

CROWN LAW

DRAFT

GUIDELINES ON IMMUNITY FROM
PROSECUTION FOR CARTEL
OFFENCES

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INTRODUCTION

1. This document outlines the guidelines to be applied by the Solicitor-General in considering an application for immunity from prosecution by a person or corporation implicated in a cartel offence. A cartel offence refers to the offence in s 82B of the Commerce Act 1986 (the Act).
2. For the avoidance of doubt, all references in these guidelines to “prosecution” are references to criminal prosecution. All references to “conditional immunity” are references to civil immunity.
3. Immunity from civil prosecution is provided by the Commerce Commission under its Cartel Leniency Policy and Process Guidelines (the Commission’s Leniency Policy). For more information on civil immunity please refer to that policy.¹
4. This guideline is based on a recognition by Government that the ability to grant immunity from prosecution is an essential tool in the detection and elimination of cartels. Immunity from prosecution and from civil penalty proceedings provides an incentive for cartel participants to defect from the illegal arrangements which, because they are usually covert pose a special difficulty in detection. The provision of immunity also enables the applicant to provide information and cooperation to investigation and prosecution agencies.
5. Applications for conditional immunity are made to the Commerce Commission and are subject to the conditions set out in paragraph 13 below. The Commerce Commission may decide those applications in respect of conditional immunity from civil penalty proceedings brought by it under s80 of the Act, but must make a recommendation to the Solicitor-General to grant immunity to the applicant in respect of criminal prosecution. The Commerce Commission cannot grant an applicant immunity from criminal prosecution.
6. Following a recommendation from the Commerce Commission, the Solicitor-General will decide whether to grant immunity from prosecution by applying the same criteria as contained in the Commission’s Leniency Policy. The decision of the Solicitor-General whether to grant immunity will be communicated to the Commerce Commission, which is obliged to promptly provide that decision to the applicant.
7. If the Solicitor-General decides to grant immunity, the Solicitor-General will provide an undertaking in writing to stay any prosecution commenced in respect of the applicant’s involvement in the particular cartel. The undertaking will be subject to conditions and on-going obligations on the applicant throughout the period of the Commerce Commission investigation and until the conclusion of any civil or criminal penalty proceedings against other cartel participants.

¹ Available at www.comcom.govt.nz/cartel-leniency-policy

ROLES OF THE COMMERCE COMMISSION AND THE SOLICITOR-GENERAL

8. The Attorney-General, as senior law officer of the Crown, has ultimate responsibility for prosecutions carried out by or on behalf of the Crown. In practice, however, the Solicitor-General exercises all of the law officer functions involved in the prosecution process pursuant to s 9A of the Constitution Act 1986. The Solicitor-General is able to provide immunity from prosecution by providing an undertaking to direct that any criminal prosecution brought in respect of a particular offence be stayed (see s 77A Summary Proceedings Act 1957 and s 378 Crimes Act 1961).²
9. The Commerce Commission is an independent Crown entity established under s 8 of the Commerce Act 1986. The Commission is responsible for investigating and enforcing alleged contraventions of the Commerce Act, including contraventions of the cartel provisions.
10. The Solicitor-General and the Commerce Commission acknowledge that certainty, swiftness and predictability of outcomes are essential to the effective operation of the Commission's leniency programme.
11. The management of the leniency programme, including the administration and management of all immunity applications, is the responsibility of the Commerce Commission.
12. Where the Commerce Commission submits to the Solicitor-General a recommendation for the granting of immunity from prosecution, the Commission will fully set out all relevant matters in order to permit the Solicitor-General to exercise independent discretion.

OBTAINING IMMUNITY – COMMERCE COMMISSION'S LENIENCY POLICY

13. The Commission's Leniency Policy records at paragraph 3.06 the criteria for eligibility for conditional immunity. These are in summary:
 - 13.1 That the applicant:
 - (i) is the first applicant to meet the criteria for conditional immunity in (ii) – (vii) below, and is either:
 - (a) the first person to apply in respect of a cartel of which the Commission is not aware; or
 - (b) the first person to apply in respect of a cartel of which the Commission is aware, but for which it does not have written advice that it has sufficient evidence to commence proceedings;
 - (ii) is or was a participant in the cartel;

² These provisions are combined under the new Criminal Procedure (Reform and Modernisation) Bill. See clause 183 CPRAM).

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- (iii) admits that they participated in, or are participating in, conduct in respect of a cartel that may constitute a breach of s 30 and/or s 82B of the Act;
- (iv) has either ceased their involvement in the cartel or has informed the Commission that they will cease their involvement;
- (v) has not coerced others to participate in the cartel;
- (vi) (for corporate applicants only), the person makes admissions in relation to actions that are genuinely corporate acts (as opposed to those undertaken by individuals);
- (vii) the person agrees to provide full and continuing cooperation to the Commission in its investigation of the cartel and any subsequent proceedings.

SOLICITOR-GENERAL'S CRITERIA FOR GRANTING IMMUNITY FROM PROSECUTION

14. Where the Commerce Commission is of the view that the applicant satisfies the criteria for conditional immunity, it may make a recommendation to the Solicitor-General that immunity from prosecution be granted to the applicant. This recommendation will provide as much information as possible in relation to the criteria listed in paragraph 13.
15. The Solicitor-General will exercise an independent discretion when considering a recommendation by the Commerce Commission. Where the Solicitor-General is satisfied that the applicant meets the criteria for conditional immunity as set out in paragraph 13 above and the applicant will meet the conditions set out in paragraph 17 below, the Solicitor-General will grant immunity from prosecution. The decision of the Solicitor-General whether to grant immunity from prosecution will be communicated to the Commerce Commission within 10 working days of receipt of the Commission's recommendation. The Commerce Commission is obliged to promptly provide that decision to the applicant.
16. If the Solicitor-General decides to grant immunity, the Solicitor-General will provide to the applicant, through the offices of the Commerce Commission, a written undertaking that, subject to fulfilment of on-going obligations and conditions, the Solicitor-General will stay any prosecution commenced against the applicant for the cartel offence for which immunity is sought. In circumstances where the applicant has requested that the leniency process be "paperless" and that it not receive copies of documents the Commission will not be required to send that undertaking to the applicant, but will communicate the decision orally. For further information about the paperless process see paragraph 3.46 of the Commission's Leniency Policy.
17. The standard conditions and on-going obligations for immunity will include that the applicant continues to meet the requirements for conditional immunity prescribed in the Commission's Leniency Policy, and expressly including the provision of full cooperation during the Commerce Commission investigation and any prosecution and, in respect of an individual:

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- 17.1 That they will appear as a witness for the prosecution as and where requested in any proceedings against the other cartel participants; and
 - 17.2 When giving such evidence, does so truthfully and discloses all relevant facts within the person's knowledge, and does not refuse to answer any questions on the ground of self-incrimination in respect of the charges.
18. Cartel participants who wish to formally cooperate with the Commerce Commission in circumstances where they cannot receive immunity under these guidelines may still be eligible for immunity under paragraph 12 of the Solicitor-General's Prosecution Guidelines (1 January 2010). For more information on cooperation with the Commerce Commission please refer to paragraphs 4.01-4.17 of the Commission's Leniency Policy.

CORPORATE DERIVATIVE IMMUNITY

19. The Commission's Leniency Policy provides that where a company has qualified for conditional immunity, all its present or former directors, officers or employees who admit their involvement in the cartel, and who cooperate as required with the Commission's investigation, will be covered by the conditional immunity granted to the company.
20. Similarly, if a corporate applicant is granted immunity from prosecution by the Solicitor-General, all its present or former directors, officers or employees who request immunity, admit their involvement in the conduct of the corporation in respect of the cartel and undertake to provide full disclosure and cooperation, will be eligible for a grant of immunity from prosecution in the same form as the corporation.
21. Where the Commerce Commission recommends to the Solicitor-General that a corporate applicant should be granted immunity from prosecution, the Commission will also make a recommendation to the Solicitor-General whether to grant immunity to any or all present or former directors, officers and employees who meet the relevant criteria in paragraphs 13 and 20 above. This recommendation will set out all relevant information in relation to the grant of immunity for these persons. The Solicitor-General will exercise an independent discretion when deciding whether to grant immunity pursuant to paragraph 20. Where the Solicitor-General decides to grant immunity to all such persons (natural or corporate) then the Solicitor-General will provide a single written undertaking to that effect.

REVOCACTION OF IMMUNITY BY SOLICITOR-GENERAL

22. The Solicitor-General may revoke immunity at any time if:
 - 19.1. The Commerce Commission makes a recommendation to revoke immunity, and the Solicitor-General, exercising independent discretion, agrees with that recommendation; or
 - 19.2. The Solicitor-General believes on reasonable grounds and after having consulted with the Commerce Commission:
 - (a) That the recipient of the immunity has provided information to the Commerce Commission or relevant prosecution agency that is false or misleading in a relevant matter; or

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(b) That the recipient of the immunity has not fulfilled the conditions of the immunity.

23. The Solicitor-General will notify the recipient and the Commerce Commission in writing if an immunity is to be revoked, and the recipient will be afforded a reasonable opportunity to make representations as to the revocation.