



International
Competition
Network

**ANTI-CARTEL
ENFORCEMENT
TEMPLATE**

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

**New Zealand
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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 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 which suffer from cartel activity to get information about the possibilities of lodging a complaint 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.]¹

1. Information on the law relating to cartels

A. Law(s) covering cartels: [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 Act"). Cartels are not mentioned specifically, but section 27 of the Act prohibits contracts, arrangements or understandings that have the purpose, or effect or likely effect of substantially lessening competition in a market.

Section 30 of the Act provides that contracts, arrangements or understandings that have the purpose or effect, or likely effect, of fixing, controlling or maintaining prices are deemed to substantially lessen competition in a market.

A summary (in English) of the legislation enforced by the Commerce Commission (the Commission) is available on www.comcom.govt.nz/TheLegislation/Overview.aspx

The Act is available, in English only, at www.legislation.govt.nz

¹ 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>B. Implementing regulation(s) (if any): [name and reference number, availability (homepage address) and indication of the languages in which these materials are available]</p>	<p>No regulations were required for the implementation of the Act.</p>
<p>C. Interpretative guideline(s) (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> <p>"Leniency Policy", "Co-operation Policy" and "Cease and Desist Guidelines" (Nov 2004), "Enforcement Criteria" (Dec 2003) and "Anti-competitive practices under Part 2 of the Commerce Act".</p> <p>These publications are available at: http://www.comcom.govt.nz/BusinessCompetition/Anti-competitivePractices/Overview.aspx</p> <p>All of these publications are in English.</p>
<p>D. Other relevant materials (if any): [availability (homepage address) and indication of the languages in which these materials are available]</p>	

2. Scope and nature of prohibition on cartels

<p>A. Does your law or case law define the term "cartel"? [Please quote.]</p> <p>If not, please indicate the term you use instead. [Please quote.]</p>	<p>The Act does not define or mention the term "cartel". The Act only provides for the prohibition of "contracts, arrangements or understandings" that have the purpose or effect or likely effect, of substantially lessening competition in a market (section 27).</p> <p>Provisions that have the purpose or effect or likely effect, of (or providing for) fixing, controlling or maintaining prices are deemed to substantially lessen competition in a market (section 30).</p>
<p>B. Does your legislation or case law distinguish between very serious cartel behaviour ("hardcore cartels" – e.g.: price fixing, market sharing, bid rigging or</p>	<p>The Act does not differentiate between very serious cartel behaviour and other types of collusive behaviour. However, fixing, controlling or maintaining prices is a per se offence in terms of section 30. Other types of conduct are prohibited only if their purpose or effect or likely effect, is to substantially lessen competition in a market.</p>

<p>production or sales quotas²) and other types of “cartels”? [Please describe how this differentiation is made and identify the most egregious types of conduct.]</p>	
<p>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 ban on hardcore cartels.]</p>	<p>Price fixing is exempt if it is pursuant to a joint venture arrangement (section 31). A small number of exemptions to the prohibition of restrictive trade practices apply. For example, conduct is exempt if it is specifically authorised by another statute, if it constitutes an arrangement between interconnected bodies, or if it relates exclusively to international shipping (sections 43 and 44).</p>
<p>D. Is participation in a hardcore cartel illegal <i>per se</i>? [If the situation differs for civil, administrative and criminal liability, please clarify this.]</p>	<p>Fixing, maintaining or controlling prices is illegal <i>per se</i> (section 30).</p>
<p>E. Is participation in a hardcore cartel a civil or administrative or criminal offence, or a combination of these?</p>	<p>Civil offence.</p>

3. Investigating institution(s)

<p>A. Name of the agency, which investigates cartels: [if there is more than one agency, please describe the allocation of responsibilities]</p>	<p>The Commerce Commission</p>
<p>B. Contact details of the agency: [address, telephone and fax including the country code, email, website address and languages available on the website]</p>	<p>PO Box 2351 Wellington New Zealand Ph: (+64-4) 924 3600 Fax: (+64-4) 924 3700 website: www.comcom.govt.nz</p>

² 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.

	English is the only language available on the website.
C. Information point for potential complainants:	www.comcom.govt.nz
D. Contact point where complaints can be lodged:	<p>Potential complainants can:</p> <p>(a) telephone the Commission's Contact Centre during office hours (8.30 - 1700 hours) on 0800 94 3600 (domestic) or +64 4 924 3600 (international);</p> <p>(b) write to the Commission at Contact Centre, PO Box 2351, Wellington;</p> <p>(c) complete an online form at www.comcom.govt.nz; or</p> <p>(d) send an email to contact@comcom.govt.nz</p>
E. Are there other authorities which may assist the investigating agency? If yes, please name the authorities and the type of assistance they provide.	In some cases the New Zealand Police may assist the Commission in relation to provisions which have criminal penalties, such as misleading the Commission (section 103).

4. Decision-making institution(s)³ [to be filled in only if this is different from the investigating agency]

A. Name of the agency making decisions in cartel cases: [if there is more than one agency, please describe the allocation of responsibilities.]	<p>Cartels are investigated by the Commission, but the Commission has no power to apply sanctions.</p> <p>Decisions on whether the Act has been breached by the operation of a cartel, and on whether sanctions will be imposed, may be made only by the High Court of New Zealand.</p> <p>There is no specialised competition court.</p>
B. Contact details of the agency: [address, telephone and fax including the country code, email, website address and languages available on the website]	<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 on www.justice.govt.nz/courts/high_court.html</p>
C. Contact point for questions and consultations:	Questions on the investigation of cartels could be addressed to the Commission, contact details for which are given elsewhere in this template.
D. Describe the role of the	Alleged cartels are investigated by the Commission which has a

³ Meaning: institution taking a decision on the merits of the case (e.g. prohibition decision, imposition of fine, etc.)

<p>investigating agency in the process leading to the sanctioning of the cartel conduct.</p>	<p>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 High Court. The Commission has discretion to decide which cases will result in enforcement action.</p> <p>Only the Commission may seek pecuniary penalties, or orders excluding certain persons from the management of a body corporate, as sanctions for restrictive trade practices.</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 persons affected.</p>
<p>E. What is the role of the investigating agency if cartel cases belong under criminal proceedings?</p>	<p>Not applicable (i.e. cartels are civil breaches).</p>

5. Handling complaints and initiation of proceedings

<p>A. Basis for initiating investigations in cartel cases: [complaint, ex officio, leniency application, notification, etc.]</p>	<p>Cartel investigations may be initiated as a consequence of a leniency application, following a complaint or as a proactive investigation by the Commission.</p>
<p>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).]</p>	<p>Complaints are not required to be in a specific form.</p>
<p>C. Legal requirements for lodging a complaint against a cartel: [e.g. is legitimate interest required, or is standing to make a complaint limited to certain categories of complainant?]</p>	<p>There are no legal requirements for lodging a complaint against a cartel.</p>
<p>D. Is the investigating agency obliged to take</p>	<p>The Commission has a discretion as to which complaints it</p>

<p>action on each complaint that it receives or does it have discretion in this respect? [Please elaborate.]</p>	<p>investigates further. In making this decision, the Commission relies on its enforcement criteria and considers the extent of detriment, the seriousness of the conduct and the public interest.</p>
<p>E. If the agency intends not to pursue a complaint, is it required to adopt a decision addressed to the complainant explaining its reasons?</p>	<p>The Commission 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.</p>
<p>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?</p>	<p>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 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.</p>

6. Leniency policy⁴

<p>A. What is the official name of your leniency policy (if any)? [Please indicate its public availability.]</p>	<p>Commerce Commission Leniency Policy. The policy is available at www.comcom.govt.nz/TheCommission/LeniencyPolicy/leniencypolicynew.aspx</p> <p>The Commission has two relevant policies: the Leniency Policy, which provides the possibility of immunity, and the Co-operation Policy which provides for the possibility of a reduced level of enforcement action by the Commission.</p> <p>The Commission is currently reviewing its Leniency Policy and its Co-operation Policy, and is formulating a framework for assessing the level of penalties that could be recommended to the court. It is envisaged that a single new Leniency Policy would deal with these three issues.</p> <p>Details of the changes to the Leniency Policy will be provided for consultation with interested parties in New Zealand in 2009.</p>
<p>B. Does your jurisdiction offer full leniency as well as partial leniency (i.e. reduction in the sanction / fine), depending on the case?</p>	<p>The Commerce Commission offers immunity only to the first applicant in relation to that cartel.</p> <p>Subsequent parties may apply to enter into a co-operation agreement. The Commission may offer a lower level of enforcement action, or in the case of individuals, no action at all, to subsequent parties through its Co-operation Policy.</p> <p>The Co-operation Policy is available at http://www.comcom.govt.nz/TheCommission/Co-operationPolicy/Overview.aspx</p>

⁴ 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>C. Who is eligible for full leniency [only for the first one to come forward or for more participants in the cartel]?</p>	<p>Only the first party to apply for leniency is eligible for immunity. Subsequent parties may apply to enter into a co-operation agreement; decisions on such requests are at the Commission's discretion.</p>
<p>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 ?</p> <p>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 ?</p>	<p>Immunity from Commission initiated proceedings will not be granted where the Commission is currently investigating conduct relating to the leniency application. The date on which applicants come forward with information to seek immunity is therefore highly relevant.</p> <p>However applicants for benefits under the Co-operation Policy can be recognised after an investigation has commenced.</p>
<p>E. Who can be a beneficiary of the leniency program (individual / businesses) ?</p>	<p>Both individuals and companies can benefit from the Leniency Policy.</p>

<p>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.]</p>	<p>The conditions for granting full leniency (i.e. immunity) are as follows:</p> <ul style="list-style-type: none"> - the party is the first to report the cartel; - full co-operation, which includes providing ongoing access to all information available (see Leniency Policy for an explanation of what the Commission considers "full co-operation" to mean); - cease involvement with the cartel or otherwise act as directed by the Commission; - the Commission is not currently investigating the conduct; and - the party must maintain confidentiality (see Leniency Policy for full details).
<p>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?]</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 co-operation. This is covered by the Commission's Co-operation Policy, which applies to all legislation enforced by the Commission.</p> <p>Under the Co-operation Policy, the Commission is more likely to consider requests for a lower level of enforcement action where individuals or businesses:</p> <ul style="list-style-type: none"> - fully inform the Commission about the behaviour that may have contravened any of the relevant Acts; - fully co-operate with the Commission during any subsequent investigation (or investigations), including by the full, frank and truthful disclosure of their own behaviour. The requirement also includes the provision of all relevant information to the Commission, including written documents, and in some circumstances, giving evidence in Court; - are prepared to pay compensation to injured parties where the Commission considers that this is appropriate; - upon discovering that their behaviour may be in breach of the Act, stop that behaviour immediately; and - are willing to put in place an effective compliance programme.
<p>H. Obligations for the beneficiary after the leniency application has been accepted: [e.g. ongoing, full cooperation with the investigating agency during the</p>	<p>For both an individual and a company, the beneficiary must fully co-operate. This requires that the beneficiary must:</p> <ul style="list-style-type: none"> - provide the Commission with access to all information available to that person regarding the existence, activities, operation and membership of the cartel; - maintain full and continuing co-operation 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; - confirm that the person has now ceased its involvement in the cartel, or otherwise has acted or will act as directed by the Commission; and - fully and truthfully co-operate with the Commission on a continuing basis. <p>In addition, the individual or company must not disclose to, or communicate with, any</p>

<p>proceedings, etc.]</p>	<p>third party (except as required by law, or in the case of their communications to other competition authorities, or otherwise with the prior written consent of the Commission):</p> <ul style="list-style-type: none"> - the person's leniency application; - any request by the person for clarification regarding their leniency application; - any grant of conditional immunity from Commission-initiated proceedings to the person; and - any information provided by that person to the Commission for the purposes of, or in connection with, the leniency application information created by the Commission by reason of, or as a consequence of, the person's leniency application. <p>And, in the case of a company, the applicant also must:</p> <ul style="list-style-type: none"> - use the company's best efforts to secure the complete and truthful co-operation of current and former directors, officers or employees; - encourage and facilitate the company's 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; and - use the company's best efforts to ensure that each of its related entities provides all assistance reasonably requested by the Commission; <p>Or, in the case of an individual, the person also must:</p> <ul style="list-style-type: none"> - 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.
<p>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.]</p>	<p>Applicants must apply in writing to the Commission's Chief Executive Officer. A standard form application letter is available at http://www.comcom.govt.nz/TheCommission/LeniencyPolicy/leniencypolicynew.aspx</p>
<p>J. Are there distinct procedural steps within the leniency program? [e.g.: provisional guarantee of leniency –</p>	<p>The Commission's procedure for leniency applications is as follows:</p> <ul style="list-style-type: none"> - enquiry (the Commission will deal with inquiries on a "hypothetical" or "off the record" basis); - formal application; - conditional grant of immunity (the applicant may be required to sign a Conditional Grant of Immunity agreement); and - final immunity (the Commission will advise the holder of conditional immunity in writing when the investigation and any proceedings are concluded).

<p>PGL – and further steps leading to a final leniency agreement / decision)?]</p>	
<p>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?</p>	<p>Certainty on eligibility is given following a formal leniency application. The person applying for leniency will be informed as soon as possible whether they are first to apply. As noted in 6J above, the Commission may require the person to sign a Conditional Grant of Immunity agreement confirming the leniency conditions.</p>
<p>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 ?</p>	<p>The Commission has a discretion in terms of who it decides to prosecute. The provision of leniency is an exercise of that discretion. Leniency is granted on the basis of an agreement and is not laid down in a formal decision. The grant of leniency is automatic if the conditions in the leniency policy are met.</p> <p>A Commission decision to take a lower level of enforcement action under the Co-operation Policy does not limit the right of third parties to institute actions for damages under section 82 of the Act, or exemplary damages under Article 82A.</p>
<p>M. Does your legislation have a marker system? If yes, please describe it.</p>	<p>No</p>
<p>N. Does the system provide for</p>	<p>No</p>

<p>any extra credit⁵ for disclosing additional violations? [e.g. a hardcore cartel in another market]</p>	
<p>O. Is the agency required to keep the identity of the beneficiary confidential? If yes, please elaborate.</p>	<p>The Commission will endeavour, where possible, to keep confidential the identity of successful and unsuccessful applicants for leniency.</p>
<p>P. Is there a possibility of appealing an agency's decision rejecting a leniency application?</p>	<p>There is no formal prescribed review process, but parties may seek a judicial review of the decision.</p>
<p>Q. Contact point where a leniency application can be lodged [telephone and fax including the country code, plus out of hours contacts (if any)]:</p>	<p>Applications for leniency must be made to the Commission's Chief Executive Officer, Mr Nicholas Hill.</p> <p>Direct Dial: +64 4 9243 620 Fax: +64 4 924 3700 Mobile: +64 021 817948 Email: nicholas.hill@comcom.govt.nz</p>
<p>R. Does the policy address the possibility of leniency being revoked? If yes, describe the circumstances</p>	<p>Yes, immunity may be revoked if the Commission at any time determines that a person granted conditional leniency has failed to meet the requirement for full co-operation. In such a case, the Commission may use information provided to it to initiate proceedings against that person.</p>

⁵ 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>es where revocation would occur. Can an appeal be made against a decision to revoke leniency?</p>	
<p>S. Does your policy allow for “affirmative leniency”, that is the possibility of the agency approaching potential leniency applicants?</p>	<p>The policy does not specifically deal with "affirmative leniency". However, it is open for the Commission to grant leniency in these circumstances. If an investigation has commenced, automatic leniency will not be granted, but the Commission may agree to enter into a co-operation agreement.</p>

7. Investigative powers of the enforcing institution(s)⁶

<p>A. Briefly describe the investigative measures available to the enforcing agency such as requests for information, searches/raids⁷, electronic or computer searches, expert opinion, etc. and indicate whether such measures requires a court warrant.</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 requiring parties to provide the Commission with information and documents by a specified date (section 98(a) and (b) .</p> <p>The Commission can also require persons to attend a formal interview (section 98(c).</p> <p>The Commission can conduct searches in terms of search warrants which may be issued only by a District Court Judge or certain other judicial officers (section 98A).</p> <p>It is open to the Commission to choose to seek expert opinion.</p>
<p>B. Can private locations, such as residences, automobiles, briefcases and persons be searched, raided or inspected? Does this require authorisation by a court?</p>	<p>Private locations can be searched, viz residences, automobiles and briefcases. Individuals cannot be searched.</p> <p>Search warrants require authorisation from the District Court.</p>

⁶ “Enforcing institutions” may mean either the investigating or the decision-making institution or both.

⁷ “Searches/raids” means all types of search, raid or inspection measures.

<p>C. 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)?</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"> • as evidence in a prosecution for an offence (or other Court action) under the same Act which was not contemplated by the warrant, or is unrelated to the warrant; • 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); • 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.
<p>D. Have there been significant legal challenges to your use of investigative measures authorized by the courts? If yes, please briefly describe them.</p>	<p>There has been one significant challenge to the Commission's search warrant powers (<i>Tranz Rail Ltd v District Court at Wellington</i> (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 <i>Tranz Rail</i> case.</p>

8. Procedural rights of businesses / individuals

<p>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</p>	<p>The Court ultimately determines whether a breach of the Act has occurred and, if so, what penalty should be imposed.</p> <p>Given that the cartel offence is civil, the usual rights available to civil defendants apply.</p>
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<p>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.]</p>	
<p>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.]</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 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 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>

9. Limitation periods and deadlines

<p>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 in the merits of the case must be made?</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 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. What is the deadline, statutory or otherwise (if any) for the completion of an investigation or to make a decision in the merits?</p>	<p>Given the limitation period for commencing proceedings outlined in 9A above, the Commission must complete its investigation in time to allow for instituting legal proceedings, where it decides to take this course.</p>
<p>C. What are the deadlines, statutory or otherwise (if any) to challenge the</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</p>

<p>commencement or completion of an investigation or a decision regarding sanctions?</p>	<p>have a discretion to refuse relief where there has been an unjustified 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 against the decision. There is no specific time limit for lodging appeals against such sanctions, but, as with judicial review applications, the court has discretion to decide if there has been unjustified delay in lodging the appeal.</p>
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10. Types of decisions

<p>A. Please list which types of decisions 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.]</p>	<p>The Commission has a number of enforcement options. It can:</p> <ul style="list-style-type: none"> - warn the parties that their conduct is likely to be in breach of the Act; - enter into a settlement with the parties requiring them to cease the conduct and comply with other appropriate terms; - commence proceedings against the parties under the Commerce Act; and - issue cease and desist orders (sections 74A-74D of the Act). <p>If the Commission commences proceedings under the 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). The Court has power 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. Please list which types of decisions on the merits of the case can be made in hardcore cartel cases under the laws listed under Section 1 (if different from those listed under 10/A).</p>	<p>Same as above.</p>
<p>C. Can interim measures⁸ be ordered during the proceedings in cartel cases? (if different measures for hardcore cartels please describe both⁹.) Which institution (the investigatory / the decision-making one) is</p>	<p>The Commission may issue cease and desist orders (section 74A).</p> <p>The Commission may also apply to the Court for an injunction restraining a person from engaging in contravening conduct (section 81).</p>

⁸ 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].

⁹ Only for agencies which answered “yes” to question 2.C. above

authorised to take such decisions? What are the conditions for taking such a decision?	
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11. Sanctions for procedural breaches (non-compliance with procedural obligations)¹⁰

A. Grounds for the imposition of procedural sanctions / fines:	<p>In general, it is an offence 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 (section 103(1) without reasonable excuse).</p> <p>In relation to search warrants it is an offence to resist, obstruct or delay a Commission employee (section 103(1)).</p> <p>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>
B. Type and nature of the sanction (civil, administrative, criminal, combined):	Criminal.
C. On whom can procedural sanctions be imposed?	Both individuals and companies.
D. Criteria for determining the sanction / fine:	Determined by the Court.
E. Are there maximum and / or minimum sanctions / fines?	<p>Maximum fines are NZ\$10,000 for an individual and NZ\$30,000 for a company (section 103(4)).</p> <p>The section does not provide minimum penalties.</p>

12. Sanctions on the merits of the case

A. Type and nature of sanctions in cartel cases (civil, administrative,	Civil.
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¹⁰ In some jurisdictions non-compliance with procedural obligations (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.) can be sanctioned.

<p>criminal, combined):</p> <p>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?]</p>	<p>Pecuniary penalties can be imposed on companies and on individuals. Individuals can also be fined as employees.</p>
<p>B. Criteria for determining the sanction / fine: [e.g.: gravity, duration of the violation, benefit gained from the violation]</p>	<p>Determined by the Courts.</p>
<p>C. Are there maximum and / or minimum sanctions / fines?</p>	<p>Section 80(2B) of the Act provides that the Courts may impose the following maximum pecuniary penalties:</p> <ul style="list-style-type: none"> - in the case of an individual, NZ\$500,000; and - in the case of a company, the greater of NZ\$10,000,000; or either: <ul style="list-style-type: none"> a. three times the value of any commercial gain resulting from the contravention; or b. 10 percent of the turnover of the company. <p>No minimum penalties are provided.</p> <p>The Court may also order a person to pay exemplary damages (section 82A).</p>
<p>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]</p>	<p>While the Commission 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: (a) whether a pecuniary penalty has been imposed for a contravention involving the conduct concerned in the claim for exemplary damages; and (b) if so, the amount of the pecuniary penalty (section 82A).</p> <p>In the past, Courts have considered the nature and gravity of the breach, the particular defendant's situation, financial resources, background and industry (Commerce Commission v Ophthalmological Society of New Zealand (2004) 11 TCLR 226).</p> <p>As noted in 6A above, the Commission intends to include in its new Leniency Policy a section showing how it would calculate the pecuniary penalties that it would recommend to the Court.</p>
<p>E. Does a challenge to a decision imposing a sanction / fine have an automatic suspensory effect on that sanction /</p>	<p>No.</p>

fine? If it is necessary to apply for suspension, what are the criteria?	
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13. Possibilities of appeal

A. Does your law provide for an appeal from 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?	<p>Sanctions for cartel offences (pecuniary penalties, the exclusion of persons from the management of a body corporate, injunctions and damages) may be imposed only by the Court. 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. Before which court or agency should such a challenge be made? [if the answer to question 13/A is affirmative]	N/A