


Communique



Commerce Commission Policies on Leniency, Co-operation and Cease and Desist Orders

The Commerce Commission is focused on maximising the effectiveness of its enforcement activity in relation to anti-competitive, false and misleading behaviour.

The Commission has several tools available to increase its enforcement impact. In addition to its existing enforcement criteria, the Commission has adopted a new Leniency Policy to tackle cartels and has defined its processes for dealing with applications for cease and desist orders. The Commission has also revisited its previous general Leniency Policy and recast it to become a Co-operation Policy, to complement its new approach to leniency.

The publication of these policies is intended to provide valuable certainty to businesses that deal with the Commission.

This publication contains the Commission's policies relating to leniency, co-operation, and cease and desist orders. Further information and supporting material are available on the Commission's website, www.comcom.govt.nz

Leniency Policy

The Leniency Policy is aimed at breaking cartel behaviour. Cartels involve secretive conduct such as collusive behaviour involving price fixing and merchant sharing. These arrangements are very difficult to detect. Other overseas agencies have found that providing incentives to cartel members to break the cartel is critical to enforcement.

The Commissions' ability to enforce the Commerce Act 1986 is often dependent on the Commission obtaining evidence from individuals and businesses. It is well recognised, that the possibility of being treated with leniency motivates those who have participated in anti-competitive cartel conduct to co-operate. The effectiveness of a clear leniency policy is proven through overseas experience which has shown that leniency policies play a critical role in cracking cartels.

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For this reason, the Commission is implementing a new formal Leniency Policy. The purpose of the Policy is to offer immunity from Commission initiated proceedings to the first person involved in a cartel to come forward with information about the cartel and co-operate fully with the Commission. It is important that it is made clear that immunity is only available to the first party to approach the Commission, creating the necessary incentives and uncertainty for the parties in the cartel.

The Leniency Policy aligns the Commission with competition agencies worldwide, most of whom offer comparable policies.

The publication of the Commission's Leniency Policy provides certainty and predictability to individuals and businesses considering a leniency application to the Commission.

Co-operation Policy

The effect of the Commission's Co-operation Policy is that the Commission, in respect of all of its enforcement responsibilities, will exercise its discretion to take a lower level of enforcement action, or no action at all, against an individual or business in exchange for information and full continuing and complete co-operation.

A lower level of enforcement action may include a settlement, or a submission made by the Commission to the court for a reduction in penalty on behalf of an individual or business. An agreement by the Commission to proceed under its Co-operation Policy does not prevent third party action.

Cease and Desist Orders

The Commerce Amendment Act 2001 provided specific powers to the Commission to obtain cease and desist orders against anti-competitive behaviour. Cease and desist orders can only be made by specially appointed Cease and Desist Commissioners who are to be barristers or solicitors of at least five years' standing.

Orders can be made to stop cartels. Cartels can include deals between competitors to set the price of goods they compete in, market rigging, or joint action by a group of businesses to block competitors coming into the market. Orders can be made to stop arrangements between businesses that have the effect of lessening competition, such as discounting arrangements. Orders can also be made to stop exclusive dealing in certain circumstances by parties with market power.

This publication contains the Commission's policies relating to leniency, co-operation and cease and desist orders. Further information is available on the Commission's website, www.comcom.govt.nz ■

Leniency Policy for Cartel Conduct

Purpose

The purpose of the Commerce Commission's Leniency Policy for Cartel Conduct is to assist in the detection of anti-competitive cartel behaviour. The Commission will grant immunity from Commission initiated proceedings to the first person involved in a cartel to come forward with information about the cartel and co-operate fully with the Commission in its investigation and prosecution of the cartel.

The Commission enforces the Commerce Act. Part II of the Commerce Act prohibits a range of anti-competitive arrangements between competitors that are often secret and difficult to detect. The Leniency Policy applies to arrangements between competitors which substantially lessen competition. It does not include conduct which amounts to a company taking advantage of a substantial degree of market power.

The Commission wishes to encourage those involved in anti-competitive cartel conduct to report the cartel to the Commission. The first person to formally apply to the Commission for leniency will be granted immunity from Commission initiated proceedings provided they co-operate fully with the Commission throughout any investigation and related proceedings.

Interpretation

For the purpose of the Leniency Policy:

- **immunity** means immunity from Commission initiated proceedings;
- **person** includes a company or an individual; and
- **information** includes all information, documents, material and evidence of any kind whatsoever, including all oral, written and electronic information.

Principles

The Commission's Leniency Policy is based on three key principles:

- Immunity is available to the first person involved in a cartel who reports the cartel to the Commission.
- The person seeking immunity must provide full co-operation to the Commission.
- If the person fails to fully co-operate with the Commission, the Commission may initiate proceedings against that person.

Background

Cartels are arrangements between competitors that breach Part II of the Commerce Act. Cartel conduct includes price fixing, excluding competitors, collusive tendering, bid rigging, production or sales quotas, and market sharing. Cartels usually operate informally and in secret. Cartel conduct is recognised as being a seriously damaging form of anti-competitive behaviour.

Penalties for a company and its officers engaging in cartel conduct are high. The court may order the following pecuniary penalties for a contravention of Part II of the Commerce Act:

- in the case of an individual, \$500,000; and

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The first person involved in a cartel who reports the cartel to the Commission and co-operates fully with the Commission may apply for leniency and gain immunity from Commission initiated proceedings.

- in the case of a company, the greater of \$10,000,000; or either:
 - a. three times the value of any commercial gain resulting from the contravention; or
 - b. 10 percent of the turnover of the company.

Where cartel members engage in price fixing, the Commerce Act prohibits a company from indemnifying any current or former director, officer or employee against any pecuniary penalty imposed by the court.

The first person involved in a cartel who reports the cartel to the Commission and co-operates fully with the Commission may apply for leniency and gain immunity from Commission initiated proceedings.

Where immunity is granted to a company, it may extend to any current or former director, officer or employee of that company.

Leniency may be available to a person directly involved in the cartel or to a company officer directly involved in the cartel where that individual acts independently in coming forward to the Commission. On the grant of immunity to an individual acting independently from a company, immunity will not then be available to the company.

Immunity granted by the Commission from Commission initiated proceedings cannot exclude claims by third parties who may have suffered loss as a result of the activities of the cartel. Under the Commerce Act, third parties may pursue private claims for compensatory or exemplary damages.

Leniency Conditions

First person

Subject to the conditions below, the Commission will grant immunity from Commission initiated proceedings to the first person involved in the cartel to come forward with information regarding the existence, activities, operation and membership of the cartel.

Full co-operation

The person must:

- provide the Commission with access to all information available to that person 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;
- 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;

and in the case of a company, the person must:

- use the person's best efforts to secure the complete and truthful co-operation of current and former directors, officers or employees;
- encourage and facilitate the person'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 person's best efforts to ensure that each of its related entities provides all assistance reasonably requested by the Commission;

or in the case of an individual, the person must:

- 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.

If the Commission at any time determines that a person granted leniency has failed to meet any of the above conditions, the Commission will not be bound by its grant of leniency to that person and may use information provided to the Commission to initiate proceedings against that person.

Confidentiality

The person must not disclose to, or communicate with, any 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):

- 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.

Prior awareness of the cartel

Immunity from Commission initiated proceedings will not be granted where the Commission is currently investigating conduct relating to the leniency application.

Company leniency

In respect of a leniency application by a company, the admissions and co-operation of a company must be a truly corporate act, as opposed to isolated admission and co-operation of individual representatives.

Co-operation Policy

Other cartel members who co-operate with the Commission, but who are not the first to formally make a leniency application may make an application, under the Commission's general Co-operation Policy, as discussed on page 7.


The earlier the approach to the Commission, the more likely the Commission's Co-operation Policy will be available.

Confidentiality

The Commission will endeavour, where possible, to keep confidential the identity of successful and unsuccessful applicants for leniency.

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To be the first person to apply for leniency, you must be the first person to make a formal leniency application.

Leniency Procedure

The Commission's procedure for leniency applications is as follows:

- enquiry;
- formal application;
- conditional grant of immunity; and
- final letter.

Enquiry

If you wish to know whether the Commission's Leniency Policy will apply to you or your company, you (or your advisers) may approach the Commission for clarification.

The Commission will deal with such inquiries on a 'hypothetical' or 'off the record' basis. Any information provided to the Commission in this context will not be used by the Commission for any purpose other than to provide the requested clarification.

Enquiries will not be considered to be an application for leniency under the policy and will not count as 'coming forward with information' so as to establish first approach to the Commission.

Enquiries must be directed to the CEO of the Commerce Commission, 04 924 3620 or email ceo@comcom.govt.nz

Formal application

To be the first person to apply for leniency, you must be the first person to make a formal leniency application.

Leniency applications must be directed to the CEO of the Commerce Commission, 04 924 3620 or email ceo@comcom.govt.nz

A corporate leniency application must be made by an officer who has the authority to represent the company for this purpose.

Conditional grant of immunity

The person applying for leniency will be informed as soon as possible whether they are first. At the same time, the Commission may require the person to sign a 'Conditional Grant of Immunity' agreement confirming the above Leniency Conditions. See the Commission's website www.comcom.govt.nz

Final letter

The Commission will advise the person in writing when the Commission's investigation and any Commission initiated proceedings, are concluded. ■

Further information, including Leniency Application letters, Conditional Grant of Leniency letters and the protocol for providing information to the Commission, is available on the Commission's website, www.comcom.govt.nz

Co-operation Policy

Introduction

Commerce Commission investigations are often assisted by the input of individuals and businesses. It considers that such co-operation should be encouraged. The possibility the Commission will agree to a lower level of enforcement action might make some participants more willing to co-operate with the Commission in its investigations. The Commission's Co-operation Policy provides a guide to the co-operation conditions.

The Effect of Co-operation

The effect of the Commission's agreement to proceed under this Co-operation Policy is that the Commission will exercise its discretion to take a lower level of enforcement action, or no action at all, against an individual or business in exchange for information and full continuing and complete co-operation.

A lower level of enforcement action may include a settlement, or a submission made by the Commission to the court for a reduction in penalty on behalf of an individual or business. An agreement by the Commission to proceed under this Co-operation Policy does not prevent third party action.

The Scope of Co-operation

The Commission's Co-operation Policy operates in relation to the Commerce Act, Credit Contracts and Consumer Finance Act 2003, Dairy Industry Restructuring Act 2001, Electricity Industry Reform Act 1998 and Fair Trading Act 1986.

Co-operation Policy Conditions

If an individual or business has been involved in behaviour that may contravene any of the relevant Acts and comes forward to the Commission, the Commission may, after consideration of relevant circumstances, agree to a lower level of enforcement action. The Commission's policy provides:

- 1) The decision to proceed with a lower level of enforcement is at the Commission's sole discretion.
- 2) The Commission is more likely to consider requests for a lower level of enforcement action where individuals or businesses:
 - fully inform the Commission about the behaviour that may have contravened any of the relevant Acts;
 - fully co-operates with the Commission during any subsequent investigation (or investigations) and this includes the full, frank and truthful disclosure of their own behaviour and provision of all relevant information to the Commission including written documents and in some circumstances, this may include 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 a breach of any of the above Acts stop that behaviour immediately; and
 - are willing to put in place an effective compliance programme.
- 3) The Commission is unlikely to agree to a lower level of enforcement action where an individual or business forced or encouraged others to take part in an activity which contravened any of the relevant Acts.
- 4) Where possible the Commission will keep the identity of the individual or business confidential. ■

Cease and Desist Order Guidelines

Introduction

These Guidelines set out the approach the Commerce Commission proposes to follow in relation to the application of the cease and desist order provisions contained in ss 74A to 74D of the Commerce Act.

Sections 74A to 74D provide specific powers for the Commission to obtain orders against anti-competitive behaviour. Cease and Desist Commissioners are able to make orders to restrain anti-competitive conduct or to require a person to do something to restore competition or the potential for competition in a market.

A cease and desist order may be made where a Cease and Desist Commissioner is satisfied that:

- at first sight, on the face of the evidence, there is anti-competitive conduct that contravenes the Commerce Act; and
- it is necessary to act urgently:
 - (a) to prevent a particular person or consumers suffering serious loss or damage; and
 - (b) in the interests of the public.

Behaviour Potentially Subject to the Cease and Desist Order Regime

The Commission believes that the cease and desist order provisions have the potential to apply to a wide range of anti-competitive behaviour including:

- s 27 – contracts, arrangements or understandings that are likely to substantially lessen competition;
- s 36 – taking advantage of a substantial degree of market power for the purpose of restricting, preventing, deterring or eliminating competition;
- s 47 – mergers or acquisitions that are likely to substantially lessen competition; and
- the specific examples set out below.

Further information is available in the Commission's publications, *Guide to Restrictive Trade Practices and Merger and Acquisition Guidelines*, or from the Commission's website, www.comcom.govt.nz

Orders can be made to stop cartels. Cartels include deals between competitors to set the price of goods they compete in, market rigging, or joint action by a group of businesses to block competitors coming into the market. Orders can be made to stop arrangements between businesses that have the effect of lessening competition such as discounting arrangements. Orders can also be made to stop exclusive dealing in certain circumstances by parties with market power.

The type of case that might be dealt with by cease and desist orders is where a business with substantial market power refuses to deal with an existing or prospective customer (ie a retailer) because that customer is also dealing with a competitor of the business with market power, or because that prospective customer will not agree not to deal with competitors of the firm with market power.

Other instances could include parties requiring purchasers to buy goods or services from the vendor or another party as a condition of doing business. Orders could also be made to stop below-cost pricing that is aimed at eliminating competitors and where recoupment is likely.

Cease and desist orders may also be used in relation to mergers and acquisitions where parties intend to carry out their transaction without seeking clearance from the Commission and it considers the transaction is likely to substantially lessen competition. The Commission could also seek orders where a transaction has occurred but needs to be undone in order to ensure competition is not lessened.

The use of the cease and desist order provisions in these circumstances will serve to promote competition. Cease and desist orders are forward-looking in this sense. Where the conduct in question may have involved an existing breach of the Commerce Act, the Commission may, in addition to seeking cease and desist orders to govern future conduct, also apply to the courts for other relief, such as penalties, for the past contravention of the legislation.

Consistent with the Commission's general approach, the Commission will assess each case against its enforcement criteria to determine the appropriate course of action.

Outline of the Regime

There are three main steps that apply in the application of the cease and desist order provisions.

Step 1 – Commission staff assessment

The Commission commences an investigation.

If, following investigation, the Commission reaches the view that there has been no apparent breach of the Commerce Act, it will discontinue the investigation.

If the Commission reaches the view that there has been a contravention of the Commerce Act, staff will prepare a report to the members of the Commission (other than the Cease and Desist Commissioners). This report will include a recommendation whether or not to seek a cease and desist order.

If the report includes a recommendation that a cease and desist order be sought, then the report will address the grounds for the making of cease and desist orders as set out in s 74A, namely:

- has a prima facie case been made out that there has been conduct in breach of the Commerce Act? and
- is it necessary to act urgently:
 - to prevent a particular person or consumers from suffering serious loss or damage; and
 - in the interests of the public?

Step 2 – Commissioner assessment of the report

Upon receipt of the report, the members of the Commission will determine whether they agree with the recommendation to seek a cease and desist order, in accordance with s 74B(b).

If the Commissioners agree with the staff recommendation to seek a cease and desist order, then the Commission will:

- direct an officer of the Commission to make an application to a Cease and Desist Commissioner for a cease and desist order. The application will include particulars of:
 - the nature of the alleged contravention, including an assessment of the alleged prima facie breach of the Commerce Act;
 - the terms of the proposed order; and
 - the reasons for the order, including the need to act urgently (as set out in s 74A); and
- serve notice on the person against whom the order is sought. This notice will likely contain a copy of the application to the Cease and Desist Commissioner.

The person against whom an order is sought has the opportunity to access all relevant information held by the Commission, in accordance with s 74B(d). The Commission will furnish all relevant information with particular safeguards for confidential information.

The person against whom an order is sought also has the opportunity to make a written submission to the Cease and Desist Commissioner, to consent to the terms of the proposed order, or to have the matter determined by a Cease and Desist Commissioner following a hearing.

Step 3 – Cease and desist orders

Where the person against whom the order is sought consents to the terms of the proposed order, a Cease and Desist Commissioner will consider the Commission's application pursuant to s 74A. There will be no hearing; the Cease and Desist Commissioner will determine the matter on the basis of the record before the Commissioner.

Where the Commission's application is determined by a Cease and Desist Commissioner following a hearing, then the procedures set out below will be followed.

Key Interpretations

Section 74A contains a number of terms which require definition. While the meaning of those terms in the context of the cease and desist jurisdiction will become clearer over time, the Commission's present interpretation of those terms is as follows:

A prima facie case

The Commission is required to have conducted an investigation to be able to demonstrate to the required standard that a contravention has occurred. The Cease and Desist Commissioner will need to be satisfied that, at first sight, on the face of the evidence, the person against whom the order is sought has engaged in conduct that contravenes the Commerce Act.

It is necessary to act urgently

The necessity to act urgently has to be considered in light of the requirement for the Commission to complete its investigation and the time taken to prosecute such matters before the courts. Investigation and litigation of Commerce Act cases take a number of years, commonly anything between five and ten years.

There will be cases where the effects of the anti-competitive conduct are such that they must be addressed more quickly than litigation before the courts will allow, especially where there is a need to restore competition, or the potential for competition, in the affected market.

Serious loss or damage

The Commission will need to establish that the likely loss or damage is not slight nor negligible. This is a useful threshold that will likely exclude those cases where the loss or damage is minimal or insignificant.

Interests of the public

It is the interests of the general public which are relevant here, rather than the interests of a private individual or individuals. However, a substantial number of individuals may constitute 'the public' for the purposes of the term.

On occasion, the Commission may consider it more appropriate to apply to the court for interim relief than to a Commissioner for a cease and desist order. (For example, the Commission's investigation may not be complete and it may be necessary to act very quickly and on occasion without notice to the other party.)


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Cease and Desist Hearings

Guidance for the procedure to be adopted at a cease and desist hearing is set out in s 74C. There are some preliminary points to note:

- While the section provides that there must be as little formality and technicality as the requirements of the Commerce Act and a proper consideration of the matter permit, in reality there will need to be reasonable formality and technicality given the nature of the order being sought and the consequences for any party against whom an order is made.
- Cease and desist orders are not able to be made on an *ex parte* basis; that is, without the Commission giving notice to the other party. The Commissioner is to permit the Commission and the person against whom an order is sought to appear and give evidence. The way in which evidence is to be given is not specified and will be for the Cease and Desist Commissioner to determine. The Commissioner will decide whether evidence-in-chief is to be given by affidavit or brief of evidence or orally. Witnesses may be cross-examined.
- The person against whom an order is sought may be represented by counsel. Questions may arise from time to time where a company seeks to be represented by its managing director or another officer of the company. Such representation will be determined by the Cease and Desist Commissioner on a case by case basis.
- The Commissioner has all necessary powers in relation to the hearing of evidence, including the powers set out in ss 99 and 100 of the Commerce Act which deal with admissibility of evidence and the ability to take evidence on oath. ■



There will be cases where the effects of the anti-competitive conduct are such that they must be addressed more quickly than litigation before the courts will allow, especially where there is a need to restore competition, or the potential for competition, in the affected market.

Summary

Steps to be taken by the Cease and Desist Commissioner when an application is made for a cease and desist order

1. Application is made to the Commissioner by the Commission accompanied by a certificate from the Commission that:
 - (a) an investigation has been conducted into the alleged contravention and a report has been submitted to the Commission recommending that a cease and desist order be sought; and
 - (b) the Commission agrees with the recommendation in the report and directs an officer of the Commission to make an application for a cease and desist order.
2. The Commission serves copies of the application and the certificate on the person against whom the cease and desist order is sought and files an affidavit of service with the Commissioner.
3. The Commission serves the person against whom the cease and desist order is sought with notice in writing of:
 - (a) the nature of the alleged contravention;
 - (b) the terms of the proposed order; and
 - (c) the reasons for the order;
 and files an affidavit of service with the Commissioner.
4. While the Commission is attending to service in terms of paragraphs 2 and 3, the Commissioner should consider the following matters to be able to discuss them with the parties at the preliminary conference:
 - (a) what does the person against whom the cease and desist order is sought want to do in respect of:
 - (i) access to the relevant information held by the Commission;
 - (ii) making a written submission;
 - (iii) consenting to the terms of the proposed order or having the matter determined by a Commissioner following a hearing?
 - (b) are directions necessary for the completion of all steps before the hearing of the application?
 - (c) what is the time within which each step should be completed?
 - (d) what steps are to be taken if any party fails to comply with any directions as to the steps to be taken or the time within which such steps are to be taken?
5. A preliminary conference (normally by telephone) should be convened by the Commissioner as soon as possible. The particular matters to be addressed will include:
 - (a) the matters in paragraph 4;
 - (b) whether the Commission and the person against whom the cease and desist order is sought are to be represented by counsel;
 - (c) when the hearing is likely to take place; how long the hearing is likely to take; and where the hearing will be held;
 - (d) what way the evidence is to be given at the hearing; directions will need to be given that the evidence, or the evidence of any particular witness or witnesses, shall be given orally or by affidavit or by pre-recorded statement or report duly sworn or affirmed by the witness before or at the hearing;
 - (e) whether experts will be giving evidence at the hearing; if so, whether the Code of Conduct for experts in the High Court Rules apply;
 - (f) within what time the evidence should be tendered if the evidence is to be in written form and whether the exchange of evidence be contemporaneous or sequential; and
 - (g) any other matters which the Commissioner or the parties think fit and, in particular, any matters which will assist in achieving as little formality and technicality as the requirements of the Commerce Act and a proper consideration of the matter permit.

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Steps to be taken at the hearing of the application

- Are there any preliminary issues which require consideration and rulings? For example, should the hearing be open or closed to the public? Are there any confidentiality or other concerns about any aspects of the evidence to be given at the hearing?
- The Commission should open its case and call its witnesses.
- An opportunity must be given to the party against whom the order is sought to cross-examine any Commission witnesses.
- An opportunity must be given to the Commission to re-examine the witnesses.
- The Commissioner presiding may ask questions at any time.
- It will be necessary for a transcript of the evidence to be taken. There are various transcription services available. The costs of such transcription should be borne by the Commission in the first instance.
- After the Commission has presented its case, the question may arise as to whether the party against whom the order is sought may wish to make a submission that there is no case to answer.
- The party against whom the order is sought should then be given the opportunity to open its case and to give and call evidence.
- An opportunity must be given to the Commission to cross-examine the party against whom the order is sought (if the party gives evidence) and the witnesses called by that party to give evidence on its behalf.
- An opportunity must be given to the party against whom the order is sought to re-examine the witnesses.
- An opportunity should then be given to the person against whom the order is sought.

CONTACT DETAILS

To contact the Commerce Commission with information about unfair or misleading trading practices, or anti-competitive behaviour by businesses:

- Call the Contact Centre on 0800 94 3600;
- Write to Contact Centre, Commerce Commission, PO Box 2351, Wellington; or
- Email contact@comcom.govt.nz

For media releases, Commission adjudication decisions, submissions, annual reports, plans, publications and more, visit the Commission's website at www.comcom.govt.nz