

GUIDELINES ON IMMUNITY FROM
PROSECUTION FOR CARTEL OFFENCES



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TABLE OF CONTENTS

Introduction.....	3
Roles of the Commerce Commission and the Solicitor-General	4
Solicitor-General’s criteria for granting immunity from prosecution	5
Derivative immunity.....	8
Revocation of immunity by Solicitor-General.....	9

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 section 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 “immunity” are references to criminal immunity.
3. Leniency from civil proceedings (“civil leniency”) is provided by the Commerce Commission under its Cartel Leniency and Immunity Policy (the Commission’s Leniency Policy). For more information on civil leniency please refer to that policy.¹
4. These guidelines are based on a recognition, informed by international experience, that the ability to grant immunity from prosecution is an essential tool in the detection and elimination of cartels. Immunity from prosecution and leniency in civil proceedings provide an incentive for cartel participants to defect from cartel conduct which, because it is usually covert, pose a special difficulty in detection. The provision of immunity enables an applicant to provide information and cooperation to investigation and prosecution agencies. These guidelines also recognise that clarity, predictability and transparency are critical to this process.
5. The Commerce Commission decides applications in respect of civil leniency but cannot grant an applicant immunity from criminal prosecution. While the Commerce Commission may make a recommendation to the Solicitor-General to grant immunity in respect of criminal prosecution, the decision is for the Solicitor-General to make in the exercise of his or her independent discretion.
6. Following a recommendation from the Commerce Commission, the Solicitor-General will decide whether to grant immunity from prosecution by applying the criteria set out below (at 14 and 15). The decision of the Solicitor-General whether to grant immunity will be communicated to the Commerce Commission, which will 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 proceedings against other cartel participants.

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

ROLES OF THE COMMERCE COMMISSION AND THE SOLICITOR-GENERAL

8. The Solicitor-General is responsible for maintaining general oversight of the conduct of public prosecutions (Criminal Procedure Act 2011, s 185) and must act independently of the investigation agency (s 193). 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 176 Criminal Procedure Act 2011).
9. The Commerce Commission is an independent Crown entity established under s 8 of the Commerce Act 1986. The Commerce 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 Policy.
11. The management of the Commission's Leniency Policy, 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.

SOLICITOR-GENERAL'S CRITERIA FOR GRANTING IMMUNITY FROM PROSECUTION

13. The Solicitor-General will exercise an independent discretion when considering a recommendation by the Commerce Commission and whether the public interest is served by granting immunity.
14. The primary criteria for a grant of immunity are those set out in the *Solicitor-General's Prosecution Guidelines* (1 July 2013), which will be applied taking into account the nature of cartel offending.
15. However, the Solicitor-General recognises the importance of the Commission's Leniency Policy in the detection and elimination of cartels. The Solicitor-General also acknowledges the importance of a "first in" policy (irrespective of whether the applicant is potentially more culpable than the other cartel participants) to the destabilisation of cartels and to effective enforcement, including of cross-border offending. Accordingly, the Solicitor-General will also have regard to the Leniency Conditions (found in paragraphs 33–41 (as well as 42–45 if the applicant is a business) of the Commission's Leniency Policy):
 - 15.1 The applicant must be the first party to qualify for immunity, either:
 - (i) in relation to cartel conduct of which the Commission is not aware;
or
 - (ii) in relation to cartel conduct of which the Commission is aware but has insufficient evidence to prosecute, and the applicant can provide valuable evidence that could not be reasonably obtained elsewhere.
 - 15.2 The applicant:
 - (i) is or was a participant in the cartel conduct;
 - (ii) admits that they participated in, or are participating in, cartel conduct that may constitute a breach of s 82B of the Act;
 - (iii) has either ceased their involvement in the cartel conduct or has confirmed to the Commission that they will cease their involvement;
 - (iv) has not coerced others to participate in the cartel conduct;
 - (v) (for corporate applicants only) makes admissions that it is liable for the cartel conduct, including due to the actions of its directors, officers, contractors, agents or employees;
 - (vi) agrees to provide full and continuing cooperation to the Commission in its investigation of cartel conduct and any subsequent proceedings.

GUIDELINES ON IMMUNITY FROM
PROSECUTION FOR CARTELOFFENCES

16. The Solicitor-General notes that an application for immunity may be received by the Commission early in, or at the beginning of, an investigation, which may require some flexibility in the application of the criteria set out in the *Solicitor-General's Prosecution Guidelines*.
 - 16.1 While immunity from prosecution is only appropriate for serious cartel conduct, and only serious cartel conduct is likely to be considered for criminal prosecution, it may not be clear, at the time an application for immunity is received, whether the cartel conduct justifies criminal prosecution.
 - 16.2 Where the Commission was not previously aware of the cartel conduct, it will generally follow that the evidence provided by the applicant significantly strengthens the prosecution case, and that there are no other reasonably available avenues to gain that evidence.
 - 16.3 For the avoidance of doubt, the Commission's decision to grant civil leniency will not preclude the availability of immunity.
17. The Commerce Commission's recommendation that immunity be granted will be accompanied by:
 - 17.1 A formal opinion on the merits of the immunity from:
 - (i) a cartel panel prosecutor, if one has been instructed in relation to the investigation to which the application relates; or
 - (ii) an appropriate senior legal staff member at the Commission, where no cartel panel prosecutor has been instructed.
 - 17.2 An indication of the evidence that will be provided under the grant of immunity but need not include briefs of evidence.
18. It is the Solicitor-General's expectation that all persons that apply for immunity will receive legal advice in advance of making the application.
19. It is the Solicitor-General's expectation that all persons who benefit from derived immunity will receive legal advice in advance of derived immunity being conferred on them. Recipients of derived immunity may need legal advice independent from the applicant. Where there is a reasonable prospect of derived immunity the relevant persons should be offered the opportunity to seek independent legal advice, including in relation to leniency. The costs of obtaining the legal advice will be met by the applicant.
20. If the application for immunity is declined, any information obtained from the applicant in connection with an application for immunity cannot be used against that person by the prosecution.

GUIDELINES ON IMMUNITY FROM
PROSECUTION FOR CARTEL OFFENCES

21. The decision of the Solicitor-General whether to grant immunity from prosecution will be communicated to the Commerce Commission promptly and in accordance with any timeframe agreed with the Commission. The Commerce Commission will promptly provide that decision to the applicant.
22. 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.
23. The standard conditions and on-going obligations for immunity will include that the applicant continues to meet the requirements prescribed in their Leniency Agreement, 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:
 - 23.1 that they will appear as a witness for the prosecution as and where requested in any proceedings against the other cartel participants; and
 - 23.2 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.
24. 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 the *Solicitor-General's Prosecution Guidelines*.
25. For more information on cooperation with the Commerce Commission please refer to paragraphs 118-134 of the Commission's Leniency Policy.

DERIVATIVE IMMUNITY

26. 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 usually be covered by derived immunity from prosecution. The corporate applicant should identify the persons, or classes of persons, for whom derivative immunity is sought.
27. 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 persons who meet the relevant criteria above. This recommendation will set out all relevant information in relation to the grant of immunity for these persons.
28. The Solicitor-General will exercise an independent discretion when deciding whether to grant immunity, as set out above. Where the Solicitor-General decides to grant immunity to all such persons (natural or corporate) then the Solicitor-General will provide a written undertaking to that effect.

REVOCATION OF IMMUNITY BY SOLICITOR-GENERAL

29. The Solicitor-General may revoke immunity at any time if:
- 29.1 The Commerce Commission makes a recommendation to revoke immunity, and the Solicitor-General, exercising independent discretion, agrees with that recommendation; or
 - 29.2 The Solicitor-General becomes aware of material information that either came to light after the granting of immunity, or which should have been provided with the recommendation but was not, which suggests immunity should not have been granted; or
 - 29.3 The Solicitor-General is satisfied, after having consulted with the Commerce Commission:
 - (i) 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
 - (ii) that the recipient of the immunity has not fulfilled the conditions of the immunity.
30. The Solicitor-General will notify the recipient and the Commerce Commission in writing of its intention to revoke immunity, and the recipient will be afforded a reasonable opportunity to make representations as to the revocation.