

**ALTERED STATES:
CO-OPERATION BETWEEN CARTELIER & COMMERCE COMMISSION**

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A Introduction

1. The Commission is the independent public regulatory agency responsible for the enforcement of the Commerce Act 1986 (*the Act*) including, relevantly, Part II of the Act and its prohibitions against restrictive trade practices.
2. That Commission's responsibilities – especially its duty to act as a model litigant - become pronounced when the Commission is contemplating co-operating with a cartel participant and discussing recommended penalties. Tensions arise that guide how the Commission considers and implements co-operation. The Commission aims to be both principled and pragmatic when handling requests for co-operation; hopefully those aims will emerge from the descriptions that follow.
3. Due in large measure to the Commission's adoption in 2000 of leniency and co-operation policies, this topic is assuming greater practical importance. In New Zealand an increasing number of cartel participants are offering co-operation. This mirrors recent overseas experience with negotiated settlements of cartel proceedings: since 1990 all US Sherman Act prosecutions seeking the imposition of criminal fines have been dealt with as negotiated settlements².
4. The purpose of this paper is to provide guidance to the legal and commercial community as to:
 - **The imperatives** that drive the cartelier and the Commission to seek to co-operate;
 - **The Commission's policies** as to leniency & co-operation;
 - **The process** followed by the Commission in assessing offers of co-operation;
 - **Standard terms of co-operation**;
 - **The Commission's expectations** when co-operating;
 - **Penalty recommendations and discounts**; and
 - **Likely future developments** in the Commission's approach to co-operation.

5. This paper takes in both leniency and co-operation, and both civil penalty proceedings and (in passing) criminal prosecution under s103.
6. This paper offers a framework for the practices that the Commission has developed in handling offers of co-operation, with the aim of providing more transparency as to the purposes and processes of co-operation, and as to the Commission's expectations of the co-operative relationship.
7. Comments from the floor are welcomed, particularly from counsel who have acted for parties who have secured or sought co-operation with the Commission. No doubt there are improvements that can still be made by the Commission.
8. An 'altered state' is "*a state of consciousness deviating from the baseline or normal.*" The term seems apposite in this context: what is required if co-operation between Commission and cartelier is to succeed is an adjustment to the baseline perceptions of each. Certain assumptions will no doubt remain; but successful co-operation – its negotiation and then its performance – requires considerable good faith by both actors and a large measure of co-dependence.

B Incentives to co-operate

9. The Commission has stated its intention to prioritise anti-cartel enforcement³. That prioritisation, plus the Commission's active pursuit of cartel enforcement in practice and prosecution of attempts to obstruct the Commission⁴, are enhancing the Commission's reputation for effective enforcement in this area.
10. The Commission, it might be thought, has every reason to seek to discuss settlement of its Part II proceedings, so as to burnish that reputation still further by obtaining judgments in its favour. But the 'drivers' for the Commission, like those for cartel participants, are not so crude. While a settlement discussion is conducted by the parties in private, the Commission is subject to judicial and public scrutiny that appropriately fetter its freedom in such discussions.

B1 Forms of co-operation

11. In a competition enforcement setting, co-operation takes the form of an agreement (or 'negotiated settlement') between the Commission and a participant in a breach of Part II.
12. In its usual form, the defendant agrees to co-operate with the Commission by admitting contravention of Part II and by providing evidence/ assistance to it, in the expectation of obtaining a reduced penalty from the Court, and having the Commission support its penalty recommendation to the Court.
13. As to penalty, usually the Commission agrees not to seek from the Court a penalty beyond an agreed recommended sum. The High Court determines the quantum of any penalty to be imposed, not the Commission. All that the parties can do is to

jointly recommend a penalty within an appropriate penalty range.

14. A leniency applicant is by definition (see section C1 below) a person against whom proceedings have not been commenced by the Commission. In return for the applicant's disclosure and commitment to future co-operation, therefore, the applicant receives immunity from Commission-initiated Court action.
15. It is possible – although it has not yet occurred in New Zealand – for the parties to agree on admissions but to leave penalty to be determined in a contested hearing.⁵
 - In a recent Commission investigation this possibility was extensively explored with the party seeking to co-operate. The cartel participant submitted that the Commission had erred in earlier penalty recommendations to the High Court, such that precedent was an unreliable guide to the proper penalty for the conduct under discussion. The Commission took seriously the criticism and traversed the facts and case-law fully with counsel for the defendant. Agreement was reached and a separate hearing avoided.

B2 Commission incentives

16. The Commission can be materially advantaged through co-operation with a cartel participant, and these potential benefits provide the incentives for the Commission to discuss workable terms of co-operation:
 - 16.1 **Cost savings:** avoided investigation and trial costs. Each of these phases can be time-consuming and resource-intensive for the Commission.
 - Note: the magnitude of any cost saving is greater the earlier the co-operation occurs. The penalty discount for co-operation will reflect that temporal ingredient.
 - These are advantages also for the Court and for the administration of justice, as is recognised in the penalty discount awarded (this is the main reason to discount, not convenience to the prosecuting authority).
 - 16.2 **Early resolution:** avoiding the delays and complexities associated with the trial process.
 - 16.3 **Securing evidence** as well as an admission of liability is a powerful drawcard for the Commission. An admission is valuable against the particular defendant; but meaningful co-operation (by way of evidence, access to documents etc) can greatly assist against other defendants.
 - 16.4 **Greater certainty as to penalty:** this is attractive to both parties. Note, however, that the Commission's process incorporates safeguards against out-of-step penalties (section D1 below).
 - 16.5 **Promotes compliance:** by setting precedent (general deterrence) and specifically by the defendant, to the extent that the co-operative relationship between the Commission and the defendant avoids fuelling resistance and hostility between them. An early resolution also allows the Commission to obtain a judgment closer to the time of the breach, enhancing its relevance to

current market conditions.

B3 Cartel incentives

17. Corresponding and powerful incentives also exist for cartel participants to seek to cooperate with the Commission⁶:
 - 17.1 **Possible immunity:** first-in applicants may be eligible for absolute immunity from suit (see section C1 below).
 - 17.2 **Cost savings:** avoidance of the considerable costs of contested litigation. The Commission is mindful of the resource-disparity between it and individual defendants (often the discrepancy is reversed with corporate defendants). The Commission cannot reach an agreed resolution with a defendant who denies involvement but wishes to avoid costs (see below at 52).
 - In one cartel proceeding the Commission gave careful scrutiny to the evidential sufficiency of causes of action against a defendant who insisted that he was innocent but was weighing up whether to admit liability in order to avoid the expense of continued litigation. The Commission determined that there was sufficient documentary and affidavit evidence available, and left it to the Court to determine liability.
 - 17.3 **Lower penalty:** the benefits of co-operation are front-loaded for applicants, in that they are able to ‘bank’ at once the available penalty discount. Scholars warn against enforcement agencies agreeing to excessive discounts that might introduce improper institutional pressure on defendants to admit liability.⁷ Penalty discounts are discussed further below.
 - 17.4 **Increased certainty** of outcome as to admissions and recommended penalties.
 - 17.5 **Avoidance/ mitigation of adverse publicity and reputational damage.** While the Commission publicises its outcomes, and the complainant may make media comment also, media interest is inevitably diluted where liability is not contested. There is a timing advantage to the cartelier, if the investigation is still publicly under wraps, which allows the company to seize the advantage and mitigate its harm in the eyes of customers. One lawyer advises:

*“Reach out to major customers and accept responsibility. Contact key accounts, even before they learn about possible claims against the company.”*⁸
 - 17.6 **Reduced personal/ institutional pressure** of litigation. For an organization, considerable business disruption can be avoided.
18. Although the cartelier incentives seem considerable, there can be little doubt that those incentives are less powerful in New Zealand than in jurisdictions where cartel conduct is a criminal offence.

- The threat of imprisonment is particularly effective in deterring ‘rational’ offences like price-fixing, and likewise in encouraging co-operation with regulators.
- From the US Department of Justice⁹:

“... nothing in our enforcement arsenal has as great an effect as the threat of substantial incarceration in a United States prison - nothing is a greater deterrent and nothing is a greater incentive for a cartelist, once exposed, to cooperate in the investigation of his co-conspirators.”

19. Another important factor influencing the cartelier’s decision-making can be whether that person – if an individual – retains his or her own legal advice.

B3.1 Separate legal counsel

20. Individual defendants who are not represented separately from their companies may be less motivated to formally co-operate or may be actively thwarted by their company. Shared representation can be superficially attractive for the employee, but may do him or her a disservice. The company’s interests seldom align for long with the individual’s.
- During a Commission co-operation discussion, an individual disclosed that he would have preferred to co-operate with the Commission much earlier, but was pressured by his employer and its counsel not to do so. The individual’s penalty discount could have been compromised by the delay.
21. Corporate defendants face considerably greater penalties than individuals (s80(2B)) and may be reluctant to admit liability at an early stage, or may seek to attribute responsibility for breaches to one or two executives, so that breaches look like isolated events rather than institutionally encouraged behaviour. Or the executives instructing the company’s counsel may be the very persons who committed the company to the illegal conduct.¹⁰ In such circumstances, defendant executives may have interests that conflict with those of their company.
22. Where an executive is being protected by his company, he may receive considerable legal assistance from his company, which may become a disincentive to break ranks and admit breach.
23. Often an individual will be prepared to admit liability once the legal reality of his situation is made clear, and he is represented by a lawyer who serves only his interests. Self-delusion and a lack of separate counsel may have previously prevented the individual from accepting the unlawfulness of his behaviour.
- From *The Art of the Steal: Inside the Sotheby’s-Christie’s Auction House Scandal* (Christopher Mason, Putnam 2004):

“The antitrust lawyers raised the question of whether individual employees at Sotheby’s should retain separate counsel just in case their personal interests should at some point clash with those of Sotheby’s. [Dede] Brooks assured the lawyers that she did not need to hire a lawyer to protect her own interests. “She felt that it would give a bad

impression,” Rena Neville recalled, “and that it wasn’t necessary and that it wouldn’t be appropriate.” (at 214-215)

“Having never had her own lawyer to turn to for advice, [Dede] Brooks was unsure of the provisions of the Sherman Antitrust Act. In describing her actions, she learned for the first time that they had alarming legal ramifications. “It wasn’t until I talked to [my own counsel] that I realized that my conversations with Davidge amounted to an agreement,” she said.” (at 255)

24. The Commission encourages, but cannot require, separate representation in such cases.¹¹
25. Where an executive is being blamed by his company, the company is likely to be very happy to see the executive ‘carved out’ of any co-operation deal. The individual is then in the wilderness, with great pressure brought to bear by his employer/ former employer and by the circumstances in which he finds himself.

B3.2 Indemnity issues

26. Consider also s80A, which prohibits a body corporate from indemnifying directors, servants and the like in respect of liability for payment of a pecuniary penalty for breaches of s30 (the *per se* price-fixing provision) and costs incurred in defending or settling a s30 case.
27. Indemnity is not prohibited in respect of other breaches, e.g. rule of reason breaches (s27).
28. The s80A prohibition can enhance an individual defendant’s incentives to co-operate. An individual must bear his or her own legal costs and pay his or her own penalty in respect of *per se* breaches. Accordingly, the benefits to be gained by co-operating with the Commission can be substantial (in particular, the penalty discount). While companies have as much or more to gain by co-operating, they are usually better placed to bear any penalty disadvantage that arises through delay.

C Leniency & Co-operation Policies

29. The Commission has in recent years increased its investigation of cartel activity, and has successfully brought civil penalty proceedings in around 16 cartel cases.
30. In 2000 the Commission launched a Leniency Policy and a Co-operation Policy, with the aim of maximising the Commission’s prospects of uncovering cartel activity and of taking effective action against cartels¹². Like other such policies elsewhere, the policies are intended to:
 - Assist in the detection of anti-competitive cartel behaviour; and
 - Assist in the bringing of enforcement action against cartel participants.

31. It is already the Commission's experience that these twin policies have been effective in encouraging admissions and the provision of evidence that have had a 'domino-effect' on other persons and companies engaged in the same cartel.
 - The Koppers Arch wood chemicals cartel investigation was expedited by the receipt of valuable evidence obtained as a result of co-operation with the Koppers Arch & Osmose companies, and some of their current and former executives. Judgment has been entered against 6 companies and executives in relation to cartel conduct.

CI Leniency Policy

32. The Commission first launched a Leniency Policy in 2000; it was updated in 2004 and specifically styled the Leniency Policy for Cartel Conduct.¹³
33. The policy extends to cartel conduct under Part II of the Act, expressly including price-fixing, competitor exclusion, collusive tendering, bid-rigging, production or sales quotas and market sharing. Conduct taking advantage of a substantial degree of market power is not covered.
34. The Commission extends immunity from suit to the *first* cartel participant (company or individual) to provide information to the Commission about a hitherto unknown cartel, and to co-operate fully with the Commission's investigation and prosecution of the cartel.
35. By "first" person, the policy states that this means the first person to make a formal leniency application. The Commission will advise an applicant as soon as possible whether he or she is first, and will grant that person conditional immunity.
36. The Commission has not yet adopted a 'marker' system for reserving a place in the leniency queue. For the present, the race for leniency is to the swift.
37. In some cases potential applicants have been slow to apply for leniency, while taking legal advice as to whether their conduct affected a New Zealand market. It may be thought that a party is not eligible to apply for or be granted leniency unless the relevant conduct *is* a breach of Part II. But that is for the Commission to determine, and leniency may be terminated (at no risk to the applicant) if the conduct is found not to concern New Zealand¹⁴. Applicants should not hesitate where the jurisdictional element of the breach (or any other element) is uncertain, and the Commission need not answer such questions as a precondition to granting leniency.
38. And, while the Commission is always grateful to receive the fruits of an internal company investigation into cartel conduct, it can be a mistake to commence or complete an investigation before self-reporting to the Commission. While a company in that position can still seek co-operation, another company or individual might have stolen a march in the race for leniency.

39. Strict adherence to the conditions of leniency (template extracts **attached**) is required. These terms include that the applicant confirms that his or her involvement in the cartel has ceased. If the Commission determines that the grantee has failed to meet these conditions the Commission is not bound by the grant and may use information provided by that person to initiate proceedings against him or her.
40. Immunity from Commission-initiated proceedings is not granted where the Commission is currently investigating conduct relating to the leniency application.
- In a recent paper one commentator observed that a Koppers Arch whistle-blower had received full immunity after the Commission's investigation had commenced, and that this was "*contrary, on the face of it, to the CC's policy.*"¹⁵
 - In fact that informant received immunity from suit under the Commission's co-operation policy, which makes up in flexibility what the leniency policy may lack. The Commission's investigation was well advanced, so no person was eligible for leniency. But the co-operation policy allows for the Commission to take no enforcement action against a person where his or her assistance is unusually critical to the success of the investigation or Court proceeding. In Koppers Arch, the informant's affidavit evidence as to meetings, events and transactions was invaluable in satisfying other defendants that they had breached the Act, and for use in Court to establish whether, when and where specific conduct occurred. Without his co-operation, much of this evidence could not have been obtained by other means.
41. To date, the Commission has received 8 leniency applications, and has granted leniency in 7 instances.

C2 Co-operation Policy

42. Under its Co-operation Policy, the Commission has discretion to take a lower level of enforcement action (or none at all) against an individual or company, in exchange for information about the cartel and co-operation in pursuing the other participants. The principal respects in which this policy differs from the Leniency Policy are:
- It does not require the Commission to be unaware of the cartel when the applicant approaches the Commission;
 - It is not all-or-nothing, and the 'return' for co-operation can range from full immunity to a partial settlement (admissions agreed, penalty disputed); and
 - The co-operation policy extends beyond cartel conduct.¹⁶
43. The Commission requires that the co-operating party supply to it all information in his or her possession, including documentary and electronic evidence, in relation to the cartel. This includes information held overseas, in circumstances where the Commission may be unable to access that information but for the co-operation.
- In the Koppers Arch case critical documentary evidence was supplied by the Australian companies within the Koppers and Osmose groups under terms of co-operation.

D Assessment process

44. The discussion that follows primarily concerns offers of co-operation, rather than applications for leniency, which are commenced simply by the making of an application and its acceptance where the stated prerequisites are satisfied.¹⁷
45. Feedback received by the Commission indicates that there is uncertainty as to what the Commission does in response to a co-operation proposal, and the steps that it takes in order to reach a decision on an application. The criticism of ‘secrecy’ is commonly leveled at enforcement agencies that negotiate settlements¹⁸, but while confidentiality within the process is necessary, secrecy as to how it operates is not.

DI Model litigant

46. Perhaps the principal factor influencing the Commission’s processes is its obligation to act as a model litigant. Justice Arnold noted in a paper on this subject¹⁹ that the Commission owes:

“... the fundamental obligation of those who conduct prosecutions. It is not a partisan or adversarial obligation. Rather, it is an obligation to ensure as far as possible that justice is done.”

47. Karen Yeung notes that there are three principal safeguards against a prosecutor ‘overcharging’ so as to gain leverage in subsequent settlement discussions. The principles apply equally to New Zealand, where cartel conduct is a civil breach not a criminal offence:
- The prosecutor does not initiate bargaining over admissions;
 - The charges laid bear a reasonable relationship to the defendant’s conduct; and
 - There is adequate evidence to support the charges.²⁰
48. The Commission applies these safeguards in practice. In particular, note the following.
49. The Commission does not approach defendants with a view to compromising all or part of a claim.
50. As a model litigant, the Commission pleads those cartel breaches for which it believes that there is sufficient evidence, and keeps the sufficiency of evidence continually under review. Where the Commission later forms the view that there is insufficient reliable and admissible evidence, there is no justification to continue and the cause of action is abandoned.
- In *Koppers Arch* the Commission discontinued its claims against Australian company KAP, after being persuaded that there was insufficient evidence against that company. KAP nevertheless undertook to assist with the Commission’s case.

51. Commission member Denese Bates QC expressed this succinctly in a recent speech:

“The Commission will not use doubtful causes of action as ‘bargaining chips’ to bring a defendant to heel. If a cause of action is deficient, the Commission will not need persuasion – or offers of money – to drop it.”²¹

- In the Koppers Arch case, the Commission of its own volition discontinued several pleaded Part II breaches that were contradicted by credible evidence obtained after the claim was filed.
52. Applying the tests as to evidential sufficiency and public interest, the Commission will continue to seek findings of liability on viable causes of action even if that means jeopardizing the prospect of an agreed settlement. There is, therefore, no ‘plea bargaining’, in the sense in which that term is understood. This is not a point well-understood by some counsel from a strictly private law background.
- On some occasions the Commission has been asked to accept a penalty or costs in lieu of an admission. Such an offer can work in a purely commercial setting, but in the absence of admissions or findings of liability the Court cannot impose a penalty. Such offers are always refused. Nor will the Commission seek payment of costs in the absence of a liability finding or admission, except perhaps in exceptional circumstances in which the way the defence has been conducted has put the Commission to unnecessary and unavoidable costs.
53. Moreover, an agreed settlement does not represent a proper outcome simply because it is the product of genuine and consensual agreement. The Commission will only put an agreed statement of facts before the Court if it is satisfied as to the document’s correctness, based on the evidence currently available to it. The Commission and the Court must be able to satisfied as to the appropriateness of the recommended penalty, in the light of these facts – not merely that the parties have agreed on these points.
54. A defendant may choose to debate with the Commission questions of evidential sufficiency or of legal interpretation. Defendants initiating such discussions must be well-organised and competently represented. They should have closely analysed all relevant facts, spoken to relevant witnesses and considered the law. They should be willing to engage in a robust and frank discussion with the Commission as to the strength of the case against their client.
55. So, in addition to the very real judicial scrutiny of Part II admissions and penalty recommendations, there are significant moral and ethical constraints on the way the Commission acts.
56. When a defendant indicates a willingness to discuss admissions and quantum of penalty, the Commission’s process usually incorporates the following phases. All of the communications between the Commission and the defendant take place on an expressly without prejudice basis.

D2 Proposal phase

57. The Commission requests from the defendant:
- (a) Details of proposed admissions to pleaded causes of action;
 - (b) If the defendant is an individual, the provision of a draft witness statement as to all relevant matters within that defendant's knowledge;
 - (c) The provision on a without prejudice basis of undiscovered documents relevant to the investigation and proceeding;
 - (d) Details of any circumstances relevant to the proposed penalty (e.g. financial circumstances, personal difficulties etc); and
 - (e) A proposed recommended penalty and penalty range, and methods of payment (e.g. time-payment terms, if proposed; security for payment by mortgage or payment into solicitor's trust account etc).

D3 Assessment phase

58. Commission staff and external counsel (if instructed) closely assess the proposal, including specifically:
- (a) The completeness and adequacy of admissions, including the reasons for any unadmitted causes of action²²;
 - (b) The completeness and utility of new evidence provided (documentary and affidavit); and
 - (c) The adequacy of the proposed penalty and costs, taking into account any proposed mitigating factors.
59. Commission staff enter into discussions with counsel for the cartelier. Investigators and Commission counsel consider whether there is good evidence as to pleaded breaches that are not admitted by the defendant, including evidence of which the defendant may not be aware.
60. Commission staff and counsel offer to meet with the defendant and its counsel, to flesh out differences in view as to the above matters, and to ascertain if agreement is possible.
61. Commission staff and counsel prepare two draft documents that will be required if a proposal is to proceed further:
- (d) A draft co-operation agreement (see section E below); and

(e) A draft agreed statement of facts based on discussions with the defendant. This document is annexed to the co-operation agreement, and later to a memorandum to the Court seeking the imposition of penalties. The statement of facts contains the following:

- Relevant agreed background facts;
- Descriptions, as per the pleadings or as agreed, of the understandings entered into by the defendant in breach of the Act;
- Particularisation of that defendant's participation in the breaches, whether personally or by means of employees/ directors;
- Other matters relevant to penalty, such as level and timing of co-operation and admissions, relevant personal circumstances etc.

These documents are provided to the defendant for consideration and comment and to obtain the defendant's agreement to them.

62. The defendant may be asked to revise aspects of its proposal, with the aim of refining the proposal so that staff can recommend to the Commissioners that it should be accepted. Staff make it clear to the defendant that only the Commissioners can agree to a proposal, and that staff can only agree to recommend a proposal to Commissioners. Commissioners decide whether the proposal is worthy of acceptance.

D4 Recommendation phase

63. When a proposal is as fully developed as possible, staff will present it to Commissioners in a formal meeting, together with relevant material including the draft agreement and statement of facts. Staff make a recommendation as to the acceptability or otherwise of the proposal.

- Commission staff endeavour to take the defendant's 'best' offer to Commission members. Staff will identify in their recommendations if they do not consider the admissions to be adequate or if they do not consider that the penalty suggested by the defendant aligns with the facts and precedents. Commission members do reject proposals and do direct staff to conduct further discussions or to pursue a contested hearing.

64. The Commission is free to agree a position on admissions without reaching agreement on the issue of a recommended penalty. Since the setting of a penalty is for the Court to determine, if the parties are unable to agree a recommendation then each is able to make a separate submission at a contested penalty hearing. A defendant is also able to admit liability at any time, without consulting with the Commission and without providing co-operation (although plainly this affects the applicable penalty discount). Whichever occurs, each party must give the Court its

views on penalty.

65. The parties' joint position is not presented in a single submission, but in separate documents that are consistent with the agreed position. Separate submissions, albeit on matters agreed, preserve the parties' independence and allow each to highlight matters of importance to them.

E Terms of co-operation

66. The Commission's co-operation agreement with a defendant typically requires that party to promptly, reliably and without compulsion by legal process:
- Co-operate with the Commission in a full, frank and unstinting manner in relation to its investigation and the proceedings;
 - Provide to the Commission all information in that party's knowledge, possession or control relevant to the formation, existence, activities, operation and membership of the cartel, and the investigation;
 - Retain and make available to the Commission relevant personal documents and records;
 - Make himself or herself available for interviews by and discussions with the Commission, at places of mutual convenience or by telephone, email or otherwise, for the purposes of providing all information requested by the Commission or otherwise relevant to the investigation and proceedings;
 - Provide full, frank and truthful responses to all inquiries by the Commission and agree to the questions and answers being recorded; and
 - Appear as a witness in any proceedings initiated by the Commission in relation to the cartel or the investigation, and provide full, frank and truthful evidence as to all matters within his or her knowledge²³.
67. The defendant is also bound to support the joint penalty recommendation (if one has been agreed) before the Court.
68. Other obligations require the defendant to permit information-sharing between the Commission and relevant overseas regulators (most often the Australian Competition & Consumer Commission) and to give the Commission advance warning if any third-party requests like information from the defendant.
69. The Commission has co-operated with companies whose executives and former executives were defendants to the same proceeding. In such cases it has been the Commission's practice to agree terms of co-operation, admissions etc separately with the individuals, rather than to automatically extend to them the benefits of the

company's co-operation deal with the Commission²⁴. The reasons for this vary. In one instance, it was because the company was prepared to admit the individual's wrongdoing during his directorship, but the director was not. In other instances, it is because complex issues relating to admissions and penalty need to be resolved with each defendant.²⁵

70. The Commission reserves the right to re-issue the proceedings if the cartelier breaches the co-operation agreement or if he or she has materially misled the Commission.
71. In some circumstances the Commission may agree to pay an individual's actual and reasonable expenses incurred in connection with future assistance provided to the Commission, although usually this is confined to expenses incurred while acting as a witness for the Commission or in traveling to Wellington at the Commission's request. Co-operating parties who admit having engaged in cartel conduct should not expect that their expenses will be met.

E1 Jurisdiction

72. Where a co-operating defendant lives overseas and might otherwise seek to protest the jurisdiction of the New Zealand High Court to hear the matter against him or her, the Commission requires a submission to jurisdiction as a term of co-operation.
73. The co-operation agreement will contain agreement to the effect that the New Zealand courts have jurisdiction to determine any proceedings arising out of or in connection with the agreement, but also in relation to the matters to which the agreement relates (including the cartel investigation). This submission to jurisdiction provides the Commission with the certainty that it will not need to face a jurisdictional challenge in relation to the co-operation arrangements *or* the underlying cartel conduct, if the co-operation agreement is breached and the Commission does take enforcement action, perhaps some significant time after such issues have been resolved against other defendants.
74. Overseas persons with no presence in New Zealand, who agree to submit to the New Zealand jurisdiction and to pay a penalty that might not otherwise be able to be enforced against them, will receive credit for that.
 - In the Koppers Arch cartel proceeding, two overseas executives admitted liability and submitted to the jurisdiction of the Court. Each took steps to ensure that the Commission would receive payment of the penalties imposed, one by paying the sum into his New Zealand solicitor's trust account, the other by arranging a mortgage security in favour of the Commission. Both received credit from the Court for these concessions.²⁶

F Commission's decision-making on co-operation proposal

75. In each instance, the co-operation proposal and the recommendations of staff and counsel are considered at a formal Commission meeting.

76. If the Commission decides to proceed with the proposed settlement, the Commission members are asked to delegate to a single Commission member the ability to sign the co-operation agreement. This allows there to be further discussion of routine matters between staff and the defendant before the agreement is signed; a formal Commission meeting need not be reconvened.
77. This delegation can be particularly useful if last-minute issues arise or if co-operation is important to imminent steps in the proceedings.
- In one recent instance, a co-operation proposal was assessed and an agreement entered into by the Commission a little more than a week before a substantive hearing. The advance delegation to a single member allowed all outstanding matters to be resolved in short order.

G Judicial discretion

G1 Courts do not 'rubber stamp'

78. The New Zealand High Court, which has exclusive first-instance jurisdiction over competition proceedings, is receptive to the Commission's recommendations as to penalty:
- "Properly negotiated settlements are in the interests of parties and the interests of the community so as to avoid Court action, potentially complex and lengthy litigation and its very substantial expense."*²⁷
79. The Commission has presented agreed penalty recommendations to the High Court in a large number of Part II cases. In none of these cases has the Court imposed a penalty different from the recommended penalty.
80. In a recent cartel penalty decision in the Koppers Arch case, Williams J noted that the difficulty for the Court in setting penalties is that it is *"much less optimally informed than counsel and the parties of the detail of relevant matters"*²⁸.
81. Nor has the District Court differed from any agreed criminal sentencing recommendation for s103 offences committed during a Commission investigation. There has, however, been little judicial discussion in that forum of the process of accepting a sentencing recommendation.
82. Despite those statistics, the High Court has made it clear that it alone has jurisdiction over penalty-setting, and that it will not tolerate 'capture' of the process by counsel²⁹. The Court has expressed reservations about some penalty recommendations – in each case suggesting that the Court might have been more heavy-handed but for the Commission's recommendations:
- *Giltrap City Ltd v Commerce Commission*³⁰:
- "We agree with the [High Court] that, but for the constraining affect of the penalty imposed on the other participants [\$50,000], the case could well have been regarded as justifying, in Giltrap City's case, a higher penalty than \$150,000...."*

Without the constraining effect we consider a penalty in the vicinity of \$250,000 could not have been challenged.”

➤ *Commerce Commission v Koppers Arch (No 2):*

*“For conduct of the type undertaken by Mr Newell but [for] that period of 16 months, the recommendation seems, if anything, a little light... ”.*³¹

*“In all the circumstances, were it not for the mitigating features, the recommended penalties for Mr Greenacre’s price-fixing and exclusionary conduct respectively of \$65,000 and \$35,000 might seem understated but, given the significance of the mitigating factors, the Court is not prepared to decline the recommendations.”*³²

83. The Court referred to and was influenced by the Australian decision in *ACCC v FFE Building Services Ltd*³³, in which the Court stated that *“there is a danger in judges of this Court being overly influenced by the view as to penalty taken by the ACCC.”* The Court in that case resisted the notion that it would simply ‘rubber stamp’ a recommendation produced by the parties.
84. However, in the recent *Koppers Arch* cartel case Williams J noted that, despite these concerns, the recommendations of parties *“gain additional weight”* where the defendants are represented by skilled and experienced specialist counsel, *“who are unlikely to advise acceptance of the Commission’s proposals if they go well beyond what is justifiable”*³⁴.
85. To guard against the Court’s acceptance of an aberrant recommendation, Williams J asked that counsel in future advise the Court in detail of:
- The process that the parties followed in order to reach their recommendations, with reference to applicable precedent and applicable facts; and of
 - The recommended range of penalties together with their reasons for their recommendation as to the appropriate penalty within that range³⁵.
86. The Commission has followed that process in all subsequent recommendations.

G2 Relevance of admissions and co-operation to penalty

87. Two of the principal factors relevant to the penalty imposed by the High Court following a negotiated admission and penalty are:
- 87.1 The timing of the defendant’s admission (i.e. nearness to trial); and
- 87.2 The extent of co-operation provided by the defendant.
88. Many other factors are also relevant (e.g. financial resources, personal circumstances, implementation of a compliance regime, previous breaches etc).

89. As to the discount applicable to an early admission, the High Court has recognised the following discounts in recent cartel cases (by analogy to criminal sentencing principles)³⁶:
- 25-33% penalty discount applicable where a trial was about 2 months away³⁷; and
 - Around 50% penalty discount applicable where there were early admissions and extensive co-operation³⁸ (i.e. where admissions of liability were made at an early stage of the proceeding).
90. The Court's decision, and the parties' recommendation, as to the discount applicable to a particular admission is fact-specific and will vary according to all of the circumstances.
91. The High Court is clear that it wishes to receive not merely a recommended penalty, but an indication as to where that penalty sits within a range of acceptable penalties³⁹. In practice, it is not always the case that the range comes first during discussion, and that the parties then fix on the appropriate point within that range. Sometimes that is the case, in that it will be apparent to the parties that the proper penalty for the conduct 'sits somewhere between X and Y': any less than X would be too low, and any higher than Y would be too high. In some cases, however, the parties agree on a figure that represents the proper penalty and a recommended range is then formulated around that figure.
- In *Commerce Commission v Greenacre & Ors (Koppers Arch (No 2))* counsel for both parties advised the Court that, unusually, they were unable to recommend a penalty range but only a penalty figure. In that case, the personal circumstances of the defendant led to agreement that any sum above that recommended would be unsuitable, and that the recommended figure was 'the' figure appropriate to the conduct.
92. The setting of penalties is more an art than a science, as is the recommending of penalties to the Court⁴⁰. A measure of comfort can be taken from statements of principle like the following:

*"... it is not actually useful to investigate whether, unaided by the agreement of the parties, we would have arrived at the very figure they propose. The question is not that; it is simply whether... this particular penalty, proposed with the consent of the corporation involved and of the Commission, is one the Court should determine to be appropriate."*⁴¹

G3 Status of agreed statements of fact

93. The Court in *Koppers Arch* expressed some concern about setting a penalty, based on the parties' recommendations, at a stage when there had not been a trial and many facts were unknown. However, the Court accepted that it could do so because – and only because – the Commission had filed an agreed statement of facts admitted by the defendant. The Court carefully caveated that admissions relating to the conduct of other defendants cannot be taken as findings of fact against those defendants. The

facts ultimately determined at trial “*can be confidently expected to differ to a greater or lesser degree from those appearing in the agreed statement*”⁴².

H Commission’s expectations of co-operation

94. The Commission is mindful not to overstate the burdens of co-operation, lest we undermine the allure of the policies. But the Commission’s recent experiences with co-operation have clarified what it contemplates is encompassed by the term “co-operation”, and the ways in which carteliers and their counsel may not yet share the same understanding.
95. By way of summary:
 - Be proactive not reactive. The Commission is expecting positive assistance with its investigation/ proceeding.
 - Companies can consider making admissions of breach based on evidence shown to them by the Commission, even where the company’s own records or witnesses tell a different story. A company can admit wrongdoing based on information previously not known to it, but which is nonetheless persuasive. The parties can indicate to the Court why the company’s position changed, and this may in some cases explain a delay in admitting breach (e.g. where the company had sold the relevant business and presently had no knowledge of the conduct),
 - Consider what documents/ oral evidence can be provided that the Commission may not otherwise be able to access (e.g documents held overseas, access to persons resident overseas). Many parties begin discussions expecting the discussion to centre around money (particularly, the amount of penalty and costs that the Commission will seek). While this is an important feature of the discussion, for the Commission co-operation is as much about information as about the penalty (and the former influences the latter, of course).
 - If your client company has conducted an internal audit, provide the report and any related documents to the Commission on a confidential without prejudice basis. This can allow the Commission to easily catch-up to the state of knowledge of the company.
 - Provide indexed documents to the Commission as and when you discover them. Do not wait until you are completing a discovery list, and then include within that list relevant documents that the Commission has not seen. If relevant new documents are discovered, but were not earlier supplied, tip off the Commission and send copies in advance. It is hit-and-miss, inconvenient and time-consuming, for the Commission to stumble across new documents during their inspection of documents discovered by a party with whom it is co-operating.

- Promptly reply to calls and correspondence from the Commission.
- Encourage your client company to allow its executives to give high priority to co-operating with the Commission.
- Engage in candid, robust without-prejudice exchanges with the Commission, so that the Commission can make responsible decisions as to how to proceed. It is always a mistake to come to the Commission – as some parties do – offering nothing by way of information or concession, but wanting the Commission to lay its cards on the table.
- If facts have been agreed with the Commission, and/ or an agreed penalty recommendation, do not make submissions at the hearing that undermine the joint agreed presentation. Do not seek to present new facts (e.g. as to the defendant's impecuniosity) unless that is in evidence and the Commission had a chance to consider it during discussions.
- If you intend to make media comment about the case, consult with the Commission, forward draft media releases etc.
- *Continue* to co-operate after disposition of the proceeding against you (if there is one). As noted, many of the benefits of co-operation to the cartelier are front-loaded, but for the Commission the greatest benefit comes around the time of the substantive hearing. It is essential that parties who agree to co-operate continue to do so during the life of the case. A failure to do so is, of course, a breach of the terms of co-operation for which the agreement can be cancelled.

I Criminal proceedings

96. The *Koppers Arch* cartel investigation gave rise to three sets of s103 criminal prosecutions for acts and omissions that obstructed the Commission's investigation:

- Koppers Arch NZ and a director were convicted, respectively, of furnishing false or misleading information⁴³ and failing to comply with a statutory notice⁴⁴, and were fined \$25,000 and \$8,000 respectively. Documents relevant to the Commission's investigation were concealed under a house, and others were deleted from a computer hard-drive;
- A director of Osmose NZ was convicted of attempting to deceive or knowingly mislead the Commission by way of lying in a voluntary interview⁴⁵, and was fined \$7,000; and
- Osmose NZ was convicted of failing to comply with a notice issued by the Commission, in that the company failed to produce relevant documents – including shared price-lists – that were held in the General Manager's office. The company was fined \$13,000.

97. Each of these defendants, save for one individual, was also a defendant in the primary civil proceedings. Each of those defendants sought to compromise with the Commission the civil proceedings and simultaneously to ‘plea-bargain’ the criminal prosecution against them.
98. The Commission exercised care to conduct wholly separate discussions in respect of the civil and criminal pleas; it would be improper for the Commission to consider discontinuing civil claims in exchange for a guilty plea in a criminal case, and vice versa. Where both kinds of enforcement action are on foot at the same time, discussions as to settlement of them proceed in parallel.

J Future Developments

99. While the leniency and co-operation policies are already working to the Commission’s satisfaction, nonetheless the Commission will keep them under review and has an open mind as to ways in which the policies might be improved.

JI ‘Staggered’ co-operation discounts

100. It is important that the co-operation policy is workable at the penalty-setting phase, as well as during information gathering. Some overseas jurisdictions – the United States, in particular – have structured discounts and penalties for those who co-operate and those who do not.
101. In New Zealand, the most recent Part II penalty judgments have all given the defendants a 50% discount for early admissions and co-operation, notwithstanding that the circumstances and extent/ value of co-operation has varied. The discounts have in each case been as recommended by the Commission, following the decision of the Court of Appeal in *Giltrap*.
102. Notwithstanding those penalty judgments – which have commendable clarity and send a strong message - there are advantages to the more nuanced approach to penalty exhibited by the US Department of Justice, for example. Features of the DOJ’s programme that the Commission may in future consider include⁴⁶:
- Co-operation discounts that reflect the overall value of the co-operation provided. Second-in co-operation is predictably ‘worth’ less than first-in; defendants who have little evidence to give or documents to supply receive a lower discount.
 - ‘Amnesty Plus’ credits in which the co-operating company receives additional discounts for reporting violations in other markets in which it operates.
 - A ‘Penalty plus’ programme in which a company that seeks co-operation, and does not report its offending in a separate market, is penalized (as to discounting) when the offending in the second market is uncovered.
103. The old adage that ‘timing is everything’ is very applicable in this setting. It is not enough to pledge to co-operate in order to obtain the benefits discussed in this paper.

To obtain truly significant penalty discounts, for example, co-operation must come when it can substantially assist the Commission's investigation, and it is valued more highly when it does not come as a result of a defendant being boxed-in by the earlier admissions of others. These factors are recognized presently in settlement discussions, but the Commission will continue to look at ways in which these differences can be clearly reflected in the judgments.

J2 Paperless process

104. Prospective leniency applicants, especially overseas applicants, not infrequently ask the Commission whether it has a 'paperless process'. Currently it does not. However, the Commission is attuned to overseas trends towards the inclusion of this option within leniency policies.

- In August 2005 the Australian Competition & Consumer Commission launched a new Immunity Policy for Cartel Conduct that incorporated, for the first time, a practice of oral or 'paperless' immunity applications.

105. The concern of the applicant is invariably with potential third-party claims, in which immunity-related documents might be discoverable and admissible against the company.

106. In the Commission's recent experience this concern has been able to be managed by applying the existing policies. While the short-form leniency application is in writing, and the subsequent grant etc, the Commission has agreed not to send the applicant company incriminating documents (draft witness statements and the like). Generally, applicants are content for the Commission to make and keep records as long as they are not sent to the company (thus coming within its control and becoming discoverable by it).

J3 Marker system

107. Some overseas jurisdictions make use of a 'marker' system, under which an applicant can reserve a place in the leniency queue. This enables them to clearly fix in time their approach to the regulator. The regulator can then extend leniency to them if the prior leniency applicant is unable or unwilling to fulfill the requirements of that policy.

108. The Commission will consider adoption of a marker system as a useful component of its leniency programme.

CONDITIONAL GRANT OF IMMUNITY FOR A COMPANY (Conditions: extracted)

Clause 2

The parties agree that immunity from Commission initiated proceedings under Part II of the Act is conditional upon the satisfaction of all the conditions set out below. Such conditions represent an ongoing obligation on *[Name]* and any related entity which will not cease until the Commission has concluded its investigation of the cartel and any Court proceedings initiated by the Commission in respect of that cartel are complete.

Clause 3 (re a Company)

[Name] and any related entity will:

- provide the Commission with access to all the Information available to it regarding the existence, activities, operation and membership of the cartel;
- maintain continuous, complete and expeditious co-operation with the Commission throughout the Commission's investigation and any ensuing proceedings initiated by the Commission;
- provide promptly and without witness summons all further Information, requested by the Commission;
- use its best efforts to secure the complete and truthful co-operation of its current and former directors, officers or employees;
- encourage and facilitate its current and former directors, officers or employees to voluntarily provide the Commission with any Information, and to appear for interviews and to give evidence in Court as required by the Commission;
- use its best efforts to ensure that each of its related entities provides all assistance reasonably requested by the Commission; and
- confirm that it has now ceased its involvement in the cartel, or otherwise has acted or will act as directed by the Commission.

Clause 4

If the Commission at any time determines that:

- *[Name]* or any related entity has failed to meet any of the conditions of this agreement; or
- a specifically authorised enactment or provision of the Act exempts *[Name]* from

the application of Part II of the Act; or

- [Name]'s conduct has not affected a market in New Zealand in breach of Part II of the Act;

the Commission will not be bound by its grant of immunity to [Name] or any related entity from Commission initiated proceedings.

Clause 5

Subject to [Name]'s full, continuing and complete co-operation as required by clause 3, the Commission agrees not to bring any proceedings under the Act against [Name] or any related entity for any act it may have committed in connection with the cartel prior to the date of this agreement that may have infringed Part II of that Act.

Clause 6 (re Executives, current or former)

Any current or former director, officer or employee of [Name] seeking immunity will:

- provide the Commission with access to all Information available to them regarding the existence, activities, operation and membership of the cartel;
- maintain continuous, complete and expeditious co-operation with the Commission throughout the Commission's investigation and any ensuing proceedings initiated by the Commission;
- provide the Commission with access to all Information available to them and relevant to the cartel;
- make relevant personal documents and records available to the Commission;
- make themselves available for interviews and respond fully and truthfully to all inquiries of the Commission in relation to the cartel; and
- appear as a witness in any proceeding relating to the cartel, if required to do so by the Commission.

(end of extract)

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- ¹ I acknowledge having derived considerable assistance, especially with the principles underlying negotiated settlements, from Karen Yeung's *Securing Compliance: A Principled Approach* (2004) Hart Publishing. Part II Chapter 5 ("Negotiated Penalty Settlements") was particularly insightful. This paper is based on a shorter paper by the same author presented by the Commerce Commission Chair at the 2006 OECD Roundtable; that paper ("Co-operating with the Commerce Commission") is available online at <http://www.comcom.govt.nz/Publications/internationalpublications.aspx>.
- ² Yeung at 106 f/n 4.
- ³ See Annual Report 2004-2005 at 5, Annual Report 2005-2006 at 9, 14, available online at <http://www.comcom.govt.nz>.
- ⁴ *Commerce Commission v KANZ & Parish* (Unreported, District Court Manakau, Judge B A Morris, 3/6/2005, CRI 2004-092-13040 & CRN 04092506119-121); *Commerce Commission v Osmose New Zealand* (Unreported, District Court Auckland, Judge Bouchier, 23/8/2006, CRI 2006-004-8264); *Commerce Commission v Greenacre* (Unreported, District Court Auckland, Judge Bouchier, 23/8/2006, CRI 2004-004-013423).
- ⁵ This has occurred in the Fair Trading Act 1986 context, see for example *Commerce Commission v Qantas Airways* (Unreported, DC Auckland, 10 October 2006, Judge Bouchier, CRI 2004-004-020305) at [46] to [48].
- ⁶ Yeung at 110-111 treats separately the incentives for the guilty applicant as opposed to the innocent applicant. She notes that the perceived benefits to applicants depend upon their guilt or innocence. In particular, the innocent applicant exchanges the risk of being found guilty and receiving a heavier penalty for the benefit of the more lenient penalty that accompanies an admission.
- ⁷ Yeung at 143, although note that Yeung acknowledges that a criminal defendant (whose liberty may be at stake) will be more susceptible to such incentives than a civil defendant, where the difference will sound in dollars.
- ⁸ K Newcomb "Early Cooperation May Limit Cartel Penalties" 18-19 *Counsel to Counsel* July 2005.
- ⁹ T O Barnett "Seven Steps to Better Cartel Enforcement 2 June 2006 Presentation to the 11th Annual Competition law & Policy Workshop (available online at <http://www.usdoj.gov/atr/public/speeches/216453.htm>).
- ¹⁰ M Sumpter "Detecting Cartel Behaviour" [2005] *NZLJ* 380 at 381.
- ¹¹ Miriam Dean QC and Matt Sumpter recommend that this problem could be largely resolved by automatically extending corporate immunity to individual executives; see "The Commercial Regulators' Armoury", for Legal Research Foundation Conference *The Modern Reality of Dealing with Commercial Regulators* 29 September 2006 at 2.59.
- ¹² See the Commerce Commission's Statement of Intent 2006-2009, available online at <http://www.comcom.govt.nz/Publications/ContentFiles/Documents/SOI%202006-07.pdf>.
- ¹³ The policy is available online at <http://www.comcom.govt.nz> together with PDFs of the Application Letter, Conditional Grant of Immunity Letter, Conditional Grant of Immunity Agreement and Protocol for Providing Information to the Commission.
- ¹⁴ See template document "Conditional Grant of Immunity for a Company" at 4.
- ¹⁵ Dean & Sumpter at 2.54.
- ¹⁶ The policy covers the Commerce Act 1986, Credit Contracts and Consumer Finance Act 2003, Dairy Industry Restructuring Act 2001, Electricity Industry Reform Act 1998 and Fair Trading Act 1986.

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- ¹⁷ See material available online at <http://www.comcom.govt.nz/TheCommission/LeniencyPolicy/leniencypolicynew.aspx> .
- ¹⁸ See Yeung at 116.
- ¹⁹ As to which see T Arnold QC “Comment on “Role of Regulator” by Professor Fels”, for Legal Research Foundation Conference *The Modern Reality of Dealing with Commercial Regulators* 2006 at 2.
- ²⁰ Yeung at 139.
- ²¹ D Bates QC, “Dancing with the Regulators” speech for Legal Research Foundation Conference *The Modern Reality of Dealing with Commercial Regulators* 29 September 2006.
- ²² The Commission has entered into co-operation agreements where no admissions were obtained. The negotiation process, in which the quality of the Commission’s evidence is tested, may disclose that there is not sufficient evidence to proceed but that terms of assistance by that defendant can be agreed.
- ²³ This obligation is expressed broadly (“*any proceedings*”) in order that the party’s evidence can be used in all cartel-related proceedings, including any criminal prosecution arising out of the investigation (as where a person of interest provides misleading information to the Commission, or fails to supply documents within their possession or control).
- ²⁴ The Leniency Policy likewise states that the Commission “may” in its discretion extend immunity to current or former directors, officers or employees.
- ²⁵ Nevertheless, the corporate co-operation agreement requires it to use its best endeavours to obtain the co-operation of directors, employees and contractors, and to make such persons available for interviews and discussions. The company is also obliged to encourage such persons to appear as witnesses, if required, and to provide full, frank and truthful evidence as to all matters within their knowledge. The effect is that where such persons are also defendants, separate co-operation agreements with them will be required; the company cannot compel their co-operation with the Commission, which is not assured unless the individuals separately agree to co-operate.
- ²⁶ *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd & Ors* (Unreported, HC Auckland, 4 October 2006, Williams J, CIV 2005-404-2080) at [45], [77] (*Koppers Arch No 2*)
- ²⁷ *Commerce Commission v Ellingham & Ors* (Unreported, HC Wellington, 27/10/2005, Gendall J, CIV 2002-485-720) at [5], see also *Commerce Commission v New Zealand Milk Corporation Ltd* [1994] 2 NZLR 730 at 737:
- “The cooperation of the defendants in acknowledging fault and bringing the matter to an early conclusion deserves full recognition and encouragement... But for that factor significantly higher penalties would have been appropriate.”*
- ²⁸ *Koppers Arch (No 2)* at [35].
- ²⁹ On this subject see C Noonan “Of Arsenic, Antitrust and Agreed Penalties for Price Fixing” 12 *NZBLQ* 253.
- ³⁰ *Giltrap v Commerce Commission* [2001] 1 NZLR 608 (CA) at 624.
- ³¹ At [60].
- ³² At [80].
- ³³ (2003) ATPR 47,798 at 47,805.
- ³⁴ *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd & Ors* (2006) 11 TCLR 581 at 588. (*Koppers Arch No 1*)
- ³⁵ *Koppers Arch (No 1)* at 588.

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- ³⁶ *Koppers Arch (No 1)* at 589 per Williams J: “Although, of course, Commerce Act proceedings alleging anti-competitive behaviour substantially differ from criminal proceedings, it is the Court’s view that a rough-hewn comparability exists in the principles to be applied.”
- ³⁷ *Ellingham* at [14].
- ³⁸ *Giltrap v Commerce Commission* [2004] 1 NZLR 608 (CA); *Koppers Arch No 1* at 588-589; *Koppers Arch (No 2)* at [35].
- ³⁹ *Koppers Arch (No 1)* at 588.
- ⁴⁰ Recently described by Williams J as “ a highly imprecise exercise”: *Koppers Arch (No 2)* at [41].
- ⁴¹ *ACCC v NW Frozen Foods PTY Ltd* (1996) 71 FCR 285, 298.
- ⁴² *Koppers Arch (No 2)* at [50]-[55].
- ⁴³ S103(1)(b) Commerce Act 1986:
 “**103(1) [Duty of person supplying information]** No person shall –
 (b) In purported compliance with [a s98] notice, furnish information, or produce a document, or give evidence, knowing it to be false or misleading...”
- ⁴⁴ S103(1)(a) Commerce Act 1986:
 “**103(1) [Duty of person supplying information]** No person shall –
 (a) Without reasonable excuse, refuse or fail to comply with a notice under... section 98 of this Act...”
- ⁴⁵ S103(2) Commerce Act 1986:
 “**103(2) [No attempts at deceit, etc]** No person shall attempt to deceive or knowingly mislead the Commission in relation to any matter before it.”
- ⁴⁶ See Scott D Hammond “Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations”, 29 March 2006, address to 54th Annual American Bar Association Section of Antitrust Law Spring Meeting.