduct of which it is currently aware that may constitute a breach section 27 via 30², section 30 or section 82B of the Commerce Act.

Scope of leniency

- 5 Subject to their continued compliance with their obligations under this agreement, the Commission grants leniency to:
- 5.1 [Company];
 - 5.2 any of [Company]'s interconnected bodies corporate; and
 - 5.3 any eligible individual.

Leniency conditions for [Company]

- 6 Unless the Commission advises [Company] in writing, [Company] will:
- 6.1 maintain continuous, complete and expeditious cooperation with the Commission throughout the investigation and any enforcement proceedings;
 - 6.2 provide the Commission promptly and voluntarily with all information available to it regarding the conduct (including its formation, scope, existence and operation);
 - 6.3 preserve, and assist the Commission to retrieve, all information related to the conduct or the investigation;
 - 6.4 use its best endeavours to secure the complete and truthful cooperation of eligible persons, including by informing all eligible persons (as notified to and agreed by the Commission) of their respective obligations under clauses 7 or 9 and 19 of the agreement;

1. For conduct that occurred prior to 15 August 2017.
2. For conduct that occurred prior to 15 August 2017.

- 6.5 inform the Commission of any employees involved in the conduct that [Company] knows are intending to leave [Company];
- 6.6 encourage and facilitate all eligible persons 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 persons are 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]);
- 6.7 act as directed by the Commission in relation to the conduct; and
- 6.8 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 persons, including in seeking independent legal advice in the course of the investigation, provided the eligible persons comply with their obligations under this agreement.

Leniency conditions for eligible individuals

- 7 To gain, and maintain, the benefit of immunity, an eligible individual must:
 - 7.1 admit their role in the conduct (to the best of his or her knowledge);
 - 7.2 maintain continuous, complete and expeditious cooperation with the Commission throughout the investigation and any enforcement proceedings;
 - 7.3 when requested, provide the Commission promptly and voluntarily with all information available to them regarding the existence, activities and operation of the conduct;
 - 7.4 preserve, and assist the Commission to retrieve, all information relating to the conduct;
 - 7.5 make available to the Commission any personal information which is relevant, or which the Commission considers may assist the investigation or the enforcement proceedings;
 - 7.6 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;
 - 7.7 comply with clause 19 of this Agreement;
 - 7.8 appear as a witness in any enforcement proceedings and provide full, frank and truthful evidence as to all matters within their knowledge, if required to do so by the Commission;
 - 7.9 act as directed by the Commission in relation to the conduct; and
 - 7.10 certify in writing that they have complied with the conditions outlined above
- 8 The obligations in clause 7 are continuing obligations and only cease when the Commission releases the eligible individual from those obligations in writing.

Leniency conditions for eligible companies

- 9 To gain, and maintain, the benefit of leniency, an eligible company must:
 - 9.1 admit its role in the conduct;
 - 9.2 maintain continuous, complete and expeditious cooperation with the Commission throughout the investigation and any enforcement proceedings;
 - 9.3 when requested, provide the Commission promptly and voluntarily with all information available to it regarding the existence, activities and operation of the conduct;
 - 9.4 preserve, and assist the Commission to retrieve, all information relating to the conduct;
 - 9.5 when requested, use its best endeavours to secure the complete and truthful cooperation of its eligible individuals;

- 9.6 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;
 - 9.7 make available to the Commission any information relating to the conduct or the investigation;
 - 9.8 comply with clause 19 of this Agreement;
 - 9.9 act as directed by the Commission in relation to the conduct; and
 - 9.10 certify in writing that they have complied with the conditions outlined above.
- 10 The obligations in clause 9 are continuing obligations and only cease when the Commission releases the eligible company from those obligations in writing.

Revocation of leniency

- 11 If the Commission forms a view on reasonable grounds that [Company] has:
- 11.1 failed to meet any of the conditions of this agreement that apply to it;
 - 11.2 made false statements to the Commission in this agreement; or
 - 11.3 materially misled the Commission as to any matter relevant to the investigation or enforcement proceedings;
- the Commission will:
- 11.4 outline to [Company] in writing the issues which provide a basis for contemplating revocation of [Company]'s leniency, and allow ten working days (or such longer period if agreed), for [Company] to respond satisfactorily to any issues the Commission identifies; and
 - 11.5 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.
- 12 If having regard to any responses made by [Company] under clause 11.5, the Commission remains of the view referred to in 11.1 – 11.3 above the Commission may give written notice to [Company] that its leniency is revoked.
- 13 If the Commission has given notice under clause 12 the Commission may:
- 13.1 use any information provided by [Company] under this agreement, for the purpose of conducting the investigation;
 - 13.2 initiate civil proceedings against [Company];
 - 13.3 initiate criminal proceedings against [Company] where [Company] has attempted to deceive or knowingly mislead the Commission;
 - 13.4 initiate civil or criminal enforcement proceedings or other proceedings against any other parties to the conduct; and
 - 13.5 recommend to the Solicitor-General that immunity be revoked.
- 14 In the event of the Commission commencing civil proceedings under clause 13.2, [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 revocation of the leniency.

- 15 If the Commission forms a view on reasonable grounds that an eligible person has:
- 15.1 failed to meet any of the conditions of this agreement that apply to it;
 - 15.2 made false statements to the Commission in this agreement; or
 - 15.3 materially misled the Commission as to any matter relevant to the investigation or enforcement proceedings;
- the Commission will:
- 15.4 outline to the eligible person in writing the issues which provide a basis for contemplating revocation of the eligible person's leniency, and allow ten working days (or such longer period if agreed), for the eligible person to respond satisfactorily to any issues the Commission identifies; and
 - 15.5 if the eligible person 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 person 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.
- 16 If having regard to any responses made by the eligible person under clause 15.5, the Commission remains of the view referred to in 15.1 – 15.3 above to the Commission may give written notice to the eligible person that its leniency is revoked.
- 17 If the Commission has given notice under clause 16 the Commission may:
- 17.1 use any information provided by the eligible person under this agreement, for the purpose of conducting the investigation;
 - 17.2 initiate civil enforcement proceedings or other proceedings against the eligible person;
 - 17.3 initiate civil or criminal enforcement proceedings or other proceedings against any other parties to the conduct; and
 - 17.4 recommend to the Solicitor-General that immunity be revoked.
- 18 In the event of the Commission commencing civil proceedings under clause 17.2, the eligible person 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 revocation of the leniency.

Confidentiality

- 19 [Company] and all eligible persons will:
- 19.1 not, without the consent of the Commission, disclose the fact of, or the content of the leniency application, the investigation or enforcement proceedings, or any details regarding the leniency application, the investigation or enforcement proceedings, except for the purposes of seeking legal advice, as required by law and/or the rules of its stock exchange; and
 - 19.2 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.
- 20 If the fact of, or the content of, the leniency 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:
- 20.1 disclose that it was the leniency applicant; and
 - 20.2 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

- 21 The Commission may disclose any information provided by [Company] or any eligible persons for the purpose of:
 - 21.1 conducting the investigation;
 - 21.2 conducting any enforcement proceedings or other proceedings;
 - 21.3 obtaining legal and other expert advice in relation to the investigation, enforcement proceedings or other proceedings;
 - 21.4 informing relevant Ministers and/or their advisers (subject to an obligation of confidence);
 - 21.5 carrying out the Commission's functions;
 - 21.6 complying with the law; or
 - 21.7 as the Commission otherwise considers necessary or desirable with [Company]'s prior written consent.
- 22 If the Commission receives a third party request for disclosure of information, whether pursuant to the Official Information Act 1982 (the OIA), the Privacy Act 2020, a request for discovery in any court, or otherwise, the Commission will to the extent reasonably possible, give [Company] an opportunity to:
 - 22.1 make submissions to the Commission regarding any proposed release of the information; and
 - 22.2 take such action as [Company] considers necessary to resist the request.
- 23 The obligations imposed on the Commission in clauses 21 and 22 survive revocation unless [Company] releases the Commission from these obligations in writing.

Continuing obligations

- 24 [Company]'s obligations in clause 6 are continuing obligations and only cease when the Commission, by notice in writing, advises [Company] that the investigation or enforcement proceedings have been concluded (whichever is the later) and releases [Company] from those obligations.
- 25 [Company]'s obligations in clauses 19 and 20 survive revocation unless the Commission releases [Company] from these obligations in writing.

General

- 26 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.
- 27 No amendment to this agreement will be effective unless it is in writing and signed by the parties.
- 28 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.
- 29 The parties represent and warrant to each other that the signatories to this agreement have the necessary authority and capacity to bind them.
- 30 The parties agree that the New Zealand courts shall have jurisdiction to determine any enforcement proceedings arising out of or in connection with this agreement and the matters to which it relates.
- 31 The parties represent and agree that they are each voluntarily entering into this Agreement after having received legal advice.
- 32 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.

33 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

Signed by and on behalf of

[Company] on

[Date]

Authorised signatory

Name

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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

www.comcom.govt.nz

