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Cartel Leniency and Immunity Policy



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Foreword

Since November 2004, the Commission has operated a cartel leniency policy. Under the policy, participants in cartel conduct can report the conduct to the Commission and cooperate with any resulting investigation and enforcement proceedings, in return for the Commission's agreement not to bring civil proceedings against them.

Since the Commerce (Criminalisation of Cartels) Amendment Act 2019 came into effect in April 2021, the scope of the cartel leniency policy has been expanded to reflect the Commission's ability to refer cartel conduct to the Solicitor-General and recommend a grant of immunity from criminal prosecution.

Because the covert nature of cartels can make them difficult to detect, operating a cartel leniency policy has been one of the Commission's most important tools to detect and enforce against cartel conduct. The cartel leniency policy also provides a useful reference tool for those wanting to speak with the Commission about relevant conduct. We invite parties to approach us early with any queries they might have about whether conduct they have been involved in is covered by the cartel leniency policy.

In April 2021, the Commission revised the policy to reflect changes due to the introduction of the criminal cartel offence. We intend to regularly review and update this policy in light of legal developments and recent experience, to ensure the policy remains relevant and fit for purpose. As such, we reviewed the policy again in February 2024, and will continue to do so going forward.

Development of this policy has been significantly assisted by consultation with practitioners, colleagues, and other stakeholders in New Zealand and overseas. Thank you to everyone who took the time to provide us with valuable contributions.

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 from 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/prosecution.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 guidelines on immunity from prosecution for cartel offences available at <https://www.crownlaw.govt.nz/assets/Uploads/Prosecution-Guidelines/Guidelines-on-Immunity-from-Prosecution-for-Cartel-Offences-April-2021.PDF>.
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.

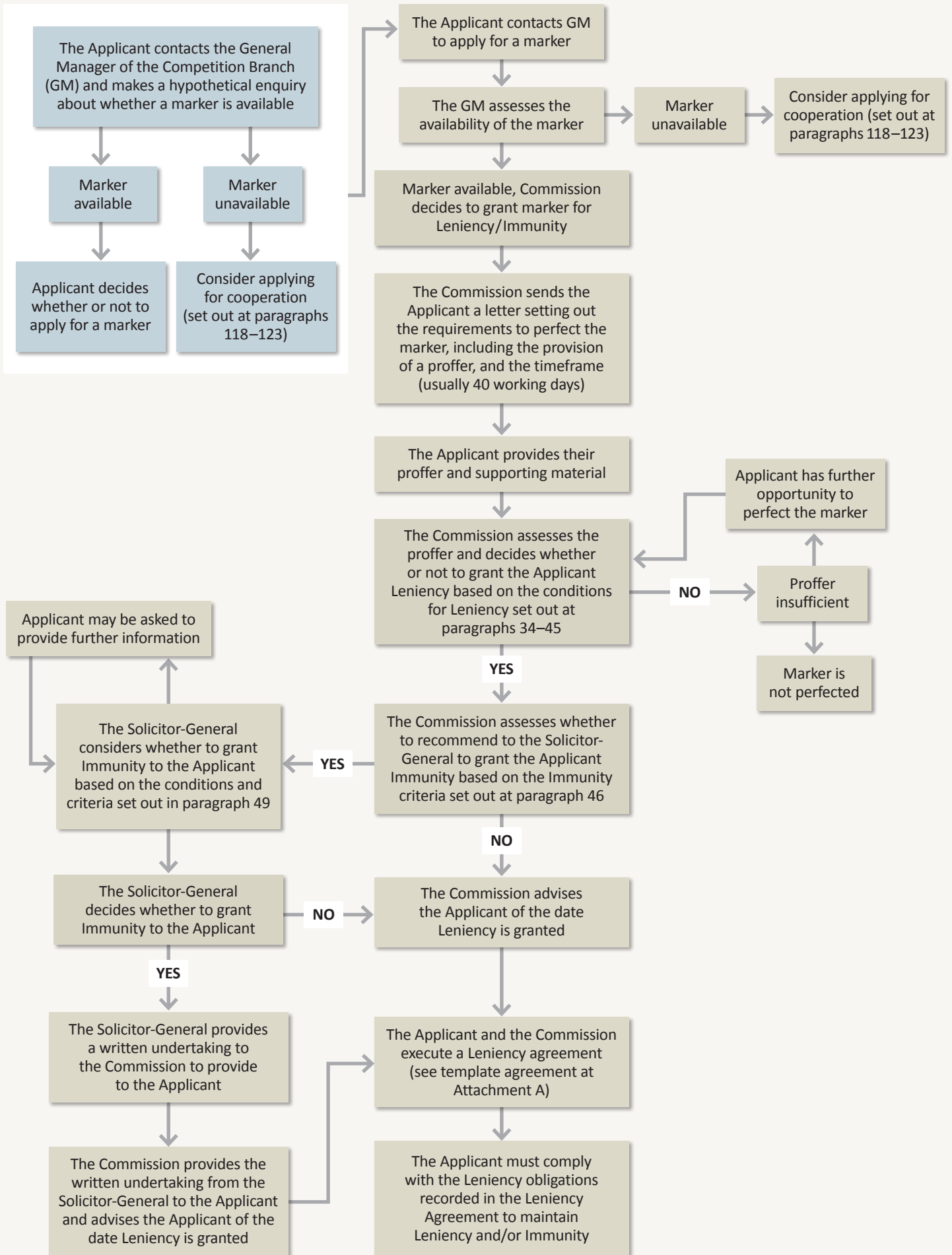
- 10 **Amnesty Plus:** If, in the course of an investigation into cartel conduct, a person under investigation notifies the Commission of separate cartel conduct the Commission may grant Leniency and/or recommend Immunity be granted in relation to the newly notified cartel conduct. To be successful in 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 who 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 on 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 reporting 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 A person who is involved in the conduct and makes a report through the anonymous reporting tool will not have the protection afforded by Immunity and/or Leniency.

4. <https://comcom.govt.nz/business/avoiding-anti-competitive-behaviour/what-is-a-cartel/cartel-leniency-faq>.

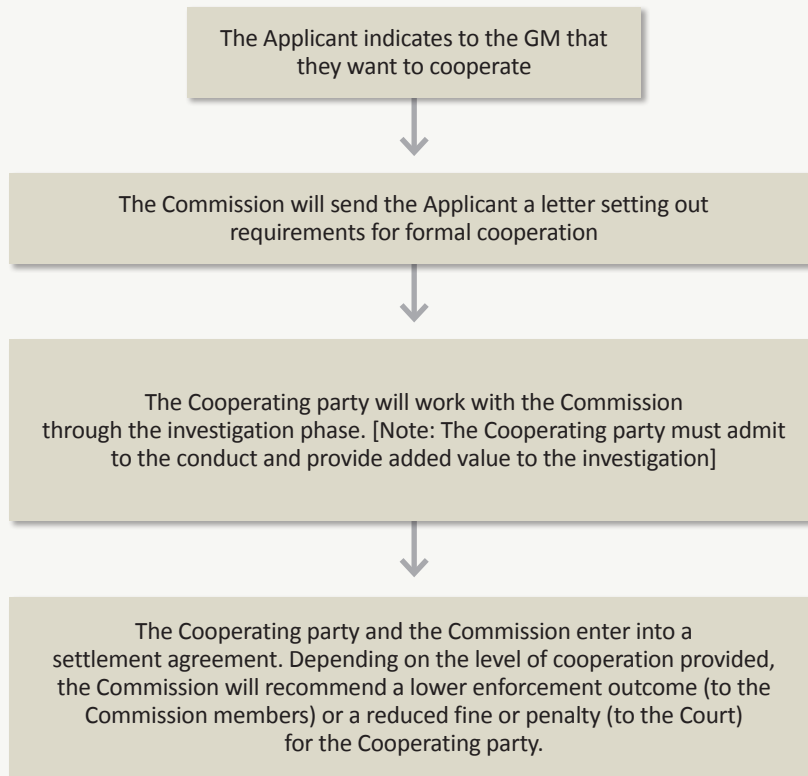
5. Further detail about the Commission's anonymous reporting tool can be found at www.comcom.govt.nz/business/avoiding-anti-competitive-behaviour/what-is-a-cartel/reporting-cartel-conduct.

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.

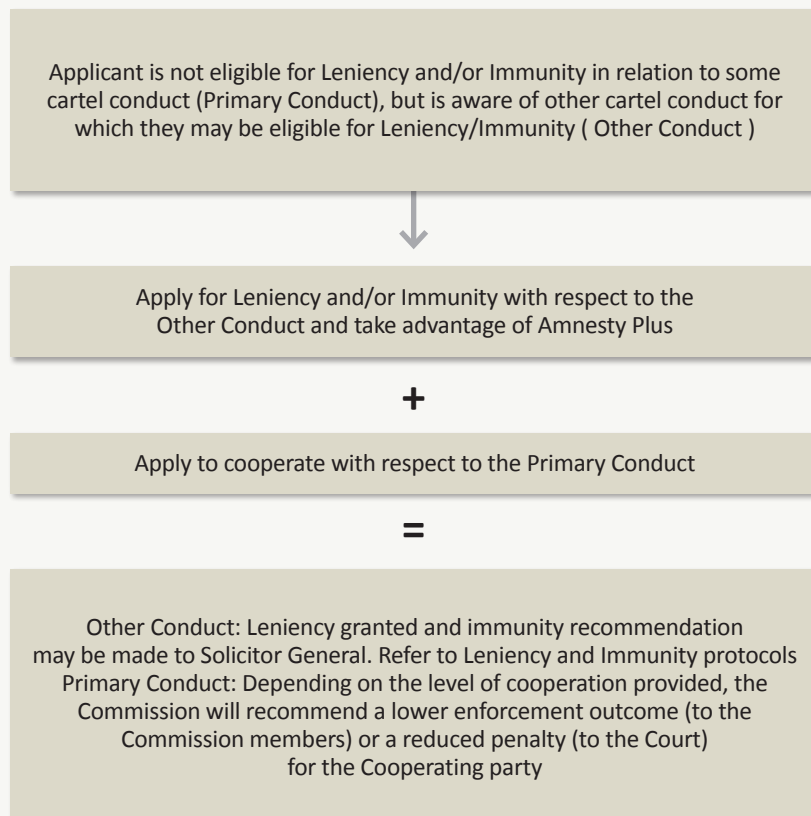
Leniency and Immunity application process



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 For the purposes of this policy, 'cartel conduct' means entering into a contract, arrangement or understanding containing a cartel provision, giving effect to such a provision, or being involved in such conduct in an ancillary capacity (eg, aiding and abetting). Cartel provisions are provisions that have the purpose, effect, or likely effect of price fixing; limiting or restricting production, capacity and/or supply; allocating customers, suppliers or territories; and/or bid rigging.⁶
- 19 Most cartel provisions are also prohibited under section 27 of the Act, 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. Agreements that breach section 27 of the Act 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 fully and continuously with the Commission's investigation and provide assistance in any legal proceedings/prosecution.
- 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 terms of imprisonment, fines and penalties

- 24 The Act provides for substantial sanctions against companies and individuals who engage in cartel conduct,⁷ attempted cartel conduct, and aiding and abetting cartel conduct. The following maximum sanctions apply, per offence:⁸
 - 24.1 For an individual:
 - 24.1.1 a fine or penalty not exceeding \$500,000; and/or
 - 24.1.2 imprisonment for a term not exceeding seven years.
 - 24.2 For a business, a fine or penalty that is 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.

7. The provisions of the Commerce (Criminalisation of Cartels) Amendment Act 2019 that make cartel conduct a criminal offence apply from 8 April 2021.

8. Fines are imposed upon criminal conviction, and penalties are imposed in a civil context.

- 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 five years.
- 26 It is illegal for a business to indemnify a director, servant or agent for the costs of any proceedings/prosecution where a pecuniary penalty or fine is imposed in any civil or criminal enforcement action we take in respect of cartel conduct. The maximum penalty or fine 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:⁹
 - 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 34 - 42 (as well as 43 - 46 if the applicant is a business).
- 28 Applications for Immunity and/or Leniency may be made by individuals¹⁰ or by businesses (both referred to below as 'applicants' or 'persons', except where it is necessary to distinguish individuals from businesses).¹¹
- 29 The first step in the process of seeking Immunity and/or Leniency is to apply for a "marker" from the Commission. 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'. All persons who benefit from derived Immunity and/or derived Leniency must continue to meet similar conditions to the applicant.
- 32 If, for whatever reason, derived Immunity and/or derived Leniency does not capture all of the cartel conduct that an individual has participated in, the Commission will consider granting Leniency and consider recommending Immunity for all of the individual's involvement in the cartel conduct. 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 previously worked at another business engaged in the cartel conduct. In these circumstances, the conditional derived Immunity/derived Leniency would only 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, the Commission may decide to extend any Immunity and/or Leniency for that individual to the whole of the relevant period.
- 33 In these circumstances, we would expect the individual, or legal counsel representing the individual, to contact the Commission at an early stage to enquire if derived Leniency and/or Immunity can be extended to provide full coverage to the individual in relation to their involvement in the conduct.

9. References to eligibility for Immunity in this policy mean eligibility for the Commission to make a recommendation to the Solicitor-General to grant Immunity.

10. Including partnerships.

11. Any person applying for Immunity and/or Leniency must have authority to bind the applicant.

All applicants must meet prescribed conditions

- 34 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.

- 35 Immunity and/or Leniency is available only to an applicant who is:
- 35.1 the first to qualify for Immunity and/or Leniency; and
 - 35.2 a participant in cartel conduct that, at the time the marker is applied for, we are either:
 - 35.2.1 not aware of; or
 - 35.2.2 aware of but do not yet have sufficient evidence about to issue civil proceedings. In this scenario the applicant must be able to provide valuable evidence that could not be reasonably obtained elsewhere. An applicant may qualify for Immunity and/or Leniency even when we are already investigating the cartel conduct, including under the exercise of our statutory information-gathering powers.
- 36 For the purposes of paragraph 35.2.2:
- 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 several factors, including 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. Participation includes aiding, abetting, or inciting cartel conduct or materially facilitating (or being knowingly concerned in) cartel conduct even if the applicant is not engaged in supplying the relevant goods or services.¹² It can also include, in certain circumstances, attempting to engage in cartel conduct.
- 38 Where an applicant has attempted to engage in cartel conduct they will be eligible for Immunity and/or Leniency if they meet all of the conditions of Immunity and/or Leniency and are able to provide material assistance in proceedings/a prosecution against another party (eg, if the attempt is part of a broader set of conduct which includes cartel agreements). However, Immunity and/or Leniency is not available for 'naked' attempts, that is, an attempt or a series of attempts to engage in conduct (eg, inviting another person to form a cartel) that does not result in actual cartel conduct.

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

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

12. See section 80(1) of the Commerce Act 1986, and section 66 of the Crimes Act 1961.

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

- 40 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.¹³

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

- 41 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 section 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/prosecution.

- 42 The applicant must provide full and continuing cooperation during the investigation of the cartel conduct and any subsequent proceedings/prosecution. 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 prosecution.¹⁴ The details of this requirement will also be set out in the Leniency agreement that the applicant signs.

Further Leniency conditions for corporate applicants

- 43 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).
- 44 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.
- 45 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 any subsequent 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.
- 46 A corporate applicant must do the following, unless the Commission specifies otherwise:
- 46.1 identify one individual in the organisation or an external lawyer as the primary contact point for all matters related to the investigation.¹⁵ Ideally, the person identified should be available for the duration of the investigation; and
 - 46.2 commit to giving us unfettered access (to the best of its ability) to its personnel, information, and documents, and swiftly respond to our queries.

13. The Commission will provide guidance as to what is required by the applicant in respect of ceasing the conduct on a case-by-case basis.

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

15. In the usual course of events, we anticipate communicating with the applicant (including any individuals) via this primary contact point. However, if individuals have separate legal representation from the applicant, it may be appropriate in some circumstances for their legal counsel to contact the Commission directly.

Criteria for recommendation of Immunity

- 47 The Commission will make a recommendation to the Solicitor-General that Immunity be granted to an applicant where:
 - 47.1 all of the Leniency conditions outlined in paragraphs 34 - 42 (as well as 43 - 46 if the applicant is a business) are met; and
 - 47.2 the following additional Immunity recommendation criteria are satisfied:
 - 47.2.1 some or all of the reported cartel conduct is likely to be prioritised for further investigation; and
 - 47.2.2 there is a prospect that criminal prosecution may be brought in relation to the prioritised conduct, including because it is serious.
- 48 For the purposes of paragraph 47.2.2, 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 Criteria¹⁶ and the Solicitor-General's Prosecution Guidelines.
- 49 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.
- 50 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 from Prosecution for Cartel Offences.¹⁷ Section 12 of the Solicitor-General's Prosecution Guidelines (Immunities from Prosecution) states that before agreeing to give immunity, the Solicitor-General will almost invariably need to be satisfied of at least the following matters:
 - 50.1 that the offence in respect of which the evidence is to be given is serious;
 - 50.2 that there are no other reasonably available avenues of gaining sufficient evidence to bring a successful prosecution other than relying upon the evidence to be given under immunity;
 - 50.3 that the evidence to be given under immunity is admissible, relevant and significantly strengthens the prosecution case;
 - 50.4 that the witness, while having committed some identifiable offence, is not an equal or greater risk to the public safety than the person to be tried;
 - 50.5 that the evidence to be given under immunity is apparently credible and, preferably, supported by other admissible material;
 - 50.6 that no inducement, other than the possibility of an immunity, has been suggested to the witness; and
 - 50.7 that admissible evidence exists, sufficient to charge the witness with the offences he or she is believed to have committed.
- 51 The Solicitor-General will exercise an independent discretion when considering an Immunity recommendation by the Commission and when considering whether the public interest is served by granting Immunity.

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

17. Solicitor-General's Prosecution Guidelines 2013 (<https://www.crownlaw.govt.nz/assets/Uploads/Prosecution-Guidelines/ProsecutionGuidelines2013.pdf>) and Solicitor-General's guidelines for immunity from prosecution for cartel offences (<https://www.crownlaw.govt.nz/assets/Uploads/Prosecution-Guidelines/Guidelines-on-Immunity-from-Prosecution-for-Cartel-Offences-April-2021.PDF>).

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

- 52 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.
- 53 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.
- 54 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.
- 55 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.
- 56 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.
- 57 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 typically be decided by reference to the relevant Leniency conditions set out at clauses 6, 7, or 9 of the Template Leniency Agreement. For example, this may arise where the Commission has reason to believe that the person is unlikely to cooperate with the investigation.
- 58 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.
- 59 It is the Solicitor-General's expectation that all applicants for Immunity will receive legal advice in advance of making the application.

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

- 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, key individuals¹⁸ 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/prosecute at the end of the investigation, key individuals must sign an acknowledgement letter setting out what is expected from them during the legal proceedings/prosecution, including whether they are expected to give evidence in the legal proceedings/prosecution and a confirmation certifying that they have provided all relevant evidence as set out in paragraph 78 (certifying all evidence provided).

18. Key individuals are those individuals that the Commission considers are closely involved in the conduct and may need to be witnesses or ongoing sources of information and evidence.

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.¹⁹ 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 152 - 157 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, 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 Policy.

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.²⁰
- 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) and/or service(s) involved, likely duration, and geographic scope;
 - 71.2 main participants; and
 - 71.3 main affected customers or classes of customers.
- 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 civil proceedings.

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

20. The scope of the marker may not always mirror the scope of the conduct for which we ultimately grant Leniency and/or recommend Immunity.

- 74 If a marker, Immunity, 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, 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 a timeframe specified by the Commission. This statement is called the ‘proffer’.
- 77 Supplying a proffer that complies with the prescribed conditions is called ‘perfecting the marker’.²¹ The standard time allowed to submit the proffer and supporting evidence is 40 working days, but the Commission may specify a longer or shorter time where appropriate. The Commission will then review the material and decide whether further information is required from the applicant (eg, interviews) or the information is sufficient to perfect the marker. See paragraphs 78 - 80 below for further details about what the Commission may require.
- 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 proffer 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 impact of the cartel conduct on a market in New Zealand (eg, in relation to prices, output/capacity, or customer choice);
 - 78.1.3 the annual value of the market(s) affected by the conduct, or where this information is not available, an estimate of the annual value of the market(s) affected (including an explanation of the methodology used and why this methodology is appropriate);
 - 78.1.4 the identities and roles of the persons (companies and individuals) involved in the conduct and their locations (if possible);
 - 78.1.5 the geographic scope and duration of the conduct;
 - 78.1.6 a description of how the cartel operated;
 - 78.1.7 a description of how the cartel agreements were entered into and given effect to; and
 - 78.1.8 a description of how any persons were affected by the cartel agreements.
 - 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 all meeting minutes, expense accounts, travel records, and calendar entries;
 - 78.2.4 copies of all internal documentation of the relevant agreements; and
 - 78.2.5 copies of all information detailing how the agreements were given effect to, including relevant tender documentation, pricing records, and supply agreements.
 - 78.3 evidence to support the connection with a market in New Zealand, which is particularly important for international applicants.

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

- 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 specified 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 If the marker holder is unable to produce the proffer within the specified time and there is no extension agreed by the Commission, 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 submit the proffer and supporting evidence within the prescribed timeframe (without valid reason), the offer of a marker for Immunity and/or Leniency will 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, Immunity and/or Leniency.
- 88 The holder of an expired marker is eligible to re-apply for Immunity and/or Leniency, but it loses its original place in the queue upon re-applying (ie, it is treated as a new applicant and goes to the back of the queue). 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 47 are met. The Commission's recommendation will cover any persons who 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 Commission promptly and in accordance with any timeframe agreed with the Commission.
- 92 If the Solicitor-General decides to grant Immunity from criminal prosecution, they will provide an undertaking staying any criminal prosecution in relation to the cartel conduct. Immunity will be subject to conditions and ongoing obligations (see paragraphs 34 - 42 (as well as 43 - 46 if the applicant is a business)) on the applicant for the duration of the Commission's investigation and until the conclusion of any civil proceedings or criminal prosecution 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 Leniency Agreement on our website.
- 96 The Commission will not depart from the form and wording of the Template Leniency Agreement unless there is a valid reason to do so.
- 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 key individuals 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 prosecution 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/prosecution.
- 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, after these steps, a person's Leniency and/or Immunity is revoked, the Commission may initiate civil proceedings and/or criminal prosecution against that person. Any proceedings and/or prosecution will depend on the relevant circumstances, and may relate to the cartel conduct itself, or may arise out of the investigation.
- 106 If a business's Immunity and/or Leniency has been revoked, we will notify all persons who have consequently lost derived Immunity and/or Leniency through no fault of their own. These persons will have 20 working days (from the date we notify them) to confirm that they wish to retain their status as derived Leniency and/or Immunity holders. Notified persons who do not provide confirmation within this timeframe will lose their status as holders of derived Leniency and/or Immunity.
- 107 In respect of any criminal prosecution, we will make a recommendation to the cartel panel prosecutor as to whether Immunity should be preserved, or any criminal prosecution should be stayed, for any persons who lost derived Immunity (through no fault of their own).

How the Commission may use the applicant's information

- 108 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/prosecution 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.
- 109 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 prosecution or civil proceedings against the applicant under the Act other than in any criminal prosecution 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, criminal prosecution or civil proceedings against other parties involved in the conduct.
- 110 Once an applicant is granted Leniency, the Commission will not use information (including witness statements) provided by the applicant as evidence in criminal prosecution or civil proceedings against the applicant under the Act except in criminal prosecution filed because we consider the applicant has attempted to deceive, or knowingly mislead, the Commission.
- 111 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 for the purpose of conducting its investigation, and as evidence in any civil proceedings and/or criminal prosecution brought by the Commission.

5 Applicants may be eligible for Amnesty Plus

- 112 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 (eg, additional cartel agreements with parties which the Commission was not aware of). It may therefore be possible for multiple parties to be granted Immunity and/or Leniency as part of a single investigation.
- 113 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.
- 114 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.
- 115 To secure Immunity and/or Leniency for the newly notified cartel conduct, the applicant must apply to the Commission as outlined in section 4 above, and meet the same conditions as those set out in paragraphs 34 - 42, as well as 43 - 46 if the applicant is a business.
- 116 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

- 117 A participant in cartel conduct who is:
- 117.1 too late to obtain a marker or Immunity and/or Leniency, or
 - 117.2 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.
- 118 This will open the possibility of obtaining Cooperation concessions, for Commission-initiated proceedings/prosecution only, in the form of a lower level of enforcement action or the Commission making a submission to the court for a reduced fine or penalty. Cooperation in the context of civil proceedings and criminal prosecution is described below.
- 119 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.
- 120 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.
- 121 To qualify for Cooperation concessions, a cartel participant must admit that it engaged in the alleged cartel conduct and provide information and evidence that is of significant value to our investigation. The Cooperation must be full and continuing throughout any investigation and proceedings/prosecution, and requirements for Cooperation may include admissions (civil proceedings) or a guilty plea (criminal prosecution) and appearing as a witness at trial if required. Mere compliance, where the Commission requests information on a voluntary basis or exercises its statutory powers under the Act, will not fulfil this requirement.
- 122 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 fine or proceed with a lower level of enforcement.

Cooperation in civil proceedings

- 123 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.
- 124 Usually, a Cooperating party will enter into a settlement agreement with the Commission, in which the party will make relevant admissions.
- 125 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.
- 126 A decision to proceed with a lower level of enforcement action²² is at the Commission's sole discretion and will reflect how we assess the relevant Cooperation.
- 127 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.
- 128 The penalty or penalty range that the Commission is prepared to recommend to the court 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.
- 129 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 Commission's 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 prosecution

- 130 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.
- 131 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 prosecution, even if that person does not qualify for Immunity.
- 132 If prosecution is 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 prosecution, including the extent of any discount to be given for Cooperation.
- 133 Depending on the value of the information provided by a Cooperating party and its contribution to the investigation, the Commission will consider making a submission to the court in relation to any discount to be given.

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

7 Dealing with confidential information

- 134 The Commission, applicants, marker and Immunity and/or Leniency holders and Cooperating parties have obligations in relation to confidentiality.
- 135 The Commission will treat information provided by holders of a marker for Immunity and/or Leniency, or Cooperating parties, as confidential to the extent permitted by law.
- 136 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.
- 137 Detailed information on how we deal with confidential information is contained in the Template Leniency Agreement.
- 138 More information is also contained in the Competition and Consumer Investigation Guidelines on our website.

The Commission's confidentiality obligations

- 139 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.
- 140 Similarly, where possible, we will keep confidential the identity of any individual or business that has approached us about Cooperation.²³
- 141 A grant of Immunity and/or Leniency may become public when we issue proceedings or commence prosecution against other cartel participants, or when officers or employees of a business granted Immunity and/or Leniency give evidence in such proceedings/prosecution. Similarly, the identity of a Cooperating party may be disclosed if we reach a settlement agreement with that party and the court imposes a sanction.
- 142 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, 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:
 - 142.1 make submissions to the Commission regarding the proposed release of the information; and
 - 142.2 take such action as the marker or Immunity and/or Leniency holder considers necessary to resist the request.
- 143 We will not share confidential information about a cartel provided by the applicant with other competition authorities,²⁴ including the applicant's identity, without the applicant's consent. Where we do wish to share such information, we will request a waiver from the applicant.
- 144 If an applicant has applied or intends to apply for Immunity and/or Leniency in another jurisdiction, we would generally expect to be granted a waiver to share information with the competition regulator in that jurisdiction, unless the applicant can satisfy us that it would face unreasonable prejudice or harm if such a waiver was granted. However, for the avoidance of doubt, the information will not be shared with other competition authorities unless the applicant agrees to grant a waiver.

23. 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.

24. In this context an applicant includes a party who has a marker for Immunity and/or Leniency, a party who holds Immunity and/or Leniency, a holder of derived Immunity and/or Leniency, and a party who 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;²⁵
 - 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 applicant's legal counsel, for the purposes of seeking legal advice in relation to their application for (and/or conditions of) Immunity and/or Leniency;
 - 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 consent. This is required for advisors other than the applicant's legal counsel (eg, accountants).
- 147 The Commission acknowledges that the Leniency/Immunity process can be stressful for individuals involved, and that they may wish to speak to a mental health professional or a support person. If this is the case, please contact the Commission in the first instance to discuss arrangements.

The 'paperless' process

- 148 At the applicant's request, and where justified,²⁶ an application can be made, and a marker or Immunity and/or Leniency granted, verbally. This is called a 'paperless' process.
- 149 While the process may be paperless for the applicant, we will create records of our communications with the applicant and their legal representatives. This will generally include taking an audio recording of an oral proffer, which will allow us to retain an accurate record of the proffer.
- 150 We will also create paper records of our recommendations to the Solicitor-General, including:
- 150.1 our communications with the Solicitor-General; and
 - 150.2 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 - 93, in the case of a paperless process the Commission will communicate the undertaking to an Immunity applicant verbally).
- 151 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.

25. This includes any communications to the Commission.

26. For example, if the cartel conduct is part of an international cartel.

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

152 Hypothetical enquiries, applications for a marker, and/or applications for Cooperation must be directed to the General Manager of Competition at the Commission.

153 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).

As set out at paragraph 64, enquiries made via any other method of communication will be disregarded.

154 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.

154.1 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.

154.2 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, and the identity of the applicant if the caller is the applicant's legal representative.

154.3 Hypothetical enquiry: the good(s) and/or service(s) involved and the connection of the cartel conduct to a market in New Zealand.

155 Applications for a marker for Immunity and/or Leniency will be treated in the order they are received.

156 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 timeframe specified to the applicant.

157 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.

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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

