



**Te Tari Ture
o te Karauna**
Crown Law

Immunities in cartel cases

Te kahu ārai ngā hara ā rāngai kamupene

As at 1 January 2025

Introduction | Ngā kupu whakataki

1. Immunity from criminal prosecution, along with civil leniency, incentivises cartel participants to provide prosecuting agencies with information the agencies could otherwise not obtain. It is an essential tool in the detection and elimination of cartels.

Scope | Te korahi

2. This guideline sets out the circumstances in which the Solicitor-General may grant immunity from criminal prosecution for cartel offending, as well as the process by which the Commerce Commission may recommend a grant of immunity for such offending. It does not cover civil leniency, which is addressed in the Commission's Cartel Leniency and Immunity Policy.¹
3. This guideline does not restrict the ability to seek immunity from prosecution in the ordinary way, as set out in the guideline on Immunities | Te kahu ārai.

Glossary | Kuputaka

4. In this guideline:
 - 4.1. *Cartel conduct* is conduct that breaches (or appears to breach) the prohibition on cartel provisions (s 30 of the Commerce Act 1986) and a *cartel offence* is an offence for intentionally breaching that prohibition (s 82B of the Commerce Act).
 - 4.2. An *applicant* is a natural person or corporate entity who has applied to the Commerce Commission for civil leniency, and/or immunity from criminal prosecution.
 - 4.3. *Leniency* means an undertaking from the Commerce Commission that, subject to the fulfilment of ongoing obligations and conditions, the Commission will not take civil enforcement action against an applicant for their involvement in specified cartel conduct.
 - 4.4. *Immunity* means an undertaking from the Solicitor-General that, subject to the fulfilment of ongoing obligations and conditions, the Solicitor-General will stay any prosecution against an applicant for specified cartel conduct.
 - 4.5. A *recipient* is a natural person or corporate entity who has received a grant of immunity from the Solicitor-General.
 - 4.6. *Derived leniency* and *derived immunity* are leniency and immunity afforded to a current or former director, officer or employee of a corporate entity that has been granted leniency and/or immunity. Like leniency and immunity, derived leniency and derived immunity are subject to the fulfilment of ongoing obligations and conditions.

¹ Available on the Commerce Commission's website at www.comcom.govt.nz.

Roles | Ngā tūnga

5. The Commerce Commission is an independent Crown entity. It is responsible for investigating under, and enforcing, the Commerce Act, including the prohibitions relating to cartel conduct. The Commission may grant (or decline to grant) leniency under its Cartel Leniency and Immunity Policy.² It may recommend that the Solicitor-General grant immunity, but it has no role in deciding applications for immunity.
6. The Solicitor-General decides applications for immunity. The Solicitor-General acts independently when considering the Commission's recommendations.

Guideline | Te aratohu

The test

7. The ultimate question for the Solicitor-General is whether it is in the interests of justice to secure the applicant's evidence at the expense of the opportunity to prosecute. The Solicitor-General will apply the criteria in the guideline on Immunities | Te kahu ārai, modified and supplemented by the following considerations, which reflect the special features of cartel offending:
 - 7.1. The importance of the Commerce Commission's "first in" policy, which gives priority to the first cartel participant willing to cooperate, regardless of that participant's culpability relative to other participants.
 - 7.2. The difficulty of assessing the criminality and seriousness of the potential cartel conduct if it is disclosed early in, or at the beginning of, an investigation.

Commentary

In cartel cases, there may be little or no evidence besides the applicant's account at the point the Solicitor-General is asked to consider immunity from prosecution.

- 7.3. The fact that a grant of civil leniency by the Commission is not an "inducement" for the purposes of the criteria in the guideline on Immunities | Te kahu ārai.
 - 7.4. The fact that, if the Commission was not previously aware of the cartel conduct, an applicant's evidence will generally strengthen the prosecution case in a "significant" way that was not otherwise reasonably available.
8. The Solicitor-General will also have regard to the prescribed conditions in the Commission's Cartel Leniency and Immunity Policy, namely:
 - 8.1. The applicant must be the first party to qualify for immunity, either:
 - 8.1.1. in relation to cartel conduct of which the Commission is not aware; or

² Available on the Commerce Commission's website at www.comcom.govt.nz.

- 8.1.2. in relation to cartel conduct of which the Commission is aware but has insufficient evidence to issue civil proceedings, and the applicant can provide valuable evidence that could not be reasonably obtained elsewhere.
- 8.2. The applicant:
 - 8.2.1. is or was a participant in the cartel conduct;
 - 8.2.2. admits that they participated in, or are participating in, cartel conduct;
 - 8.2.3. has either ceased their involvement in the cartel conduct, or has confirmed to the Commission that they will cease their involvement;
 - 8.2.4. has not coerced others to participate in the cartel conduct; and
 - 8.2.5. agrees to provide full and continuing cooperation to the Commission in its investigation of cartel conduct and any subsequent proceedings (including prosecution).
- 8.3. If the applicant is a corporate entity, it must also make admissions that it is liable for the cartel conduct, including due to the actions of its directors, officers, contractors, agents or employees.

Civil leniency not relevant

9. A decision by the Commerce Commission to grant the applicant civil leniency is not relevant to the question whether it is in the interests of justice for the Solicitor-General also to grant immunity from criminal prosecution.

The process

Legal advice

10. The Solicitor-General expects that every applicant will receive legal advice before making an application.

The recommendation

11. When the Commerce Commission recommends that the Solicitor-General grant immunity from prosecution, it will send a formal opinion on the merits of the proposed immunity to criminal@crownlaw.govt.nz. The opinion should be from a cartel panel prosecutor (if one has been instructed), or an appropriate senior legal staff member at the Commission (where no cartel panel prosecutor has been instructed). The opinion should include, or annex, an indication of the evidence that would be provided under the grant of immunity (which need not be in the form of briefs of evidence).

The decision and its consequences

12. The Solicitor-General will promptly communicate immunity decisions to the Commerce Commission, in accordance with any timeframe agreed with the Commission. The Commission will promptly provide decisions to applicants.

If the application is declined

13. If the Solicitor-General declines to grant immunity, any information obtained from the applicant in connection with it cannot be used against that person in a prosecution.

If the application is granted

14. If the Solicitor-General grants immunity, they will provide a written undertaking (through the Commerce Commission) that, subject to the fulfilment of ongoing obligations and conditions, they will stay any prosecution commenced against the applicant for the cartel offence for which immunity was sought.
15. The standard conditions and ongoing obligations for immunity include that the applicant continues to meet the requirements in their leniency agreement with the Commission and the Commission's Cartel Leniency and Immunity Policy. This includes fully cooperating with the Commission investigation and any prosecution. For individuals, this also means:
 - 15.1. they will appear as a witness for the prosecution as and when requested in any proceedings against other cartel participants; and
 - 15.2. they will give evidence truthfully, disclosing all relevant facts within their knowledge, and will not refuse to answer any questions to avoid self-incrimination in respect of cartel conduct covered by the immunity from prosecution.

Immunity and cooperation on alternative bases

16. Cartel participants who wish to formally cooperate with the Commerce Commission in circumstances where they cannot receive immunity under this guideline may still be eligible for immunity under the guideline on Immunities | Te kahu ārai.
17. The Commission's Cartel Leniency and Immunity Policy provides further information about cooperation with the Commission.

Derived immunity

18. If the Solicitor-General grants immunity to a corporate applicant, they will also usually grant derived immunity to all of the applicant's present and former directors, officers and employees who ask for immunity if they:
 - 18.1. admit their involvement in the conduct of the corporation in respect of the cartel; and
 - 18.2. undertake to provide full disclosure and cooperation.
19. Corporate applicants should identify the persons, or classes of persons, for whom derived immunity is sought.
20. The Solicitor-General expects that anyone who may benefit from derived immunity will receive legal advice in advance of a grant of derived immunity. Recipients of derived immunity may need legal advice independent from the applicant. Where there is a reasonable prospect of derived immunity, the relevant individuals 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.

21. Where the Commerce Commission recommends to the Solicitor-General that a corporate applicant should be granted immunity from prosecution, the Commission should also recommend whether derived immunity should be granted to the persons who meet the criteria above. This recommendation should set out all relevant information in relation to the proposed grants of derived immunity.
22. The Solicitor-General will independently decide whether to grant derived immunity. When the Solicitor-General decides to grant derived immunity, they will provide a written undertaking to that effect.

Revocation

23. The Solicitor-General may revoke a grant of immunity at any time if:
 - 23.1. the Commerce Commission makes a recommendation to revoke immunity and the Solicitor-General, exercising their independent judgement, agrees with that recommendation; or
 - 23.2. the Solicitor-General becomes aware of information that suggests immunity should not have been granted (whether or not the Commission knew about the information at the time it made its recommendation); or
 - 23.3. the Solicitor-General is satisfied, after having consulted with the Commission, that:
 - 23.3.1. the recipient of the immunity has provided information to the Commission or relevant prosecuting agency that is false or misleading in a relevant matter; or
 - 23.3.2. the recipient of the immunity has not fulfilled the conditions of the immunity.
24. The Solicitor-General will notify the recipient and the Commission in writing of their intention to revoke the grant of immunity. They will give the recipient a reasonable opportunity to respond before revoking immunity.
25. If immunity is revoked, any information provided to the Solicitor-General or the Commission may be used against the recipient in a prosecution.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Immunities | Te kahu ārai

Disclosure | Te tūhura