

# **Commerce Commission Leniency Policy**

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# Commerce Commission Leniency Policy

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## Introduction

Unquestionably, leniency programs are the greatest investigative tool ever designed to fight cartels.<sup>2</sup>

The United States Justice Department Antitrust Division (the DOJ) should know. They have many years of experience having introduced their leniency programme in 1978 and substantially revising it in 1993 with significant results. The DOJ learned some hard lessons before determining to revise their programme. They made the programme more transparent, increased the opportunities and raised the incentives for companies to report criminal activity and cooperate with the DOJ. This led to a twenty fold increase in leniency applications resulting in the prosecution of dozens of international cartels.<sup>3</sup>

The new leniency programme had substantial effects. In the US alone companies have been fined over US \$2.5 billion for antitrust crimes since 1997, with over 90% of this total tied to investigations assisted by leniency applicants<sup>4</sup>.

In its Strategic Plan for 2004 to 2007, the Commerce Commission (the Commission) stated that one of its strategic priorities was to focus on its enforcement impact. The Commission wants to maximise the effectiveness of its enforcement activity in relation to anti-competitive behaviour. One of the areas the Commission is targeting is cartel behaviour. At the same time as preparing its Strategic Plan the Commission was reviewing its former leniency policy. This led to the Commission introducing its Leniency Policy for Cartel Conduct (referred to in this paper as the Leniency Policy) in November 2004.

The advent of leniency programs has completely transformed the way competition authorities around the world detect, investigate, and deter cartels. An effective leniency program will lead cartel members to confess their conduct to authorities even before an investigation is opened. In other cases, it will induce organisations already under investigation to abandon the cartel stonewall, race to the regulator, and provide evidence against the other cartel members. Leniency programs have led to the

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<sup>1</sup> Disclaimer: The views expressed in this paper are my views only and should not be taken as the views of the Commission.

<sup>2</sup> Cornerstones Of An Effective Leniency Program By Scott D. Hammond Director of Criminal Enforcement Antitrust Division U.S. Department of Justice 2004 available at [www.usdoj.gov/atr/public/speeches](http://www.usdoj.gov/atr/public/speeches)

<sup>3</sup> Ibid

<sup>4</sup> Ibid

detection and dismantling of the largest global cartels ever prosecuted and resulted in record-breaking fines in the United States, Canada, the EU and other jurisdictions<sup>5</sup>.

This paper will look at why the Commission wants to target cartel behaviour, what makes an effective leniency programme, the reasons for introducing the Leniency Policy, the Commission's Leniency Policy and the procedures for seeking leniency.

## Why Target Cartel Behaviour?

Cartel behaviour can take various forms and often agencies will refer to hard core cartel behaviour. Hard core cartel behaviour refers to price fixing, market sharing and bid rigging. It is the conduct that s30 of the Commerce Act 1986 deems to substantially lessen competition. In this paper I will refer to cartel behaviour meaning hard core cartel conduct deemed to substantially lessen competition.

Cartels harm consumers and have destructive effects on economic efficiency. A successful cartel raises price above the competitive level and reduces output. Consumers, which include other businesses and government, choose either not to pay the higher price for some or all of the product subject to the cartel that they desire, thus forgoing the product, or they pay the cartel price and thereby unknowingly transfer wealth to the cartel operators. A cartel also shelters its members from full exposure of market forces, reducing pressures on them to control costs and to innovate. All of these effects harm efficiency in a market economy.<sup>6</sup>

In 1998 the OECD Council for Competition considered cartel behaviour “ ‘the most egregious violations’ of competition law and hence a principal focus of competition policy and enforcement”<sup>7</sup>.

The precise estimate of the commercial harm of cartels remains an elusive goal. However, a recent OECD survey has made it possible to estimate the amount of affected commerce in respect of 16 large international cartel cases. The total affected commerce for those 16 cases exceeded the equivalent of US\$55 billion.<sup>8</sup>

The OECD survey found it difficult to generalise about international cartels, however, the markets in which these cartels operated tended to be highly concentrated; to involve homogeneous products; and to have at the centre of the collusive arrangement an industry trade association, which provided opportunities for members of the cartel to meet and agree.

Domestic cartels can also have significant harmful effects on international competitiveness of domestic producers as they can involve products that are inputs into other products. For example, Spain's domestic sugar cartel created a competitive disadvantage for all Spanish exporters of products containing sugar. The OECD

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<sup>5</sup> Ibid

<sup>6</sup> Paula Rebstock, Speech KPMG Chairmen's Forum 7 and 10 February 2005

<sup>7</sup> Organisation for Economic Cooperation and Development, *Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws*, 9 April 2002, p. 11.

<sup>8</sup> Ibid, p.72.

survey provided some interesting information about the general characteristic of these cartels. Domestic cartels occurred in all economic sectors, but they were relatively more common in some sectors, including construction and construction material, sales to government institutions, bulk food products, electrical equipment, retail sales of petrol and the services sector.<sup>9</sup>

The survey confirmed that the parties to cartel agreements, for the most part, are not honest business people who inadvertently become involved in a technical violation. Rather, in these cases, they fully realised that their conduct was harmful and unlawful, causing them sometimes to go to great lengths to keep their agreement secret.<sup>10</sup>

Cartel operators can go to great lengths to keep their agreements secret, showing that they fully realise that their conduct is harmful and unlawful. In some cases, they are explicit in their contempt for the competitive process.

Sometimes it is said that cartels are not a serious problem in New Zealand and the Commission is wrong to prioritise cartel behaviour. This seriously underestimates the issue and the harm cartels cause. We know that domestic cartels exist in New Zealand. The Commission has no reason to assume that the problem in New Zealand is any less than in any other western economy.

The Commission has prosecuted a number of cartels involving meat companies, petrol companies, and car dealers. The Commission recently announced its prosecution of Koppers Arch Ltd, Osmose New Zealand Ltd and their officers and directors for an alleged cartel involving wood preserving chemicals. The Commission is currently investigating four leniency applications involving international cartels.

We did consider whether the few cartels that came to the Commission's attention was the result of an unclear enforcement approach. The Commission had to consider what it could do to improve its ability to detect cartels. This led to the review of the Commission's policy for leniency.

## **An Effective Leniency Programme**

Much of the development of leniency programmes has taken place in the US. Leniency programmes are now being adopted across the world by agencies, including Brazil and Japan.<sup>11</sup> In the US the experience with leniency programmes is demonstrated by their success with their revised programme introduced in 1993:<sup>12</sup>

..... the original version of the U.S. Corporate Leniency Program dates back to 1978. Until the current program was revised in 1993, we received only one leniency application per year, and the original program did not lead to the detection of a single international cartel — not one. We learned some lessons the hard way and revised the program in 1993. We made it

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<sup>9</sup> Ibid; see also: ACCC leniency Policy 2003

<sup>10</sup> Ibid

<sup>11</sup> Organisation for Economic Cooperation and Development, *Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws*, 9 April 2002; [http://www.internationalcompetitionnetwork.org/competition\\_advocacy\\_in\\_brazil\\_preliminary\\_version.pdf](http://www.internationalcompetitionnetwork.org/competition_advocacy_in_brazil_preliminary_version.pdf); <http://www.jftc.go.jp/e-page/pressreleases/2005/june/050630.html>

<sup>12</sup> Cornerstones Of An Effective Leniency Program By Scott D. Hammond Director of Criminal Enforcement Antitrust Division U.S. Department of Justice 2004 available at [www.usdoj.gov/atr/public/speeches](http://www.usdoj.gov/atr/public/speeches).

more transparent and increased the opportunities and raised the incentives for companies to report criminal activity and cooperate with the Division. Since then, there has been a nearly twenty-fold increase in the application rate, and it has resulted in the cracking of dozens of large international cartels.

Internationally agencies have built upon the US experience. Agencies have accepted that what is needed to effectively detect, prosecute and deter cartels is an effective leniency programme. What is needed is a leniency programme that has three elements:

- severe sanctions for corporates and individuals
- increased risk of detection
- clear and transparent policies

These prerequisites are essential elements that must be in place before a jurisdiction can successfully implement a leniency program<sup>13</sup>.

First, the jurisdiction's antitrust laws must provide the threat of severe sanctions for those who participate in hardcore cartel activity and fail to self-report. Second, organizations must perceive a high risk of detection by antitrust authorities if they do not self-report. Third, there must be transparency and predictability to the greatest extent possible throughout a jurisdiction's cartel enforcement program, so that companies can predict with a high degree of certainty how they will be treated if they seek leniency and what the consequences will be if they do not. These three major cornerstones — severe sanctions, heightened fear of detection, and transparency in enforcement policies — are the indispensable components of every effective leniency program.

### **Severe Sanctions**

New Zealand has severe sanctions for cartel conduct. The penalties for cartel behaviour were increased significantly in 2001. Section 80 of the Commerce Act now provides for a significant maximum penalty for corporates that is the higher of:

- \$10 million
- three times the commercial gain, or, if commercial gain cannot be readily ascertained,
- 10% of the annual turnover of the company/group involved.

For individuals, the maximum penalty under s. 80 is \$500,000 and the company cannot indemnify the individual involved against any penalty imposed or costs incurred (s. 80A); and, the individual can be banned as acting as in the management capacity for up to five years (s.80C).

It is said that New Zealand cannot have an effective leniency programme as we do not have criminal sanctions for the individuals involved. This is not necessarily so as evidenced by the fact that the Commission has received four leniency applications to date. Individuals may not face criminal sanctions but they do face significant personal exposure to penalties and costs. For example in the recent ophthalmology

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<sup>13</sup> Organisation for Economic Cooperation and Development, *Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws*, 9 April 2002.

proceedings five ophthalmologists faced liability for costs of \$460,000. In addition there is the moral guilt for breaking the law and potentially years of anxiety in court proceedings. These factors will weigh heavily on most individuals.

Nevertheless, to be effective financial penalties must be severely punitive to attract leniency applicants.<sup>14</sup> The Commission will be pressing hard for effective punitive penalties to be imposed to increase the effectiveness of its leniency policy and will be referring the Courts to the international experience on the need for effective sanctions and their role in supporting an effective leniency programme.

### ***Risk of Detection***

To be effective the companies involved must face a real fear of being caught. The Leniency Policy is designed to increase the risk of detection by creating distrust by offering amnesty to the first through the door but not for others even if they are second by a matter of minutes. This sense of distrust is heightened by making the ability for individuals to obtain amnesty. Companies face a race to the enforcement agency both at a corporate and an individual level. Companies will fear each other and will have to fear the possibility that one of its senior executive or directors may go to the Commission.

The Commission will also be looking to improve its ability to uncover cartels. When investigating one cartel the Commission will be on the lookout for leads into other cartels. Increased risk of detection will require the Commission to adopt focussed investigative techniques such as tracking the individuals involved in a reported cartel and investigating their involvement in other industries or companies. This is a prime strategy used by the DOJ<sup>15</sup>:

It has been widely acknowledged that one of the keys to the Division's success in cracking the worldwide vitamin cartel was the cooperation provided by Rhône-Poulenc SA pursuant to its amnesty application. However, what may not be fully appreciated is that the Division had been investigating the vitamin industry for more than two years before Rhône-Poulenc came forward. By the time Rhône-Poulenc sought amnesty, the investigation had already uncovered conspiracies to fix prices and allocate smaller vitamin markets, such as naicin, naicinamide, and choline chloride. These investigations were generating leads that indicated the existence of cartel activity in the massive vitamin A, C, and E markets. It was the development of these leads that precipitated Rhône-Poulenc's decision to seek amnesty. With one investigation rolling over into the next, the Division eventually uncovered cartel activity in 12 different vitamin markets. Our investigation led to the prosecution of 12 companies (three U.S., three German, three Japanese, two Swiss, and one Canadian) and 14 individuals, nearly \$1 billion in fines, and the incarceration of 11 executives, including 6 foreign nationals.

To increase the risk of detection further the Commission is also considering adding to its Leniency Policy supporting policies such as 'amnesty plus'. We will look to increase the carrot and stick incentives. This is part of the DOJ approach. The DOJ offers to the parties who are found to be involved in one cartel the opportunity to tell the DOJ about any other cartel conduct they are involved in. This applies to the

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<sup>14</sup> Cornerstones Of An Effective Leniency Program By Scott D. Hammond Director of Criminal Enforcement Antitrust Division U.S. Department of Justice 2004 available at

[www.usdoj.gov/atr/public/speeches](http://www.usdoj.gov/atr/public/speeches)

<sup>15</sup> *ibid*

leniency applicant and those parties who were caught in the cartel. If they do confess their involvement in other cartels, they can obtain amnesty under the DOJ's leniency policy for those other cartels. The amnesty will be available for the company and all its cooperating directors and officers. That is the carrot. The stick is the DOJ seeking increased penalties, referred to as 'penalty plus', in those cases where a party is caught for one reported cartel, but fails to report its involvement in other cartels the party is involved in. This is an approach that is likely to be available in New Zealand by the Commission relying on the failure to report the other cartels as an aggravating factor justifying a greater sentence.

To further increase the risk of detection the Commission has pressed for increased cooperation with the ACCC. A number of the investigations before the Commission involve conduct in Australia. The ACCC is also targeting cartel behaviour. It introduced its Leniency Policy for Cartel Conduct in 2003.<sup>16</sup> ACCC is also focussing on improving its detection of cartel behaviour. The ACCC recently announced its investigation into fine paper manufacturing following the work it did in cardboard.

The Australians are looking to introduce criminal sanctions for cartel conduct.<sup>17</sup> This is likely to have spin-off effects in New Zealand. We are likely to see the same sort of effects the EU found from the impact of US criminal sanctions. The risk of detection in New Zealand goes up with the introduction of criminal sanctions in Australia.

New Zealand and Australia agree that we need to improve our ability to assist each other in our investigations and gather and share information with each other. This will also lead to greater risk of detection of cartel conduct in each other's jurisdiction.

The remaining pillar of an effective leniency programme is clear and transparent policies. The Leniency Policy is the first step to creating an effective suite of leniency related policies. The Commission is considering making clear whether it needs to introduce amnesty plus or penalty plus type policies to increase the risk of detection. The advantages of adopting a leniency policy were recognised as not only providing consistency for the sake of consistency, but also to enhance the detection and prosecution of domestic and international cartels. Companies with significant exposure in a number of jurisdictions may be reluctant to come forward if they can not be assured of immunity in each one. In Mr Griffin's words<sup>18</sup>: *"Nowhere is the need for convergence in anti-cartel law and policy more essential than in the fundamental elements of leniency policies."*

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<sup>16</sup> ACCC Leniency Policy 2003

<sup>17</sup> "Key Elements of an Effective Antitrust Leniency Policy and Criminal Penalties and Deterrence – The American Experience" – paper presented by Deputy Assistant Attorney General US Department of Justice Antitrust Division at the Competition and Consumer Protection Law Enforcement conference, Sydney July 2002.

<sup>18</sup> Ibid.

## Reasons for the Leniency Policy

The sole reason for introducing the Leniency Policy is to crack down on cartels. The DOJ found that an effective leniency programme has greater impact than any other investigative tool and it will unlock secret cartels<sup>19</sup>:

Our investigations are assisted by highly trained FBI agents skilled in interview and interrogation techniques. Individuals face possible jail sentences for violating U.S. antitrust laws and are therefore often motivated to confess and cooperate in our investigations in exchange for reduced penalties. With the cooperation of "insiders," we are able to secretly record incriminating calls or meetings among cartel members. Other available investigative powers include the power to compel individuals to provide sworn oral testimony, the assistance of INTERPOL and national immigration authorities to track, question, detain, and possibly extradite cartel members, and the execution of search warrants on corporate offices as well as the homes of cartel members. While all of these tools are valuable and frequently utilized in our investigations, the fact is that the U.S. Corporate Leniency Program has directly led to the detection and successful prosecution of more international cartels than all of these other powers combined. Unquestionably, leniency programs are the greatest investigative tool ever designed to fight cartels.

The Commission formerly operated a form of leniency policy (referred to in this paper as the Former Policy) and it provided that the Commission would consider lower forms of enforcement action, that is leniency) for those parties that provided assistance and information to the Commission. It was of general application covering all of the Commission's enforcement activities.

The review considered:

1. What use, if any, had been made of the Former Policy.
2. The Former Policy's purpose and objectives and whether the purpose and objectives had been achieved.
3. The reasons for the Former Policy's success or lack of success.
4. Any changes required to the Former Policy to address:
  - Clarification of the Former Policy's purposes and objectives.
  - The description of the Former Policy – e.g. to whistleblower policy.
  - Whether and how to increase use of the Former Policy.
  - Whether the Former Policy includes all relevant legislation.
  - Differences between the Former Policy and the policies adopted by other enforcement agencies.
5. The appropriate promotion of any new policy.

The review of the Former Policy found that it did not address cartel conduct directly contrary to policies used by overseas agencies, particularly by the DOJ. At the same time as the Commission was conducting its review, the ACCC had just announced its

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<sup>19</sup> Cornerstones Of An Effective Leniency Program By Scott D. Hammond Director of Criminal Enforcement Antitrust Division U.S. Department of Justice 2004 available at [www.usdoj.gov/atr/public/speeches](http://www.usdoj.gov/atr/public/speeches)

new Leniency Policy for detecting cartel conduct.<sup>20</sup> This policy is in similar terms to the DOJ policy.

The Commission had to consider whether it ought to introduce its own policy for cartel behaviour in line with other international agencies.

## **Background**

The Former Policy applied to all the legislation enforced by the Commission including the Commerce Act, the Fair Trading Act and the Electricity Industry Reform Act. Very broadly it set out the circumstances where the Commission would consider taking a reduced level of enforcement action, or no action, against a party in exchange for information or co-operation.

The key element of the Former Policy was that whether to grant leniency was entirely within the Commission's discretion. The Former Policy primarily set out the framework for the exercise of the discretion to treat informants and other parties who cooperated with the Commission differently from those who did not.

The Former Policy was used to a degree, but only informally. The Commission frequently worked on the basis of encouraging cooperation in an investigation by indicating that a more lenient approach might be considered or adopted. To that extent the Former Policy was effective as it helped lead to a number of agreed outcomes with parties cooperating and entering into settlements with the Commission or early admission of liability and mitigated penalties.

The Former Policy did not appear to have been used at all in the direct sense of a party approaching the Commission with information in exchange for leniency. It had not been used where parties sought immunity for cartel behaviour (price fixing, market sharing etc). There was no certainty that a party coming forward to confess their part in a cartel would automatically be granted immunity from prosecution by the Commission.

## **Overseas Agencies**

Australia, the US, the EU and the UK have each moved to separating their general co-operation policies from policies dealing with cartels, recognising the different objectives of the two policies.<sup>21</sup> A general co-operation policy is designed to provide a framework for the exercise of a broad discretion to treat those who cooperate with an investigation differently from those who do not. The aim of this type of policy is to encourage cooperation, usually within an investigation. Considerations such as fairness, culpability and the value of the cooperation can be dealt with in the policy, and the exercise of leniency will accordingly be very discretionary. These policies have an underlying concept of rewarding "good citizen" behaviour, or of encouraging cooperation from those who have already been "caught".

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<sup>20</sup> ACCC Leniency Policy for Cartel Conduct 2003

<sup>21</sup> See the ACCC Leniency Policy for Cartel Conduct (June 2003), the US Department of Justice Antitrust Division Corporate Leniency Policy (August 1993) and the UK Office of Fair Trading Leniency in Cartel Cases Policy (2002).

The separate policies dealing solely with cartels have a different objective. The key objective of these policies is to motivate members of cartels to come forward and blow the whistle on their co-conspirators. “Good citizen” type behaviour alone is recognised as being an unlikely motivation to break down cartel behaviour. Instead the policies recognise that cartel behaviour is so difficult to detect, and so significant in terms of economic damage, that it is worth providing total immunity to quite unworthy parties simply to get the chance to obtain inside information on the cartel. The policies are designed to do exactly that as they are meant to be enforcement tools.

Separate cartel policies provide very clear immunity to the first member of a cartel to blow the whistle on the co-conspirators, in exchange for full and frank co-operation. The policies are designed to create a high level of tension and distrust between members of a cartel, and to maximize the motivation for cartel members to come forward. The DOJ leniency policy plays a critical role in cracking the majority of international cartel cases prosecuted in the US:<sup>22</sup>

. . . In the United States alone, companies have been fined over \$2.5 billion dollars for antitrust crimes since 1997, with over 90 percent of this total tied to investigations assisted by leniency applicants. And there is more to come. Currently, the Division is investigating over 50 suspected international cartels operating on six continents. More than half of these investigations were initiated or are being advanced by information received from a leniency applicant.

The American experience is that the policy operates best in an environment where there is the threat of severe sanctions and a real fear of detection. The DOJ found that the key element in making the policy effective is that it is clear and predictable – corporations who come forward and meet the criteria in the policy *will* be granted amnesty. There is no residual discretion. The importance of this abdication of discretion is succinctly put by former Deputy Assistant Attorney General at the DOJ, James M Griffin<sup>23</sup>: *Uncertainty in the qualification process will kill an amnesty program.*

The role of the policy is to create distrust and instability within a cartel and motivate cooperation<sup>24</sup>:

To put it plainly, when cartel members know that amnesty is available only to the first one in the door and they have a reasonable fear of detection, they start to sweat. In a system where the second firm “in the door”, even if only by a matter of a few hours, which has happened on a number of occasions, remains, along with all of its culpable executives, subject to full prosecution, the value of swift action is readily apparent. And the cost of failing to react quickly is equally obvious. The resulting “race to the prosecutor’s office” to provide early cooperation is exactly what the anti-cartel enforcer wants to see, and just what the first-only element of a successful leniency policy is designed to create. . . . The “winner-take-all” race dynamic leads to tension and mistrust among the cartel members.

Other significant elements from the DOJ experience included:

- immunity from prosecution must be complete.

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<sup>22</sup> “Key Elements of an Effective Antitrust Leniency Policy and Criminal Penalties and Deterrence – The American Experience” – paper presented by Deputy Assistant Attorney General US Department of Justice Antitrust Division at the Competition and Consumer Protection Law Enforcement conference, Sydney July 2002.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

- immunity must extend to all cooperating executives.
- the only obligation on the company must be to meet the clear standard of full cooperation, with no residual issues as to the subjective value of the evidence, or whether it later results in a successful prosecution.

All these elements reinforced what the DOJ experience showed was the prime requirement of a successful policy – that it be clear and predictable. A cartel member and their legal advisors need to be able to assess quickly and with certainty what the benefits will be if they blow the whistle on the cartel and cooperate with an investigation. Only then can the policy provide an effective motivation.

Confidentiality is a critical element in the policy. To protect the viability of its immunity program the DOJ has adopted a policy of not disclosing the identity of or the information obtained from an amnesty applicant to anyone, including refusing to disclose to foreign antitrust agencies.

The Australian policy is in similar terms to the US policy, as is the UK policy, although there has been some criticism that the UK policy still retains some elements of uncertainty<sup>25</sup>. It is worth noting that since its adoption, the new UK policy has given rise to forty applications for amnesty or reduced fines<sup>26</sup>.

### ***Changes to the Commission's Policy?***

The Commission's Former Policy had not been used to facilitate whistle blowing by cartel members. Based on overseas experience it is likely that this was due, in large part at least, to the discretionary nature of the leniency offered. If the Commission wished to obtain the success achieved in other jurisdictions, the Commission had to adopt a non-discretionary, clear and certain leniency policy that provided complete immunity for the first applicant through the Commission's door along the lines of other overseas policies.

A key drawback is, of course, the very surrender of discretion that is the fundamental element of these policies. As the DOJ has found, it has had to "swallow hard" on a number of amnesty applications<sup>27</sup>. It is necessary to keep in mind the overall objective of the policy as an enforcement tool, which will only be effective as a motivation to blow the whistle if it provides a clear and certain immunity. The Commission had to be prepared to accept that it would be *obliged* to grant immunity to applicants who meet the criteria.

Overseas the jurisdictions do not usually provide immunity as of right in circumstance where the agency is aware of the cartel. Policies distinguish between an application made before or after the agency becomes aware of the cartel using different formula: (Australia) awareness of the cartel; (US) the Division has received any information about the cartel, and (UK) the OFT has begun an investigation and does not have enough evidence to establish that the cartel exists. In each case, the policy goes on to

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<sup>25</sup>: "Cashing in on Cartels", Ysewyn and Jordan, [2003] ECLR 235.

<sup>26</sup> Ibid.

<sup>27</sup> "Key Elements of an Effective Antitrust Leniency Policy and Criminal Penalties and Deterrence – The American Experience" – paper presented by Deputy Assistant Attorney General US Department of Justice Antitrust Division at the Competition and Consumer Protection Law Enforcement conference, Sydney July 2002.

offer a reduced discretionary benefit to the first cartel member to come forward even after those events: in Australia, the ACCC will not seek a penalty; in the US, the Division may grant immunity depending on other factors; and, in the UK the OFT may grant immunity if a decision to prosecute has not been made.

The review led to the Commission determining to introduce its Leniency Policy as the first part of an overall effective leniency programme.

## **The Commission's Leniency Policy**

The Commission adopted two policies:

- the Leniency Policy; and
- a Cooperation Policy.

The Leniency Policy addresses the automatic right to immunity for cartel behaviour provided the conditions of full cooperation are met. The reason for using the label leniency, as opposed to immunity or amnesty, is to keep consistency with international approaches. But what the Leniency Policy offers is complete immunity from prosecution.

The Cooperation Policy will be used for all other situations where the Commission wishes to encourage or reward early cooperation.

The Leniency Policy is annexed. Key elements of the Leniency Policy are:

- Immunity is full and automatic for the first cartel member to approach the Commission with relevant information, subject only to full and continuing cooperation.
- Immunity extends to the company's directors, officers and employees, provided they also cooperate in the investigation.
- Automatic immunity is available to cartel members up until the time the Commission becomes aware of the cartel.
- Immunity is discretionary if the Commission is already aware of the cartel.
- Immunity will be available to individuals who approach the Commission first, be they the businesses involved or officers of corporations involved in the cartel.
- Confidentiality is offered to those who approach the Commission with an inquiry about the policy, and the policy states that the Commission will endeavour to keep the identity of applicants confidential where possible.

The key point is the automatic immunity to the first through the door. There are no ifs or buts. The Commission will have to swallow hard as the applicant will have been involved in the cartel. But the return will be the break up of the cartel.

To maintain the incentives on the cartel members immunity will not be available to the second through the door even if they are behind the first applicant by a matter of minutes. To some this will appear unfair and arbitrary but that is the effect of the policy. It is how it must work. Without this the policy loses its impact. The policy

must provide the right incentives. There has to be a race to the Commission to create real fear of detection and mistrust among the cartel members.

The Commission will still work with the later applicants and negotiate penalties and admissions of liability. We will also encourage the applicants to confess their involvement in other cartels.

To make the Leniency Policy more transparent we will continue to publicise the Policy through presentations to business organisations and will look to use conferences to do so. The Policy and supporting documentation are prominently available on our website.

Sitting alongside the Leniency Policy is our Co-operation Policy. The new Co-operation Policy is the Former Policy substantially unchanged, except for its name. It was renamed as the Co-operation Policy to distinguish it from the Leniency Policy, to be consistent with the terminology used overseas and be stand alone. The Co-operation Policy allows the Commission to use its discretion in situations falling outside the Leniency Policy. For example a director may be needed to provide direct evidence to support the Commission's case. The Commission will want to have the ability of offering immunity even though its investigation is well advanced.

## **Procedures**

We have endeavoured to make applying for leniency as straightforward as possible including meeting with the applicant and their lawyers. Our protocol, Policy and templates are available on the internet.<sup>28</sup>

First the Commission will deal with general inquiries and confidential requests for assistance as to whether the Leniency Policy might apply. A formal application is required to trigger the grant of immunity. The application is made in writing and a conditional grant of immunity is offered first time round. The conditional grant is to allow for the conditions of co-operation to be met. If the conditions are met then a final letter confirming the Commission will not prosecute is issued.

The Commission will endeavour to keep the identity of successful and unsuccessful applicant(s) and the fact of the leniency application and conditional grant of immunity confidential. The Commission will often require the applicant to keep the application confidential to enable the investigation to proceed effectively. The Commission will likely want to issue search warrants quickly

## **Conclusion**

In New Zealand we are well on our way to establishing an effective Leniency Programme to take on cartels and so prevent New Zealanders being ripped off. We now have a clear Leniency Policy and severe sanctions in place. The Commission will be focussing on cartels and increasing its ability to detect cartels.

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<sup>28</sup> [www.comcom.govt.nz](http://www.comcom.govt.nz)

We strongly urge you as legal advisors to be aware of the Leniency Policy and what it offers to your clients. We trust that you are publicising the Leniency Policy among your clients. The Commission will be focussing on cartel behaviour as it does seriously harm competition and increases costs to every New Zealander. It is the most egregious form of anti-competitive behaviour. Detecting, investigating and deterring cartels is a high priority and it has to be.

The Commission will be pressing the three pillars of an effective leniency programme. We will be actively seeking severe sanctions, increasing our effectiveness in detecting cartels and increasing the risk of detection through a number of initiatives. We are considering adding amnesty plus and penalty plus policies to the Leniency Policy.

The Commission will be aiming for a substantial increase in applications for leniency. Whether we will see the level of increase experienced in other jurisdictions remains to be seen.

# LENIENCY POLICY FOR CARTEL CONDUCT

## PURPOSE

- A The purpose of the Commerce Commission's (the *Commission*) Leniency Policy for Cartel Conduct (*Leniency Policy*) 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 to co-operate fully with the Commission in its investigation and prosecution of the cartel.
- B The Commission enforces the Commerce Act 1986 (the *Act*). Part II of the 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.
- C 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 (*Leniency Application*) will be granted immunity from Commission initiated proceedings provided they co-operate fully with the Commission throughout any investigation and related proceedings.

## INTERPRETATION

1. For the purpose of the Leniency Policy:
  - a. Immunity means immunity from Commission initiated proceedings.
  - b. Person includes a company or an individual.
  - c. Information includes all information, documents, material and evidence of any kind whatsoever, including all oral, written and electronic information.

## PRINCIPLES

2. The Commission's Leniency Policy is based on the following key principles:

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

## **BACKGROUND**

3. Cartels are arrangements between competitors that breach Part II of the 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.
4. 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 Act:
  - a. in the case of an individual, \$500,000;
  - b. 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% of the turnover of the company.
5. Where cartel members engage in price fixing, the Act prohibits a company from indemnifying any current or former director, officer or employee against any pecuniary penalty imposed by the Court.
6. The first person involved in the cartel that reports the cartel to the Commission and co-operates fully with the Commission may apply for leniency and gain immunity from Commission initiated proceedings.
7. Where immunity is granted to a company it may extend to any current or former director, officer or employee of that company.
8. 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.

9. 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 Act, third parties may pursue private claims for compensatory or exemplary damages.

## **LENIENCY CONDITIONS**

### **First person**

10. Subject to clauses 9, 10, 11 and 12 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**

11. The person must:
  - a. provide the Commission with access to all Information available to that person regarding the existence, activities, operation and membership of the cartel;
  - b. maintain continuous, complete and expeditious co-operation with the Commission throughout the Commission's investigation and any ensuing proceedings initiated by the Commission;
  - c. provide promptly and without witness summons, all further Information requested by the Commission;
  - d. confirm that the person has now ceased its involvement in the cartel, or otherwise has acted or will act as directed by the Commission;
  - e. fully and truthfully co-operate with the Commission on a continuing basis;

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

- f. use the person's best efforts to secure the complete and truthful co-operation of current and former directors, officers or employees;
- g. 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;

- h. use the person's best efforts to ensure that each of its related entities provides all assistance reasonably requested by the Commission;

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

- i. make themselves available for interviews and responding fully and truthfully to all inquiries of the Commission in relation to the cartel;
  - j. appear as a witness in any proceeding relating to the cartel, if required to do so by the Commission.
12. 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**

13. 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):
- a. the person's Leniency Application;
  - b. any request by the person for clarification regarding their Leniency Application;
  - c. any grant of conditional immunity from Commission initiated proceedings to the person; and
  - d. any Information provided by that person to the Commission for the purposes of or in connection with the Leniency Application or any documents or Information created by the Commission by reason of or as a consequence of person's Leniency Application.

**Prior awareness of the cartel**

14. Immunity from Commission initiated proceedings will not be granted where the Commission is currently investigating conduct relating to the Leniency Application.

### **Company leniency**

15. 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**

16. Other cartel members who co-operate with the Commission, but who are not the first to formally make a Leniency Application, will not be granted immunity but may be treated with leniency under the Commission's general Co-operation Policy. The Commission's Co-operation Policy is a separate policy which is accessible on the Commission's website. The earlier the approach to the Commission, the more likely the Commission's Cooperation Policy will be available.

### **CONFIDENTIALITY**

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

### **IMMUNITY PROCEDURE**

18. The Commission's procedure for Leniency Applications is as follows:
  - a. Inquiry.
  - b. Formal application.
  - c. Conditional grant of immunity.
  - d. Final letter.

### **Inquiry**

19. If you wish to know whether the Commission's Leniency Policy will apply to you or your company, you (or your advisors) may approach the Commission for clarification.
20. 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.

21. Inquiries 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.
22. Inquiries must be directed to Geoff Thorn, General Manager of the Commerce Commission, 04 924 3620 or email [geoff.thorn@comcom.govt.nz](mailto:geoff.thorn@comcom.govt.nz).

### **Application**

23. 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 Geoff Thorn, General Manager of the Commerce Commission, 04 924 3620 or email [geoff.thorn@comcom.govt.nz](mailto:geoff.thorn@comcom.govt.nz).
24. A corporate Leniency Application must be made by an officer who has the authority to represent the company for this purpose.

### **Conditional grant of leniency**

25. 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 in the attached form.

### **Final letter**

26. The Commission will advise the person in writing when the Commission’s investigation and any Commission initiated proceedings are concluded.



[Date]

[Addressee details ]  
[ ]  
[ ]  
[ ]  
[ ]

**CONFIDENTIAL**

Dear [ ]

**Conditional Grant of Leniency**

I refer to [*Name*]'s Leniency Application made on [ ].

I confirm that [*Name*] is the first member of the cartel to approach the Commerce Commission with information regarding the cartel.

Subject to satisfaction of the Commission's Leniency Policy [and the Conditional Grant of Immunity Agreement] the Commission will grant [*Name*] immunity from Commission initiated proceedings in relation to [*Name*]'s participation in the cartel.

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Geoff Thorn  
General Manager for the Commerce Commission

# CONDITIONAL GRANT OF IMMUNITY FOR A COMPANY

## BACKGROUND

This agreement is between the Commerce Commission (the *Commission*) and [Name] (*Name*) in connection with [describe cartel] conduct in the [describe industry] in [geographical area if smaller, or New Zealand] (*the cartel*), in respect of which [Name] has applied for leniency (*Leniency Application*).

## INTERPRETATION

1. For the purposes of this agreement:

- “*Company*” includes:

Any association of persons whether incorporated or not and any body corporate incorporated inside or outside New Zealand:

- “*Information*” includes:

All information, documents, material and evidence of any kind whatsoever, including all oral, written and electronic information.

- “*Related entity*” includes:

Any interconnected bodies corporate as defined in clause 2(7) of the Commerce Act 1986 (*the Act*).

## COMPANY IMMUNITY CONDITIONS

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.

## [NAME] LENIENCY CONDITIONS

3. [Name] and any related entity will:

- a. provide the Commission with access to all the Information available to it regarding the existence, activities, operation and membership of the cartel;

- b. maintain continuous, complete and expeditious co-operation with the Commission throughout the Commission's investigation and any ensuing proceedings initiated by the Commission;
  - c. provide promptly and without witness summons all further Information, requested by the Commission;
  - d. use its best efforts to secure the complete and truthful co-operation of its current and former directors, officers or employees;
  - e. 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;
  - f. use its best efforts to ensure that each of its related entities provides all assistance reasonably requested by the Commission; and
  - g. confirm that it has now ceased its involvement in the cartel, or otherwise has acted or will act as directed by the Commission.
4. If the Commission at any time determines that:
- a. *[Name]* or any related entity has failed to meet any of the conditions of this agreement; or
  - b. a specifically authorised enactment or provision of the Act exempts *[Name]* from the application of Part II of the Act, or
  - c. *[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.

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.

#### **CURRENT OR FORMER DIRECTORS, OFFICERS OR EMPLOYEES OF [NAME] IMMUNITY CONDITIONS**

6. Any current or former director, officer or employee of *[Name]* seeking immunity will:
- a. provide the Commission with access to all Information available to them regarding the existence, activities, operation and membership of the cartel;

- b. maintain continuous, complete and expeditious co-operation with the Commission throughout the Commission's investigation and any ensuing proceedings initiated by the Commission;
  - c. provide the Commission with access to all Information available to them and relevant to the cartel;
  - d. make relevant personal documents and records available to the Commission;
  - e. make themselves available for interviews and respond fully and truthfully to all inquiries of the Commission in relation to the cartel; and
  - f. appear as a witness in any proceeding relating to the cartel, if required to do so by the Commission.
7. If the Commission at any time determines that any current or former director, officer or employee of [*Name*] or any related entity has failed to meet any of the conditions of this agreement the Commission will not be bound by its grant of immunity to him or her from Commission initiated proceedings.
8. Subject to his or her full, continuing and complete co-operation as required by clause 6, the Commission agrees not to bring any proceedings under the Act against any current or former director, officer or employee of [*Name*] or any related entity for any act he or she may have committed in connection with the cartel while employed by [*Name*] and prior to the date of this agreement, that may have infringed Part II of the Act.

#### **USE OF INFORMATION WHERE A FAILURE TO COMPLY WITH THE AGREEMENT**

9. In the event clause 4(a) or clause 7 apply and the Commission initiates proceedings against [*Name*], any related entity or any current or former director, officer or employee of [*Name*] or any of the above, then statements or other Information provided to the Commission by any of them, may be used against them in Commission initiated proceedings.

#### **INFORMATION PROTOCOL**

10. Information provided to the Commission will be subject to the "Protocol for Providing Information to the Commerce Commission".



- c. any grant of conditional immunity from Commission initiated proceedings to [Name] or any current or former director, officer or employee of [Name];
- d. any Information provided by [Name] to the Commission for the purposes of or in connection with this agreement; or any documents or Information created by the Commission by reason of or as a consequence of [Name]'s Leniency Application.

**MISCELLANEOUS**

- 15. This agreement, together with the accompanying schedules, is the entire agreement between the Commission and [Name] and supersedes all prior communications, understandings or representations whether oral or written between the Commission and [Name].
- 16. This agreement shall be governed by, and construed in accordance with, the laws of New Zealand.
- 17. The failure of the Commission to enforce any provision of this agreement at any time shall not operate as a waiver of that provision in respect of the particular act or omission or any other act or omission.
- 18. The Commission and [Name] represent and warrant to each other that the signatories to this agreement have the necessary authority and capacity to bind them.

**EXECUTION:**

SIGNED for and on behalf of )  
 [Name] )

Name:  
 Director/Duly Authorised Signatory

in the presence of:

Witness Name:  
 Witness Address:  
 Witness Occupation:

SIGNED for and on behalf of )  
 The Commerce Commission )

Name:  
 Chair, Commerce Commission

in the presence of:

Witness Name:

Witness Address:

Witness Occupation:

# PROTOCOL FOR PROVIDING INFORMATION TO THE COMMERCE COMMISSION

## BACKGROUND

The matters set out in this Protocol do not fetter or otherwise restrict the Commission from acting in accordance with the Conditions set out in the Commission's "Leniency Policy for Cartel Conduct" (Leniency Policy) [and its "Conditional Grant of Immunity for a Company" (the Agreement)] or from conducting any legal proceedings relating to the cartel including where appropriate [Name] and any related entity or any current or former director, officer or employee of [Name] in respect of the matters which are the subject of [Name]'s Leniency Application.

## USE OF INFORMATION

1. This protocol is subject to the Leniency Policy [and the Agreement].
2. Subject to clause 1, [Name] acknowledges and agrees that:
  - a. The Commission may use the Information provided to it by [Name] for the purpose of conducting any legal proceedings in relation to the cartel (other than proceedings against [Name] and any related entity or any current and former directors, officers or employees in respect of whom leniency is granted).
  - b. The Commission may use the Information provided to it by [Name] for the purpose of considering and implementing appropriate administrative action by the Commission in relation to the cartel (other than proceedings against [Name] and any related entity or any current and former directors, officers or employees in respect of whom leniency is granted).
3. The parties agree and acknowledge that in the event of a failure by [Name] to comply with the Leniency Policy [or clause 4(a) or clause 7 of the Agreement], the Commission may use Information provided to the Commission by [Name], any related entity or any current or former director, officer or employee of [Name] in Commission initiated proceedings against [Name] or any or any current or former director, officer or employee of [Name].

## DISCLOSURE

4. [Name] acknowledges and agrees that documents or information provided to the Commission by [Name] may be disclosed:
  - a. to officers, employees and members of the Commission;

b. to barristers, solicitors, witnesses, expert witnesses, potential witnesses or other advisers or consultants retained by the Commission for the purpose of legal advice or the preparation of legal proceedings; or

c. as the Commission otherwise deems necessary,

for the purpose of carrying out the Commission's functions.

5. [Name] acknowledges and agrees that the Commission may make general statements in its annual report and appropriate statements in any media releases at the commencement and conclusion of any legal proceedings against others in respect of these matters. The Commission agrees that it will notify [Name] and have regard to [Name]'s timely comments as to the form and content of statements referring to [Name] prior to their release.

### **CONFIDENTIALITY**

6. In the event that the Commission proposes to make a disclosure pursuant to clause 4, to the extent reasonably possible, an obligation of confidence will be imposed on the recipient of the Information.
7. In the event that the Commission proposes to make a disclosure pursuant to clause 5, the Commission acknowledges and agrees that, to the extent it is reasonably able to do so, it will not disclose that [Name] is the source of any document, record or information.

### **DISCOVERY**

8. In the event that a request for discovery is made of the Commission in relation to any documents or information provided to the Commission by [Name], the Commission will notify [Name] and except as required by law, provide [Name] with the opportunity to oppose such a request by Court action if necessary.
9. The Commission will not waive any privilege that it may hold in relation to the Information provided to it by [Name].

### **OFFICIAL INFORMATION**

10. The Commission acknowledges that in addition to the rights granted to [Name] pursuant to the Official Information Act 1982 (the *OIA*) in relation to certain types of information, including personal or business information:
- a. to the extent reasonably possible, [Name] will be notified of any OIA request for the disclosure of the documents or information provided by it to the Commission; and

b. to the extent reasonably possible, the Commission will not release any documents, records or information pursuant to an OIA request without first:

(i) providing notice to *[Name]* of its intention to do so; and

(ii) providing *[Name]* with the opportunity to take such action as may be advised to challenge the OIA request.

11. *[Name]* acknowledges and agrees that the Commission's obligations in relation to the release of any documents, records or information is subject to the requirements of the law.

### **MISCELLANEOUS**

12. The Commission will not procure, encourage, advise in or support any proceedings brought by any third party against *[Name]* arising from or in connection with the matters which are the subject of the Agreement.