



**International  
Competition  
Network**

**ANTI-CARTEL  
ENFORCEMENT  
TEMPLATE**

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

**New Zealand**

**2 September 2022**

# ICN ANTI-CARTEL ENFORCEMENT TEMPLATE

## IMPORTANT NOTES:

This template is intended to provide information for the ICN member competition agencies about each other's legislation concerning anti-competitive practices, particularly hardcore cartels. At the same time the template supplies information for businesses participating in cartel activities about the rules applicable to them; moreover, it enables businesses and individuals which suffer from cartel activity to get information about the possibilities of enforcement of their rights in private law in one or more jurisdictions.

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

[Please include, where applicable, any references to relevant statutory provisions, regulations or policies as well as references to publicly accessible sources, if any.]<sup>1</sup>

## 1. Information on the law relating to cartels

<b>A. Law(s) covering cartels:</b> [availability (homepage address) and indication of the languages in which these materials are available]	The law prohibiting cartels is contained in the Commerce Act 1986 (the Commerce Act). Section 30 of the Commerce Act prohibits a person entering into, or giving effect to, a contract, arrangement or understanding that contains a 'cartel provision'.  Section 30A of the Commerce Act defines a 'cartel provision' as provision in a contract, arrangement, or understanding, that has the purpose, effect, or likely effect of price fixing, restricting output, or market allocating. These three terms are also defined in section 30A.  The Commerce Act is available, in English only, at <a href="http://www.legislation.govt.nz">www.legislation.govt.nz</a> .
<b>B. Implementing regulation(s)</b>	No regulations were required for the implementation of the Commerce Act.

<sup>1</sup> Editor's note: all the comments in [square brackets] are intended to assist the agency when answering this template, but will be removed once the completed template is made public.

<p>(if any): [name and reference number, availability (homepage address) and indication of the languages in which these materials are available]</p>	
<p><b>C. Interpretative guideline(s)</b> (if any): [name and reference number, availability (homepage address) and indication of the languages in which these materials are available]</p>	<p>Relevant Commission publications include:</p> <ul style="list-style-type: none"> <li>• Cartel Leniency and Immunity Policy <a href="https://comcom.govt.nz/_data/assets/pdf_file/0023/90437/Cartel-Leniency-Policy-and-Guidelines.pdf">https://comcom.govt.nz/_data/assets/pdf_file/0023/90437/Cartel-Leniency-Policy-and-Guidelines.pdf</a></li> <li>• <i>What is a cartel?</i> (webpage) <a href="https://comcom.govt.nz/business/avoiding-anti-competitive-behaviour/what-is-a-cartel">https://comcom.govt.nz/business/avoiding-anti-competitive-behaviour/what-is-a-cartel</a></li> </ul> <p>All of these publications are in English.</p>
<p><b>D. Other relevant materials</b> (if any): [availability (homepage address) and indication of the languages in which these materials are available]</p>	<p>The Commission has also published a series of relevant factsheets and guidelines. These include:</p> <ul style="list-style-type: none"> <li>• How to recognise and deter bid rigging - Guidelines for procurers <a href="https://comcom.govt.nz/_data/assets/pdf_file/0034/89881/How-to-recognise-and-deter-bid-rigging-Guidelines-March-2018.pdf">https://comcom.govt.nz/_data/assets/pdf_file/0034/89881/How-to-recognise-and-deter-bid-rigging-Guidelines-March-2018.pdf</a></li> <li>• Reporting cartel conduct (webpage) <a href="https://comcom.govt.nz/business/avoiding-anti-competitive-behaviour/what-is-a-cartel/reporting-cartel-conduct">https://comcom.govt.nz/business/avoiding-anti-competitive-behaviour/what-is-a-cartel/reporting-cartel-conduct</a></li> <li>• How to recognise and deter bid rigging (fact sheet) <a href="https://comcom.govt.nz/_data/assets/pdf_file/0038/89858/How-to-recognise-and-deter-bid-rigging-Fact-sheet-April-2021.pdf.pdf">https://comcom.govt.nz/_data/assets/pdf_file/0038/89858/How-to-recognise-and-deter-bid-rigging-Fact-sheet-April-2021.pdf.pdf</a></li> <li>• Information for trade associations (fact sheet) <a href="https://comcom.govt.nz/_data/assets/pdf_file/0029/94088/Trade-associations-Fact-sheet-April-2021.pdf">https://comcom.govt.nz/_data/assets/pdf_file/0029/94088/Trade-associations-Fact-sheet-April-2021.pdf</a></li> <li>• Competitor Collaboration Guidelines <a href="https://comcom.govt.nz/_data/assets/pdf_file/0036/89856/Competitor-Collaboration-guidelines.pdf">https://comcom.govt.nz/_data/assets/pdf_file/0036/89856/Competitor-Collaboration-guidelines.pdf</a></li> <li>• Exemptions under the Commerce Act (fact sheet) <a href="https://comcom.govt.nz/_data/assets/pdf_file/0023/256406/Exemptions-under-the-Commerce-Act-Fact-sheet-June-2021.pdf">https://comcom.govt.nz/_data/assets/pdf_file/0023/256406/Exemptions-under-the-Commerce-Act-Fact-sheet-June-2021.pdf</a></li> <li>• Business collaboration under COVID-19 (guidelines) <a href="https://comcom.govt.nz/_data/assets/pdf_file/0019/215812/Bu">https://comcom.govt.nz/_data/assets/pdf_file/0019/215812/Bu</a></li> </ul>

	<p><a href="#">siness-collaboration-under-COVID-19-guidelines-May-2020.pdf</a></p> <ul style="list-style-type: none"> <li>Is your business at risk of breaking competition law? (quick guide) <a href="https://comcom.govt.nz/_data/assets/pdf_file/0025/90439/Quick-guide-Is-your-business-at-risk-of-breaking-competition-law-January-2018.pdf">https://comcom.govt.nz/_data/assets/pdf_file/0025/90439/Quick-guide-Is-your-business-at-risk-of-breaking-competition-law-January-2018.pdf</a></li> </ul> <p>Other materials include:</p> <ul style="list-style-type: none"> <li>New Zealand Legislation <a href="https://www.legislation.govt.nz/">https://www.legislation.govt.nz/</a></li> <li><i>Gault on Commercial Law (Thomson Reuters)</i> which brings together commentary and analysis on the principal statutes which regulate commercial activity in New Zealand, including the Commerce Act.</li> </ul>
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## 2. Scope and nature of prohibition on cartels

<p><b>A. Does your law or case law define the term “cartel”?</b> <b>[Please quote.]</b></p> <p><b>If not, please indicate the term you use instead. [Please quote.]</b></p>	<p>Section 30A of the Commerce Act provides that a ‘cartel provision’ is a provision in a contract, arrangement, or understanding, that has the purpose, effect, or likely effect of price fixing, restricting output, or market allocating. These three terms are also defined in section 30A.</p>
<p><b>B. Does your legislation or case law distinguish between very serious cartel behaviour (“hardcore cartels” – e.g.: price fixing, market sharing, bid rigging or production or sales quotas<sup>2</sup>) and other types of “cartels”?</b> [Please describe how this differentiation is made and identify the most egregious types of conduct.]</p>	<p>The Commerce Act does not differentiate between very serious cartel behaviour and other types of collusive behaviour. However, price fixing, restricting output, and market allocating is a per se offence under section 30 of the Commerce Act.</p>
<p><b>C. Scope of the prohibition of hardcore cartels: [including any exceptions, exclusions and defences e.g. for particular industries or sectors. Please also describe any other limitations to the</b></p>	<p>A ‘cartel provision’ is exempt from section 30 of the Commerce Act if it comes within the exception for collaborative activities in section 31. A small number of exemptions to the prohibition of restrictive trade practices in section 43 to 44B also apply. For example, conduct can be exempt if it applies to vertical supply contracts (section 32) or joint buying and promotion agreements (section 33); is specifically authorised by another</p>

<sup>2</sup> In some jurisdictions these types of cartels – and possibly some others – are regarded as particularly serious violations. These types of cartels are generally referred to as “hardcore cartels”. Hereinafter this terminology is used.

<b>ban on hardcore cartels.]</b>	statute (section 43); if it constitutes an arrangement between interconnected bodies (section 44); or if it relates exclusively to international shipping (section 44A).
<b>D. Is participation in a hardcore cartel illegal <i>per se</i><sup>3</sup>? [If the situation differs for civil, administrative and criminal liability, please clarify this.]</b>	Price fixing, restricting output, and market allocating are all <i>per se</i> offences under section 30 of the Commerce Act. However, for price fixing, restricting output, and market allocating to be a criminal offence, intent to engage in this conduct is required to be shown.
<b>E. Is participation in a hardcore cartel a civil or administrative or criminal offence, or a combination of these?</b>	Both a civil and criminal offence.

### 3. Investigating institution(s)

<b>A. Name of the agency, which investigates cartels: [if there is more than one agency, please describe the allocation of responsibilities]</b>	The Commerce Commission
<b>B. Contact details of the agency: [address, telephone and fax including the country code, email, website address and languages available on the website]</b>	PO Box 2351 Wellington 6140 New Zealand Ph: (+64- 4) 924 3600 Website: <a href="http://www.comcom.govt.nz/">http://www.comcom.govt.nz/</a> (English only)
<b>C. Information point for potential complainants:</b>	<a href="http://www.comcom.govt.nz/">http://www.comcom.govt.nz/</a>
<b>D. Contact point where complaints can be lodged:</b>	Potential complainants can: <ul style="list-style-type: none"> <li>• Telephone the Commission's Contact Centre during office hours (8:30am-5:30pm, Monday – Friday) on 0800 94 3600 (domestic) or +64-4 924 3600 (international).</li> <li>• Write to the Commission at Contact Centre, PO Box 2351, Wellington, 6140, New Zealand.</li> <li>• Complete an online form at <a href="https://comcom.govt.nz/make-a-complaint">https://comcom.govt.nz/make-a-complaint</a></li> <li>• Send an email to <a href="mailto:contact@comcom.govt.nz">contact@comcom.govt.nz</a>.</li> </ul>

<sup>3</sup> For the purposes of this template the notion of 'per se' covers both 'per se' and 'by object', as these terms are synonyms used in different jurisdictions.

<p><b>E. Are there other authorities which may assist the investigating agency? If yes, please name the authorities and the type of assistance they provide.</b></p>	<p>In some cases the New Zealand Police, the New Zealand Customs Service and/or the Serious Fraud Office may assist the Commission, for example with the execution of search warrants. The New Zealand Police may also assist in relation to provisions which have criminal penalties, such as misleading the Commission (section 103 of the Commerce Act).</p>
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#### 4. Decision-making institution(s)<sup>4</sup> [to be filled in only if this is different from the investigating agency]

<p><b>A. Name of the agency making decisions in cartel cases: [if there is more than one agency, please describe the allocation of responsibilities.]</b></p>	<p>Cartels are investigated by the Commission, but the Commission has no power to apply sanctions.</p> <p>Decisions on whether the Commerce Act has been breached by the operation of a cartel, and on whether sanctions will be imposed, may only be made by the District Court or High Court of New Zealand.</p> <p>There is no specialised competition court in New Zealand.</p>
<p><b>B. Contact details of the agency: [address, telephone and fax including the country code, email, website address and languages available on the website]</b></p>	<p>Judges and acting-warranted judges of the District Court are permanently based in 26 main centres, but travel to other courts on circuit.</p> <p>Information on the District Court is available at <a href="https://www.districtcourts.govt.nz/">https://www.districtcourts.govt.nz/</a></p> <p>The judges and associate judges of the High Court are based in the three largest New Zealand cities: Auckland, Wellington and Christchurch, and travel on circuit to several other cities and towns.</p> <p>Information on the High Court is available at <a href="http://www.justice.govt.nz/courts/high-court">http://www.justice.govt.nz/courts/high-court</a></p>
<p><b>C. Contact point for questions and consultations:</b></p>	<p>Questions on the investigation of cartels should be addressed to the Commission, contact details for which are given elsewhere on this template.</p>
<p><b>D. Describe the role of the investigating agency in the process leading to the sanctioning of the cartel conduct.</b></p>	<p>Alleged cartels are investigated by the Commission which has a range of powers discussed elsewhere in this template that strengthen its ability to undertake investigations.</p> <p>If a Commission investigation leads it to conclude that the Commerce Act has been breached by the operation of a cartel, the Commission will apply its enforcement criteria to decide whether legal proceedings should be instituted in the District</p>

<sup>4</sup> Meaning: institution taking a decision on the merits of the case (e.g. prohibition decision, imposition of fine, etc.)

	<p>Court or High Court. The Commission has discretion to decide which cases will result in enforcement action.</p> <p>If civil proceedings are initiated, only the Commission may seek pecuniary penalties, or orders excluding certain persons from the management of a body corporate, as sanctions for cartel conduct.</p> <p>If criminal proceedings are initiated, the Commission refers the case to a “cartel prosecutors panel” appointed by the Solicitor-General which conducts the criminal prosecution on behalf of the Crown. This panel can seek pecuniary penalties, or imprisonment, as sanctions for cartel conduct.</p> <p>The Commission, or any other person, may seek injunctions from the court in respect of restrictive trade practices.</p> <p>Private actions for damages or exemplary damages may be made by the person affected.</p>
<p><b>E. What is the role of the investigating agency if cartel cases belong under criminal proceedings?</b></p>	<p>If a Commission investigation leads it to conclude that the Commerce Act has been breached by the operation of a cartel and criminal proceedings should be initiated, the Commission refers the case to a “cartel prosecutors panel” appointed by the Solicitor-General, which conducts the criminal prosecution on behalf of the Crown.</p> <p>Although the Commission will recommend to the cartel prosecutors panel which individuals and/or companies should be prosecuted, the panel has the ability to depart from this recommendation.</p> <p>The Commission will lay the criminal charges and once the Defendant(s) puts forward a plea, the prosecution is conducted by the Crown.</p>

## 5. Handling complaints and initiation of proceedings

<p><b>A. Basis for initiating investigations in cartel cases: [complaint, ex officio, leniency application, notification, etc.]</b></p>	<p>Cartel investigations may be initiated as a consequence of a leniency application; following a complaint to the Commission; following information the Commission receives through its anonymous whistleblowing tool; or as a proactive investigation by the Commission.</p>
<p><b>B. Are complaints required to be made in a specific form (e.g. by phone, in writing, on a form, etc.)? [If there is a requirement to complete a specific form, please, indicate its location (website address).]</b></p>	<p>Complaints are not required to be in a specific form. However, the Commission does have a specific form for making complaints on its website.</p> <p><a href="https://comcom.govt.nz/make-a-complaint">https://comcom.govt.nz/make-a-complaint</a></p>
<p><b>C. Legal requirements for lodging a complaint against a cartel:</b></p>	<p>There are no legal requirements for lodging a complaint against a cartel.</p>

[e.g. is legitimate interest required, or is standing to make a complaint limited to certain categories of complainant?]	
<b>D. Is the investigating agency obliged to take action on each complaint that it receives or does it have discretion in this respect? [Please elaborate.]</b>	The Commission has a discretion as to which complaints it investigates. In making this decision, the Commission considers the quality of the complainant's information and relies on its enforcement criteria and considers the extent of detriment, the seriousness of the conduct, and the public interest.
<b>E. If the agency intends not to pursue a complaint, is it required to adopt a decision addressed to the complainant explaining its reasons?</b>	The Commission considers the complaint and applies its enforcement criteria to decide whether a complaint should be pursued. A conclusion that a particular complaint should not be pursued is not a formal Commission decision. However, as a matter of practice, the Commission explains to complainants its reasons for not investigating further where appropriate.
<b>F. Is there a time limit counted from the date of receipt of a complaint by the competition agency for taking the decision on whether to investigate or reject it?</b>	There is no time limit by which a decision about whether to investigate a complaint must be made. However, under section 80(5) of the Commerce Act, the Commission must commence legal proceedings within 3 years after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered. Under this same section the Commission cannot commence proceedings more than 10 years after the matter giving rise to the contravention.

## 6. Leniency policy<sup>5</sup>

<b>A. What is the official name of your leniency policy (if any)? [Please indicate its public availability.]</b>	Commerce Commission Cartel Leniency and Immunity Policy. The policy is publicly available at <a href="https://comcom.govt.nz/_data/assets/pdf_file/0023/90437/Cartel-Leniency-Policy-and-Guidelines.pdf">https://comcom.govt.nz/_data/assets/pdf_file/0023/90437/Cartel-Leniency-Policy-and-Guidelines.pdf</a>
<b>B. Does your jurisdiction offer full leniency as well as partial leniency (i.e. reduction in the sanction / fine), depending on the case?</b>	<p>Generally, only the first cartel participant to apply to the Commission and meet required criteria is eligible for conditional civil leniency and/or criminal immunity. However, a subsequent applicant may be able to obtain conditional leniency and/or immunity later if the first applicant fails to meet the prescribed conditions agreed with the Commission or Solicitor-General (as applicable).</p> <p>The Commission can only grant leniency for civil proceedings.</p> <p>Immunity from criminal proceedings can only be granted by the Solicitor-General, which will typically be granted on the</p>

<sup>5</sup> For the purposes of this template the notion of 'leniency' covers both full leniency and a reduction in the sanction or fines. Moreover, for the purposes of this template terms like 'leniency' 'amnesty' and 'immunity' are considered as synonyms.



	<p>recommendation of the Commission. 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.</p> <p>In exceptional circumstances, an individual involved in cartel conduct might also gain immunity from criminal prosecution from the Solicitor-General outside the framework of the Commission's Cartel Leniency and Immunity Policy.</p> <p>The Commission can also recognise significant cooperation by other cartel participants who are not eligible for conditional leniency and/or immunity, by recommending a lower level of penalty to the Courts in proceedings. However, it is a matter for the Court to determine the appropriate sanction to be imposed on a party convicted of engaging in cartel conduct, including the extent of any discount to be given for cooperation.</p> <p>Cooperation is available throughout the Commission's investigation. However, applicants that cooperate with the Commission as early as possible are likely to obtain greater concessions from cooperation.</p>
<p><b>C. Who is eligible for full leniency [only for the first one to come forward or for more participants in the cartel]?</b></p>	<p>The Commission or Solicitor-General (as applicable) only offers full leniency and/or immunity to the first applicant in relation to that cartel who meets the required criteria.</p> <p>Subsequent cartel members that apply to the Commission may be eligible for reduced penalties in exchange for information, and full, continuing, complete cooperation throughout a cartel investigation and any subsequent proceedings. This is at the discretion of the Commission or Solicitor-General (as applicable).</p>
<p><b>D. Is eligibility for leniency dependent on the enforcing agency having either no knowledge of the cartel or insufficient knowledge of the cartel to initiate an investigation?</b></p> <p><b>In this context, is the date (the moment) at which participants in the cartel come forward with information (before or after the opening of an investigation) of any relevance for the outcome of leniency applications?</b></p>	<p>Eligibility for conditional leniency and/or immunity from Commission initiated proceedings is not dependent on the Commission having either no knowledge of the cartel or insufficient knowledge of the cartel to initiate an investigation..</p> <p>The Commission may grant conditional leniency to:</p> <ul style="list-style-type: none"> <li>• The first person who applies to the Commission for a marker for conditional leniency in respect of a cartel that the Commission is not aware of (Type A); or</li> <li>• The first person to apply for a marker for conditional leniency for a cartel the Commission is aware of but does not yet have evidence that is likely to warrant issuing proceedings against a cartel member. This may be after the Commission has started investigating, including exercising its statutory information gathering powers. Also, the applicant has to show they would provide evidence of significant value and that evidence is not reasonably obtainable from elsewhere.</li> </ul>

<p><b>E. Who can be a beneficiary of the leniency program (individual / businesses)?</b></p>	<p>Both individuals and companies can benefit from the Commission's Cartel Leniency and Immunity Policy.</p>
<p><b>F. What are the conditions of availability of full leniency: [e.g. provide decisive evidence, maintain cooperation throughout, not to be the ringleader, cease the infringement, restitution, etc.]</b></p>	<p>Under the Commission's Cartel Leniency and Immunity Policy, to be eligible for conditional leniency and/or immunity, an applicant must meet the following conditions:</p> <ul style="list-style-type: none"> <li>• Is the first applicant to meet the criteria for conditional leniency and/or immunity.</li> <li>• Is or was a participant in that cartel.</li> <li>• Admits that they participated in, or are participating in, conduct in respect of that cartel that may constitute a breach of section 30 of the Commerce Act.</li> <li>• Has either ceased their involvement in the cartel or has informed the Commission that they will cease their involvement. In some circumstances the Commission may require the applicant to continue to act in particular ways towards the cartel, for a specific period, to allow necessary evidence to be obtained.</li> <li>• Has not coerced others to participate in the cartel.</li> <li>• In the case of companies, makes admissions in relation to actions that are genuinely corporate acts (as opposed to those undertaken by individuals).</li> <li>• Agrees to provide full and continuing cooperation to the Commission in its investigation of the cartel, and any subsequent proceedings.</li> </ul> <p>For immunity from criminal proceedings, the Commission will make a recommendation to the Solicitor-General that immunity be granted to an applicant where all of the conditions outlined above are met, and the following additional criteria are satisfied:</p> <ul style="list-style-type: none"> <li>• some or all of the reported cartel conduct is likely to be prioritised for further investigation; and</li> <li>• there is a prospect that criminal proceedings may be brought in relation to the prioritised conduct, including because it is serious.</li> </ul> <p>If the Commission makes a recommendation to the Solicitor-General for immunity from criminal prosecution, the Solicitor-General's decision will be made based on the criteria set out in the Solicitor-General's Prosecution Guidelines (<a href="https://www.crownlaw.govt.nz/publications/prosecution-guidelines/">https://www.crownlaw.govt.nz/publications/prosecution-guidelines/</a>), read in accordance with the Guidelines on Immunity for Prosecution for Cartel Offences.</p>

<p><b>G. What are the conditions of availability of partial leniency (such as reduction of sanction / fine / imprisonment): [e.g.: valuable, potential, decisive evidence by witnesses or on basis of written documents, etc.? Must the information be sufficient to lead to an initiation of investigations?]</b></p>	<p>The Commission is able to exercise its discretion to take a lower level of enforcement action, or no action at all, in exchange for information and full and continuing cooperation.</p> <p>To be eligible for reduced penalties the information provided by a person must add significant value to the investigation. The cooperation must be full and continuing throughout the investigation and any proceedings. Mere compliance, where the Commission exercises its statutory powers under the Act, does not fulfil this requirement. Information provided early in an investigation will be of more value than the same information provided at a much later stage.</p>
<p><b>H. Obligations for the beneficiary after the leniency application has been accepted: [e.g. ongoing, full cooperation with the investigating agency during the proceedings, etc.]</b></p>	<p>For both an individual and a company, the beneficiary must provide full, continuing and complete cooperation. The Commission will discuss with each applicant the specific voluntary actions they will be required to undertake to fulfil this requirement.</p> <p>While the exact details of this requirement may vary with circumstances, it will usually include the following:</p> <ul style="list-style-type: none"> <li>• An applicant company must identify one individual in the organisation as the primary contact point for all matters related to the investigation unless otherwise agreed by the Commission. Ideally the person identified should be available for the duration of the investigation.</li> <li>• Where the applicant is a company, the Commission may require it to do an internal investigation to obtain more detailed information, including on how the cartel was conducted. This could apply where a cartel has been conducted by middle level staff, without the knowledge and participation of top management.</li> <li>• Commission access to IT systems and relevant IT personnel. Where changes in an IT system are necessary, steps should be taken to preserve the information stored in it and to provide practicable means for access by the Commission.</li> </ul>
<p><b>I. Are there formal requirements to make a leniency application? [e.g. must applications take a particular form or include particular information/data, must they be in writing or can they be made orally, etc.]</b></p>	<p>Applications for a marker, or conditional immunity, and hypothetical enquiries must be directed to the General Manager, Competition at the Commission. The required method of contact is by telephone, email or in person, during the Commission's working hours: 8:30am to 5pm, Monday to Friday.</p> <p>Telephone messages will not qualify as an application for a marker or conditional immunity. Applicants must speak to or email the General Manager, Competition, or authorised delegate if the General</p>

	<p>Manager is unavailable.</p> <p>The telephone number is +64-4 924 3720. The email address is <a href="mailto:gm.competition@comcom.govt.nz">gm.competition@comcom.govt.nz</a></p> <p>A list of the information the General Manager will require from applicants is listed in the Cartel Leniency and Immunity Policy: <a href="https://comcom.govt.nz/_data/assets/pdf_file/0023/90437/Cartel-Leniency-Policy-and-Guidelines.pdf">https://comcom.govt.nz/_data/assets/pdf_file/0023/90437/Cartel-Leniency-Policy-and-Guidelines.pdf</a></p>
<p><b>J. Are there distinct procedural steps within the leniency program? [e.g.: provisional guarantee of leniency ("PGL") and further steps leading to a final leniency agreement / decision)?]</b></p>	<p>The Commission's procedure for leniency and/or immunity applications is as follows:</p> <p><b>Enquiry</b></p> <p>The Commission is the primary point of contact for all applications for criminal immunity, civil leniency, amnesty plus or cooperation relating to cartel conduct.</p> <p>A potential applicant for conditional leniency and/or immunity, or their legal representative, may contact the Commission to ascertain if a marker or conditional leniency and/or immunity is available for a particular cartel. The Commission will deal with such enquiries on a 'hypothetical basis'. Hypothetical enquiries do not constitute an application for conditional immunity or a marker.</p> <p><b>Formal application</b></p> <p>A prospective applicant must provide the Commission with sufficient information on the nature of the cartel in order to enable the Commission to assess whether or not conditional leniency and/or immunity or a marker for conditional leniency and/or immunity are available. The information required will include:</p> <ul style="list-style-type: none"> <li>• Information about the product(s) and/or service(s) subject to the cartel.</li> <li>• The main participants of the cartel.</li> <li>• The impact of the cartel on a market in New Zealand.</li> </ul> <p>The time and date of the application will be recorded. Subsequent applicants will be advised by the Commission if conditional leniency and/or immunity or a marker is no longer available. These applicants will not be told the identity of the conditional leniency and/or immunity or marker holder but will be informed of their place in the queue for conditional leniency and/or immunity.</p> <p><b><i>Application for marker for conditional leniency and/or immunity</i></b></p> <p>An applicant who considers that they do not have sufficient information to qualify for conditional leniency and/or immunity may request a marker. This marker confirms, and preserves for a limited</p>

time, their position as the first applicant for conditional leniency and/or immunity.

An applicant who has gained a marker must 'perfect the marker' by providing the Commission with a statement on an agreed list of issues, within an agreed time. This statement is called the proffer. The standard time allowed to perfect the marker is 40 working days, but a longer or shorter period can be agreed upon.

The exact content of the proffer will vary but its scope must include detailed information and supporting evidence on the cartel activities for which conditional immunity is sought. It must also include the nexus with a market in New Zealand and the supporting evidence to illustrate this.

If a marker expires before it is perfected, the next qualifying applicant in the queue may be eligible for conditional leniency and/or immunity or a marker subject to meeting the other conditions outlined in the policy.

### **Conditional grant of leniency for civil proceedings**

If the Commission concludes that a marker holder has met the prescribed requirements, it will confirm that conditional leniency has been granted. Leniency is 'conditional' in that the holder must continue to meet the prescribed conditions to maintain their leniency status.

The Commission can only grant leniency for civil proceedings.

The Commission will confirm its decision to grant conditional leniency in writing except where the Commission has agreed to a paperless process. In this situation the communication will be oral. When conditional leniency is granted, the Commission will specify in the leniency agreement the conditions the applicant must meet for conditional leniency to continue to apply. A copy of the template of the leniency agreement is available at Attachment A of the Commission's Cartel Leniency and Immunity Policy: [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0023/90437/Cartel-Leniency-Policy-and-Guidelines.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0023/90437/Cartel-Leniency-Policy-and-Guidelines.pdf)

### **Conditional grant of immunity for criminal proceedings**

Immunity for criminal proceedings can only be granted by the Solicitor-General, which are typically granted on the recommendation of the Commission. 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.

	<p><b>Final immunity</b></p> <p>Conditional immunity becomes unconditional when all proceedings have been resolved.</p>
<p><b>K. At which time during the application process is the applicant given certainty with respect to its eligibility for leniency, and how is this done?</b></p>	<p>The person applying for leniency is given certainty on eligibility for conditional leniency when the Commission concludes that a marker holder has met the prescribed requirements and perfected their marker. As noted in 6J above, the Commission will confirm its decision to the applicant in writing in the form of a leniency agreement.</p> <p>Where the Commission has made a recommendation to the Solicitor-General that immunity from criminal prosecution should also be granted, the Commission will typically await the decision of the Solicitor-General before communicating both decisions (that for leniency and immunity) to the applicant.</p>
<p><b>L. What is the legal basis for the power to agree to grant leniency? Is leniency granted on the basis of an agreement or is it laid down in a (formal) decision? Who within the agency decides about leniency applications?</b></p>	<p>The Commission has discretion in terms of who it decides to prosecute in both civil and criminal matters. The provision of leniency by the Commission is an exercise of that discretion in a civil context. Leniency is granted on the basis of an agreement and is not laid down in a formal decision.</p> <p>While only the Solicitor-General is able to grant immunity from criminal prosecution, the Commission can also decide not to prosecute a party in a criminal context.</p> <p>The grant of leniency by the Commission is automatic if the conditions in the Commission’s Cartel Leniency and Immunity Policy are met.</p>
<p><b>M. Do you have a marker<sup>6</sup> system? If yes, please describe it.</b></p>	<p>Yes, as described in 6J above.</p>
<p><b>N. Does the system provide for any extra credit<sup>7</sup> for disclosing additional violations? [e.g. a hardcore cartel in another market]</b></p>	<p>Yes, Amnesty Plus is available to a person who is not granted conditional leniency and/or immunity in respect of their participation in a cartel being investigated by the Commission, but who informs the Commission of their participation in a separate cartel. The Commission must be unaware of this cartel or not yet have evidence that is likely to warrant taking legal action against the cartel.</p> <p>Under Amnesty Plus granted by the Commission, an applicant will be entitled to:</p> <ul style="list-style-type: none"> <li>• Conditional leniency from civil proceedings for their participation in the second cartel, through the</li> </ul>

<sup>6</sup> A marker protects an applicant’s place in the queue for a given period of time and allows it to gather the necessary information and evidence in order to meet the relevant evidential threshold for immunity.

<sup>7</sup> Also known as: “leniency plus”, “amnesty plus” or “immunity plus”. This category covers situations where a leniency applicant, in order to get as lenient treatment as possible in a particular case, offers to reveal information about participation in another cartel distinct from the one which is the subject of its first leniency application.

	<p>marker process.</p> <ul style="list-style-type: none"> <li>An additional recommended penalty concession under civil proceedings in respect of the first cartel where they do not qualify for immunity, but admit to the conduct.</li> </ul> <p>The decision to award Amnesty Plus immunity or concessions under criminal prosecution for the first or second cartel 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.</p>
<p><b>O. Is the agency required to keep the identity of the beneficiary confidential? If yes, please elaborate.</b></p>	<p>The Commission will endeavour to protect to the fullest extent confidential information provided by holders of a marker or conditional leniency and/or immunity. The Commission will answer hypothetical questions about the availability of a marker for a particular cartel, but will not disclose the identity of any marker holder or the identity of successful and unsuccessful applicants for conditional leniency and/or immunity.</p>
<p><b>P. Is there a possibility of appealing an agency's decision rejecting a leniency application?</b></p>	<p>There is no formal prescribed review process, but parties may seek a judicial review of the decision.</p>
<p><b>Q. Contact point where a leniency application can be lodged [telephone and fax including the country code, plus out of hours contacts (if any)]:</b></p>	<p>As described in 6I applications for leniency and/or immunity must be made by phone, email or in person to the Commission's General Manager of Competition:</p> <p>Antonia Horrocks: Telephone (+64 (0) 4 924 3720), Email gm.competition@comcom.govt.nz</p>
<p><b>R. Does the policy address the possibility of leniency being revoked? If yes, describe the circumstances where revocation would occur. Can an appeal be made against a decision to revoke leniency?</b></p>	<p>Yes, to maintain conditional leniency and immunity under the Commission's Cartel Leniency and Immunity Policy, applicants must continue to meet the requirements for conditional leniency prescribed in the leniency agreement. Failure to do so can lead to revocation of the conditional leniency and a recommendation from the Commission that the Solicitor-General revokes immunity from criminal prosecution. The Commission can revoke conditional leniency at any time if it concludes that an applicant has failed to provide full and continuing cooperation. If the Commission is minded to revoke leniency, the Commission will give the leniency and/or immunity holder the opportunity to remedy the shortcomings that have been identified.</p> <p>Where conditional leniency is revoked because of the holder's failure to meet the prescribed conditions, the Commission will be entitled to use the information provided as evidence in proceedings against the person concerned.</p>
<p><b>S. Does your policy allow for "affirmative leniency", that is the possibility of the agency approaching potential leniency applicants?</b></p>	<p>The Commission's Cartel Leniency and Immunity Policy does not specifically deal with "affirmative leniency". However, it is open to the Commission to grant leniency and recommend immunity in these circumstances.</p> <p>Where the Commission becomes aware of potential collusive conduct for which it has not received an application for leniency, the Commission may request information from parties and make them</p>

	aware that conditional immunity is available.
<b>T. Does your authority have rules to protect leniency material from disclosure? If yes, please elaborate which parts are protected and what does protection actually mean.</b>	<p>Under the Official Information Act 1982, there is a presumption that official information, including information held by the Commission, shall be made available unless there is good reason for withholding it. Under this Act, if the release of official information would likely prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, then this is a good reason to refuse to release it. This reason would ordinarily enable the Commission to refuse to release some leniency material, such as material that would identify the leniency and/or immunity applicant.</p> <p><a href="https://legislation.govt.nz/act/public/1982/0156/latest/DLM64785.html">https://legislation.govt.nz/act/public/1982/0156/latest/DLM64785.html</a></p>

## 7. Settlement

<b>A. Does your competition regime allow settlement?</b>  <b>If yes, please indicate its public availability (link to the relevant rules, guidelines, etc.).</b>	<p>The Commission allows settlement in relation to cartel law breaches. It should be noted that if the settlement involves criminal cartel conduct then the settlement will be conducted by a panel prosecutor. In civil matters if the settlement includes a declaration in respect of conduct and/or a penalty then the settlement must be approved by the High Court. In either civil or criminal enforcement it is important to note that the Commission will only make recommendations to the Court and the Court is free to depart from those recommendations.</p> <p>Further information on negotiated settlements by the Commission is provided in Paragraph 63 onwards in the Commission's Enforcement Response Guidelines: <a href="https://comcom.govt.nz/_data/assets/pdf_file/0030/62589/Enforcement-Response-Guidelines-October-2013.pdf">https://comcom.govt.nz/_data/assets/pdf_file/0030/62589/Enforcement-Response-Guidelines-October-2013.pdf</a></p>
<b>B. Which types of restrictive agreements are eligible for settlement [e.g. hardcore cartels, other types of cartels, vertical agreements only ...]?</b>	As above, all restrictive agreements can be subject to settlement.
<b>C. What is the reward of the settlement for the parties?</b>	It is acknowledged by New Zealand Courts that the earlier that a party takes responsibility for their conduct and avoids unnecessary costs, then the lower the penalty that should be imposed. For example, if a party agrees to settle as soon as enforcement action is taken then generally the penalty will be reduced by at least 20% to 25%.



<b>D. May a reduction for settling be cumulated with a leniency reward?</b>	There is Amnesty Plus as noted above but there is no explicit cumulation.
<b>E. List the criteria (if there is any) determining the cases which are suitable for settlement.</b>	There are no criteria. All cases are appropriate for settlement.
<b>F. Describe briefly the system [who can initiate settlement – your authority or the parties, whether your authority is obliged to settle if the parties initiate, in which stage of the investigation settlement may be initiated, etc.].</b>	Any party can initiate settlement discussions at any point when the Commission is looking at their conduct. There is no obligation on any party to settle once settlement discussions have been initiated.
<b>F. Describe the procedural efficiencies of your settlement system [e.g. shorter decision, etc.].</b>	The benefits are in terms of whether enforcement action is taken and/or the size of the penalty imposed. There are no direct procedural efficiencies.
<b>G. Does a settlement necessitate that the parties acknowledge their liability for the violation?</b>	No, but the Commission will require an admission of liability or breach, or likely liability or breach, in most cases as a condition of settlement.
<b>H. Is there a possibility for settled parties to appeal a settlement decision at court?</b>	Any settlement when decided on by a Court can be subject to appeal.

## 8. Commitment

<b>A. Does your competition regime allow the possibility of commitment?</b>  <b>If yes, please indicate its public availability [link to the relevant rules, guidelines, etc.].</b>	The Commission may accept a written undertaking given by, or on behalf of, a person in connection with any matter relating to the enforcement of the Commerce Act (section 74A).
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<p><b>B. Which types of restrictive agreements are eligible for commitment [e.g. hardcore cartels, other types of cartels, vertical agreements only ...]?</b></p> <p><b>Are there violations which are excluded from the commitment possibility?</b></p>	<p>All types of agreements and conduct that is captured by the Commerce Act.</p>
<p><b>C. List the criteria (if there are any) determining the cases which are suitable for commitment.</b></p>	
<p><b>D. Describe, which types of commitments are available under your competition law.[e.g.: behavioural / structural]</b></p>	<p>This can include undertakings to:</p> <ul style="list-style-type: none"> <li>• pay compensation to any person</li> <li>• take action to avoid, remedy, or mitigate any actual or likely adverse effects arising from a contravention, or possible contravention, of the Commerce Act</li> <li>• pay to the Commission all or part of the Commission's costs incurred in investigating, or bringing proceedings in relation to, a contravention, or possible contravention, of the Commerce Act.</li> </ul>
<p><b>E. Describe briefly the system [who can initiate commitment – your authority or the parties, in which stage of the investigation commitment may be initiated, etc.]</b></p>	
<p><b>I. Does a commitment decision necessitate that the parties acknowledge their liability for the violation?</b></p>	
<p><b>J. Describe how your authority monitors the parties' compliance to the commitments.</b></p>	
<p><b>K. Is there a possibility for parties to appeal a commitment decision at court?</b></p>	

## 9. Investigative powers of the enforcing institution(s)<sup>8</sup>

<p><b>A. Briefly describe the investigative measures available to the enforcing agency such as requests for information, searches/raids<sup>9</sup>, electronic or computer searches, expert opinion, etc. and indicate whether such measures requires a court warrant.</b></p>	<p><b>Section 98(1)(a) and (b) notices</b></p> <p>Where the Commission considers it necessary or desirable for the purposes of carrying out its functions and exercising its powers under the Act, the Commission can issue statutory notices under section 98(1)(a) and (b) of the Commerce Act. These notices require parties to provide the Commission with information and documents by a specified date.</p> <p><b>Section 98(1)(c) interviews</b></p> <p>The Commission can also require persons to attend a formal interview under section 98(1)(c) of the Commerce Act.</p> <p><b>Search warrants</b></p> <p>The Commission can apply to a District Court judge (or certain other judicial officers) for a search warrant under section 98A of the Commerce Act.</p> <p><b>Expert opinions</b></p> <p>It is open to the Commission to seek expert opinion.</p>
<p><b>B. Can private locations, such as residences, automobiles, briefcases and persons be searched, raided or inspected? Does this require authorisation by a court?</b></p>	<p>Private locations including residences, automobiles and briefcases can be searched. Individuals cannot be searched.</p> <p>Search warrants require authorisation from the District Court.</p>
<p><b>C. Can servers located outside the territory (abroad or in a cloud) be inspected? Are there special rules for this investigative power? Please explain!</b></p>	<p>Yes, as long as the server overseas or cloud facility can be accessed from a device in New Zealand. There are no special rules for such searching.</p>
<p><b>D. May evidence not falling under the scope of the authorisation allowing the inspection be seized / used as evidence in another case? If yes, under which circumstances (e.g. is a post-search court warrant needed)?</b></p>	<p>The general rule is that information obtained under compulsion (including information obtained under a search warrant) is confidential and can be used only for the purposes for which it was obtained. This means that such material should not be disclosed to third parties (including the complainant). It also means that information obtained under a search warrant cannot be used:</p> <ul style="list-style-type: none"> <li>• As evidence in a prosecution for an offence (or other Court action) under the same Act which</li> </ul>

<sup>8</sup> “Enforcing institutions” may mean either the investigating or the decision-making institution or both.

<sup>9</sup> “Searches/raids” means all types of search, raid or inspection measures.

	<p>was not contemplated by the warrant, or is unrelated to the warrant.</p> <ul style="list-style-type: none"> <li>• As evidence in a prosecution for an offence (or other Court action) under a different Act (for situations where claims under multiple Acts are anticipated).</li> <li>• To assist the Commission in any of its investigations or other functions not related to the search warrant and to give to another agency for use by them in their investigations or other functions.</li> </ul>
<p><b>E. Have there been significant legal challenges to your use of investigative measures authorized by the courts? If yes, please briefly describe them.</b></p>	<p><b>Search warrants</b></p> <p>There has been one significant challenge to the Commission's search warrant powers <i>Tranz Rail v District Court</i>, at Wellington [2002] 10 TCLR 552.</p> <p>The Court of Appeal considered the implications of the Commission's failure to disclose its prior co-operative communications with Tranz Rail to the Registrar of the District Court when applying for a warrant.</p> <p>The Court of Appeal held that this fact was clearly relevant as to whether the issue of a warrant was necessary. The concept of necessity must imply some consideration of what other investigative tools, such as a statutory information gathering notice, are reasonably available before a warrant is issued. The Court held a notice was a reasonable alternative and the warrant was not necessary in this instance.</p> <p>Further, the Court held that the nature of the contravention at issue was not adequately described. A simple reference to conduct possibly contravening sections 27 and 36 of the Commerce Act was not enough. Accordingly, the warrant was too widely drawn and invalid on account of its generality.</p> <p>There have been no court decisions on this issue since the Tranz Rail case.</p> <p><b>Section 100 confidentiality orders</b></p> <p>There has been one significant challenge to the Commission's ability to issue section 100 confidentiality orders <i>Commerce Commission v Air New Zealand Limited</i> [2011] 13 TCLR 243 (CA).</p> <p>Air New Zealand asked the High Court in March 2009 to review the Commission's decision to impose section 100 confidentiality orders on witnesses in the cartel case. The orders prevented the witnesses from speaking about their Commission interviews with third parties. The aim of the order</p>

	<p>was to prevent Air New Zealand staff from disclosing the Commission's lines of enquiry revealed in witness interviews in the air cargo price-fixing case.</p> <p>The Court of Appeal ruled that the Commission correctly applied its powers under section 100 of the Commerce Act.</p> <p>In its decision, the Court of Appeal provided guidance on the proper scope of confidentiality orders under section 100. The Court clarified that confidentiality orders can, in appropriate cases, survive, or be issued, after the commencement of litigation where the investigation is continuing. The Court also ruled that questions posed by the Commission in a witness interview can be covered by confidentiality orders.</p>
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## 10. Procedural rights of businesses / individuals

<p><b>A. Key rights of defence in cartel cases: [e.g.: right of access to documents in the possession of the enforcing authority, right to a written statement of the case against the defendant, right to respond to that case in writing, right to respond orally, right to confront companies or individuals that make allegations against the defendant, right to legal representation before the enforcing authorities, right not to self-incriminate, etc.] Please indicate the relevant legal provisions.</b></p>	<p>The Court ultimately determines whether a breach of the Commerce Act has occurred and, if so, what penalty should be imposed.</p> <p>Given that the cartel offence is both civil and criminal, the usual rights available to civil and criminal defendants apply.</p>
<p><b>B. Protection awarded to business secrets (competitively sensitive information): is there a difference depending on whether the information is provided under a compulsory legal order or provided under informal co-operation? Please indicate the relevant legal provisions.</b></p>	<p>The Commission has power to make orders prohibiting the publication or communication of any information, document or evidence which is given to, or obtained by, the Commission in the course of an investigation (section 100 of the Commerce Act).</p> <p>In the context of civil legal proceedings, confidential information still needs to be disclosed. However, the parties can agree on the conditions under which confidential information may be disclosed to a limited group of people (e.g. legal counsel and experts).</p> <p>The Commission is an independent Crown entity, and persons can obtain information from the Commission under the Official Information Act 1982. However, information may be withheld if</p>

	<p>its disclosure would reveal a trade secret, or would be likely to prejudice the commercial position of a person who supplied it or who is the subject of the information, or for certain other reasons (section 9(2) of the Official Information Act).</p> <p><a href="http://legislation.govt.nz/act/public/1982/0156/latest/DLM64785.html">http://legislation.govt.nz/act/public/1982/0156/latest/DLM64785.html</a></p>
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## 11. Limitation periods and deadlines

<p><b>A. What is the limitation period (if any) from the date of the termination of the infringement by which the investigation / proceedings must begin or a decision on the merits of the case must be made? Please describe potential suspension or interruption opportunities of this limitation period and the requirements for such rules to apply!</b></p>	<p>Proceedings must be commenced within three years after the conduct was discovered or ought reasonably to have been discovered (section 80(5) of the Commerce Act). Where the behaviour is giving effect to (rather than the entering into) an arrangement the limitation period is three years from the last occasion of giving effect to the arrangement. No proceedings can be commenced 10 years or more after the matter giving rise to the contravention.</p>
<p><b>B. What is the deadline, statutory or otherwise (if any) for the completion of an investigation or to make a decision on the merits? Please describe potential suspension or interruption opportunities of this limitation period and the requirements for such rules to apply!</b></p>	<p>There is no time limit for investigations. However, given the limitation period for commencing proceedings outlined in 11A above, the Commission must complete its investigation in time to allow for instituting legal proceedings, where it decides to take this course.</p>
<p><b>C. What are the deadlines, statutory or otherwise (if any) to challenge the commencement or completion of an investigation or a decision regarding sanctions? (see also 15A)</b></p>	<p>Parties affected by a Commission investigation may seek a judicial review of the Commission's processes. There is no specific deadline for seeking a judicial review, but the Court has discretion to refuse relief where there has been an unjust delay in bringing an application.</p> <p>Where sanctions have been imposed by a court in relation to restrictive trade practices that breached the Act, the affected parties may lodge an appeal within 20 working days after the date of the decision against which the party wishes to appeal.</p>

## 12. Types of decisions

<p><b>A. List which types of decisions</b></p>	<p>The Commission has a number of enforcement options</p>
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<p><b>on the merits of the case can be made in cartel cases under the laws listed under Section 1. [E.g.: finding of an infringement, ordering to bring the infringement to an end, imposition of fines, etc.]</b></p>	<p>including:</p> <ul style="list-style-type: none"> <li>• Issuing compliance advice to the parties.</li> <li>• Warning the parties that their conduct is likely to be in breach of the Act.</li> <li>• Entering into a settlement with the parties requiring them to cease the conduct and comply with other appropriate terms.</li> <li>• Commencing civil proceedings against the parties under the Commerce Act.</li> <li>• Recommending to the Solicitor-General that criminal proceedings be taken against the parties under the Commerce Act.</li> </ul> <p>If the Commission commences civil proceedings under the Commerce Act, the Court can impose penalties on the defendant (section 80). The Court may also order that persons be excluded from management of a company (section 80C).</p> <p>If the Solicitor-General commences criminal proceedings under the Commerce Act, the Solicitor-General can seek pecuniary penalties or imprisonment (section 82B).</p> <p>The Court has the power under the Commerce Act to grant an injunction restraining a person from engaging in contravening conduct (section 81). Other affected parties may also take legal action for damages (section 82).</p>
<p><b>B. List any other types of decisions on the merits of the case relevant particularly in hardcore cartel cases under the laws listed under Section 1 (if different from those listed under 12/A).</b></p>	<p>Same as above.</p>
<p><b>C. Can interim measures<sup>10</sup> be ordered during the proceedings in cartel cases? (if different measures for hardcore cartels please describe both<sup>11</sup>.) Which institution (the investigatory / the decision-making one) is authorised to take such decisions? What are the conditions for taking such a decision?</b></p>	<p>The Commission may also apply to the Court for an injunction restraining a person from engaging in contravening conduct (section 81 of the Commerce Act).</p>

<sup>10</sup> In some jurisdictions, in cases of urgency due to the risk of serious and irreparable damage to competition, either the investigator or the decision-making agency may order interim measures prior to taking a decision on the merits of the case [e.g.: by ordering the immediate termination of the infringement].

<sup>11</sup> Only for agencies which answered “yes” to question 2.B. above

### 13. Sanctions for procedural breaches (non-compliance with procedural obligations) in the course of investigations

<p><b>A. Grounds for the imposition of procedural sanctions / fines [e.g. late provision of requested information, false or incomplete provision of information, lack of notice, lack of disclosure, obstruction of justice, destruction of evidence, challenging the validity of documents authorizing investigative measures, etc.]:</b></p>	<p>In general, it is an offence under the Commerce Act to deceive or knowingly mislead the Commission (section 103(2)). In relation to the Commission's information gathering powers, it is an offence to fail to comply with a notice or to give false or misleading information without reasonable excuse (section 103(1)).</p> <p>In relation to search warrants it is an offence under the Commerce Act to resist, obstruct or delay a Commission employee (section 103(1)). In terms of compulsory interviews under section 98(c) it is an offence to fail to appear, to refuse to take an oath or make an affirmation, or to refuse to answer any question or produce any document (section 103(3)), without reasonable excuse.</p>
<p><b>B. Type and nature of the sanction (civil, administrative, criminal, combined; pecuniary or other):</b></p>	<p>Criminal.</p>
<p><b>C. On whom can procedural sanctions be imposed?</b></p>	<p>Both individuals and companies.</p>
<p><b>D. Criteria for determining the sanction / fine:</b></p>	<p>Determined by the Court.</p>
<p><b>E. Are there maximum and / or minimum sanctions / fines?</b></p>	<p>Maximum fines are NZ\$100,000 for an individual and NZ\$300,000 for a company (section 103(4) of the Commerce Act). The section does not provide minimum penalties.</p>

### 14. Sanctions on the merits of the case

<p><b>A. Type and nature of sanctions in cartel cases (civil, administrative, criminal, combined):</b></p> <p><b>On whom can sanctions be imposed? [E.g.: representatives of businesses, (imprisonment for individuals), businesses, in the case of associations of companies the associations or the individual companies?]</b></p>	<p>Civil and criminal.</p> <p>Imprisonment for a term not exceeding 7 years for individuals.</p> <p>Pecuniary penalties can be imposed on companies and on individuals.</p> <p>A body corporate cannot indemnify a director, servant or agent of the body corporate in respect of payment of pecuniary penalties.</p>
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<p><b>B. Criteria for determining the sanction / fine: [e.g.: gravity, duration of the violation, benefit gained from the violation]</b></p>	<p>Determined by the Courts.</p>
<p><b>C. Are there maximum and / or minimum sanctions / fines?</b></p>	<p><b><i>Civil sanctions</i></b></p> <p>Section 80(2B) of the Commerce Act provides that the Courts may impose the following maximum pecuniary penalties:</p> <ul style="list-style-type: none"> <li>• in the case of an individual, NZ\$500,000; and</li> <li>• in the case of a company, the greater of NZ\$10,000,000; or either: <ul style="list-style-type: none"> <li>a. three times the value of any commercial gain resulting from the contravention; or</li> <li>b. 10 percent of the turnover of the company.</li> </ul> </li> </ul> <p>No minimum penalties are provided.</p> <p><b><i>Criminal sanctions</i></b></p> <p>Section 82B of the Commerce Act provides that the Courts may impose the following maximum penalties:</p> <ul style="list-style-type: none"> <li>• in the case of an individual, NZ\$500,000 and/or imprisonment for a term not exceeding 7 years; and</li> <li>• in the case of a company, the greater of NZ\$10,000,000; or either: <ul style="list-style-type: none"> <li>b. three times the value of any commercial gain resulting from the contravention; or</li> <li>b. 10 percent of the turnover of the company.</li> </ul> </li> </ul> <p>No minimum penalties are provided.</p> <p>The Court may also order a person to pay exemplary damages (section 82A).</p>
<p><b>D. Guideline(s) on calculation of fines: [name and reference number, availability (homepage address) and indication of the languages in which these materials are available]</b></p>	<p>While the Commission or Solicitor-General (as applicable) may recommend to the Court that a particular financial penalty be imposed, the decision on the level of the penalty is solely determined by the Court.</p> <p>In determining whether to award exemplary damages, the Court must have regard to:</p> <ul style="list-style-type: none"> <li>• Whether a pecuniary penalty has been imposed for a contravention involving the conduct concerned in the claim for exemplary damages.</li> <li>• If so, the amount of the pecuniary penalty (section 82A of the Commerce Act).</li> </ul>

	In the past, Courts have considered the nature and gravity of the breach, the particular defendant's situation, financial resources, background and industry ( <i>Commerce Commission v Ophthalmological Society of New Zealand</i> (2004) 11 TCLR 226).
<b>E. Does a challenge to a decision imposing a sanction / fine have an automatic suspensory effect on that sanction / fine? If it is necessary to apply for suspension, what are the criteria?</b>	No.

## 15. Possibilities of appeal

<b>A. Does your law provide for an appeal against a decision that there has been a violation of a prohibition of cartels? If yes, what are the grounds of appeal, such as questions of law or fact or breaches of procedural requirements?</b>	<p>Sanctions for cartel offences (imprisonment, pecuniary penalties, the exclusion of persons from the management of a body corporate, injunctions and damages) may be imposed only by the Courts. The parties on whom sanctions have been imposed have the normal appeal rights to a higher court on questions of law and of fact.</p> <p>In relation to the conduct of an investigation by the Commission, those affected have the right to seek a judicial review of the processes followed by the Commission.</p>
<b>B. Before which court or agency should such a challenge be made? [if the answer to question 15/A is affirmative]</b>	

## 16. Private enforcement

<b>A. Are private enforcement of competition law and private damage claims possible in your jurisdiction? If there is no legal provision for private enforcement and damage claims, what are the reasons for it?</b>	<p>Any person aggrieved by another person engaging in anti-competitive conduct prohibited by Part 2 of the Commerce Act (including cartel conduct) has a right of action for relief through the Courts.</p> <p>Relief can be sought by way of an injunction (section 81), damages (section 82), or a declaration.</p>
<b>B. Laws regulating private enforcement of competition law in your jurisdiction</b>	The Commerce Act provides for private actions seeking an injunction (section 81) or damages (section 82). There are no special rules or procedures for Commerce Act proceedings.

<p>[indication of the provisions and languages in which these materials are available; availability (homepage address)]</p>	
<p><b>C. Implementing regulation(s) on private enforcement (if any): [name and reference number, availability (homepage address) and indication of the languages in which these materials are available]</b></p>	<p>No regulations were required for the implementation of the Commerce Act.</p>
<p><b>D. On what grounds can a private antitrust cause of action arise? / In what types of antitrust matters are private actions available?</b></p>	<p>A claimant must show that the defendant has breached the Commerce Act, and that they suffered loss or damage flowing from the anti-competitive conduct which breached the Commerce Act.</p>
<p><b>E. What pleading standards must the plaintiff meet to file a stand-alone or follow-on claim?</b></p> <ul style="list-style-type: none"> <li>• is a finding of infringement by a competition agency required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition agency on national courts/tribunals?</li> <li>• if a finding of infringement by competition authority is required, is it also required that decision to be judicially finalised?</li> </ul>	
<p><b>F. Are private actions available where there has been a criminal conviction in respect of the same matter?</b></p>	
<p><b>G. Do immunity or leniency applicants in competition investigations receive any beneficial treatment in follow-on private damages cases?</b></p>	
<p><b>H. Name and address of specialised court (if any) where private enforcement claims may be submitted to</b></p>	<p>Third party damages claims are brought by filing proceedings in the relevant court. The District Court can hear claims up to NZD\$350,000. Claims above this amount must be filed in the High Court.</p>
<p><b>I. Information about class</b></p>	<p>There is no legislated class action regime in New Zealand, but</p>

<p><b>action opportunities</b></p>	<p>representative actions are permitted under the High Court Rules. A recent Court of Appeal decision (<i>Ross v Southern Response Earthquake Services Limited</i> [2019] NZCA 431) ruled that representative actions in New Zealand should proceed on an "opt-out" basis in the first instance. This means that any eligible claimant is automatically included as part of the proceedings, unless they actively choose not to participate in the case.</p>
<p><b>J. Role of your competition agency in private enforcement actions (if at all)</b></p>	
<p><b>K. What is the evidentiary burden on plaintiff to quantify the damages? What evidence is admissible?</b></p> <ul style="list-style-type: none"> <li>• <b>Role of your competition agency in the damage calculation (if at all)</b></li> </ul>	
<p><b>L. Discovery / disclosure issues:</b></p> <ul style="list-style-type: none"> <li>• <b>can plaintiff obtain access to competition authority or prosecutors' files or documents collected during investigations?</b></li> <li>• <b>is your competition agency obliged to disclose to the court the file of the case (in follow-on cases)?</b></li> <li>• <b>summary of the rules regulating the disclosure of confidential information by the competition agency to the court</b></li> <li>• <b>summary of the rules regulating the disclosure of leniency-based information by the competition agency to the court</b></li> </ul>	
<p><b>M. Passing-on issues:</b></p> <ul style="list-style-type: none"> <li>• <b>how is passing-on regulated / treated in your jurisdiction?</b></li> <li>• <b>is standing to bring a claim limited to those directly affected or may</b></li> </ul>	

<b>indirect purchasers bring claims?</b>	
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