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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Working Party No. 3 on Co-operation and Enforcement**

**The Future of Effective Leniency Programmes – Note by New Zealand**

13 June 2023

This document reproduces a written contribution from New Zealand submitted for Item 5 of the 137th meeting of Working Party 3 on 13 June 2023.

More documents related to this discussion can be found at  
<https://www.oecd.org/competition/the-future-of-effective-lenieny-programmes-advancing-detection-and-deterrence-of-cartels.htm>

Antonio CAPOBIANCO  
Email : Antonio.CAPOBIANCO@oecd.org

**JT03519675**

## *New Zealand*

### 1. Introduction

1. This paper is a contribution to Working Party 3's call for country contributions to the meeting on 'Leniency Programmes' to be held on 13 June 2023.

2. Since November 2004 the New Zealand Commerce Commission (NZCC) has operated a cartel leniency policy.<sup>1</sup> The key feature of the policy is that a participant in cartel conduct can report the conduct to the NZCC and cooperate with the resulting investigation, in return for the NZCC's agreement not to bring civil proceedings against them.<sup>2</sup> The policy has worked successfully and a significant proportion of the NZCC's cartel proceedings are leniency-derived. But as we address below it has been important for the NZCC to not just solely rely on leniency as the only detection tool.

3. During the time that the NZCC's cartel leniency policy has operated, there have been a number of changes as to how the policy operates. The most significant of these changes happened in April 2021, when cartel conduct became subject to both criminal and civil sanctions. From April 2021, an individual can face up to seven years in prison and businesses can face criminal fines. The impact of the availability of criminal sanctions on the NZCC cartel leniency policy and the changes made are outlined below.

4. Due to the covert nature of many cartels, they can be difficult to detect. However, having a leniency policy has proven to be a very important and effective tool for the NZCC in detecting and enforcing against cartels. Prior to the adoption of a cartel leniency policy, between 1986 and 2004, the NZCC undertook some cartel enforcement, but it was often difficult to obtain sufficient evidence to be able to satisfy the legal threshold to establish a contract, arrangement or understanding. In respect of the cartel enforcement that was undertaken in this period, the enforcement often involved defendants cooperating with the NZCC under the general cooperation policy.

5. One of the rationale for the NZCC adopting a cartel leniency policy was that the more cartel cases that a competition agency can prove, the higher the perception amongst cartelists that they are at risk of their conduct being caught or uncovered. This remains an important reason for keeping our cartel leniency policy relevant.

6. Closely related to this, it is important as a competition agency to publicise when we take enforcement action, particularly when it is non-leniency based, and any resulting penalties/sanctions to demonstrate the risks of what could happen if you choose not to come in for leniency. This in turn provides more incentive for potential applicants to come forward as quickly as possible and creates a 'race' to make use of the cartel leniency policy.

7. However, potential applicants also recognise that there might be drawbacks to coming forward and admitting to cartel conduct that they have been involved in. For example, there may be significant legal costs, reputational considerations about being an informer and the chance of third-party claims. Potential applicants need to balance these

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<sup>1</sup> Available at [https://comcom.govt.nz/\\_\\_data/assets/pdf\\_file/0023/90437/Cartel-Leniency-Policy-and-Guidelines.pdf](https://comcom.govt.nz/__data/assets/pdf_file/0023/90437/Cartel-Leniency-Policy-and-Guidelines.pdf)

<sup>2</sup> More information about New Zealand's leniency programme is available at <https://comcom.govt.nz/business/avoiding-anti-competitive-behaviour/what-is-a-cartel/cartel-leniency-faq>

factors against the risk of getting caught and potential civil and/or criminal sanctions. New Zealand does not yet have a follow-on damages regime for cartel conduct, but such a regime is under consideration by the Law Commission.

8. Although leniency is a valuable and effective tool, the NZCC is wary of not being too reliant on cartels being primarily detected through applications under the NZCC cartel leniency policy. The NZCC considers it is critical for effective cartel detection and enforcement to have a wider set of cartel detection tools to uncover conduct. This needs to have a wider tool kit and the tools which agencies are adopting was extensively discussed at the ICN Cartels Workshop in December 2022 in Auckland. The NZCC found this invaluable and are thinking of the tools to adopt in the future. Currently, the NZCC (in addition to leniency) uses the following tools to detect potential cartel conduct:<sup>3</sup>

- an anonymous whistle blower reporting system on the NZCC website;
- a more traditional complaints system where members of the public can email or phone in complaints;
- a confidential informants policy (more comprehensive policy/programme currently being developed);
- running regular outreach programmes; and
- referrals from other parts of the NZCC and other government agencies.

9. Additionally, as noted above, the NZCC is looking at new tools to develop our intelligence capabilities, including in relation to detection of bid-rigging in public sector procurement.

10. Having other cartel detection methods does not mean that the NZCC cartel leniency policy is failing as a detection tool, but we view them as complementary.

11. In the remainder of this paper, we outline how the NZCC leniency policy works, including recent changes that have been made to keep our policy relevant, and provide a summary of the current New Zealand experience. We then discuss the other tools that the NZCC uses to detect cartel conduct and briefly outline the new tools and capabilities that are in the process of being developed.

## 2. New Zealand Cartel Leniency and Immunity Policy

12. The latest iteration of the NZCC policy was published in April 2021. Modifications and updates to the policy were needed to reflect that, since April 2021, under New Zealand law cartel conduct is a criminal offence as well as a civil contravention.

13. The NZCC policy covers both businesses and individuals. The threat of criminal sanctions for individuals (eg, potential imprisonment) means that the benefits of a leniency policy may be more tangible to those individuals involved in cartel conduct.

14. The move to criminalisation of cartel conduct has had implications for the NZCC cartel leniency policy. While the NZCC as the competition regulator can grant leniency to an individual or company, we are unable to grant criminal immunity. The power to grant criminal immunity lies with the Solicitor-General. In New Zealand the Solicitor-General is

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<sup>3</sup> For more information see <https://comcom.govt.nz/business/avoiding-anti-competitive-behaviour/what-is-a-cartel/reporting-cartel-conduct>

the government’s advocate in the courts, and they have responsibility and oversight for all public prosecutions. It sits completely separate from the NZCC.

15. Despite this change, the NZCC has tried to keep the process for applicants securing leniency and immunity as simple as possible. The NZCC remains the contact point for all enquiries and applications relating to leniency/immunity. The NZCC retains the ability to grant leniency in respect of civil proceedings, and make recommendations to the Solicitor-General to grant immunity for criminal prosecutions. The Solicitor-General exercises their independent discretion in considering the NZCC’s recommendation on whether to grant immunity. The Solicitor-General’s decision around whether to grant immunity is made in accordance with the Solicitor-General’s Prosecution Guidelines.<sup>4</sup>

16. The NZCC works with the Solicitor-General to ensure that the process for assessing immunity is aligned with how we assess leniency. Applicants can obtain criminal immunity and civil leniency for the same conduct.

17. A priority in the updated cartel leniency policy was ensuring clarity around both the process and the conditions for applicants to secure civil and criminal immunity. As part of this review, the NZCC engaged with a number of overseas counterpart agencies and the domestic competition bar in New Zealand. A strong line of feedback was that potential applicants need a clear process. As the NZCC had operated the cartel leniency policy well for a number of years, there was keenness for the NZCC to still be the contact point in respect of criminal immunity applications.

18. Although the main reason for publishing an updated policy in 2021 was the change to criminalisation of cartel conduct, the NZCC considers it is important that the policy is frequently reviewed and updated in light of recent experience so that it remains relevant and fit for purpose. The current policy looks very different to the first iteration in 2004, which is in part a reflection of the changes globally in relation to leniency, such as the development of the marker phase and use of the paperless process.

19. The NZCC seeks to obtain informal feedback annually from the competition bar in New Zealand around how the cartel leniency policy is operating, and undertakes a more fulsome review every two years. We are currently undertaking a more fulsome review of our policy, including looking at recent leniency cases and experiences to see whether any improvements can be made.

### 3. Current New Zealand experience with leniency applications

20. In New Zealand, there has been a consistent number of leniency applications over recent years and in the last seven years we have consistently had between four to eight applications per year; however we received 19 in 2022. The table below shows the number of leniency applications over the past seven years.

**Table 1. Leniency applications 2017-2023**

Year	No of leniency applications received by NZCC
2017	4
2018	5

<sup>4</sup> Available at <https://www.crownlaw.govt.nz/assets/Uploads/Prosecution-Guidelines/ProsecutionGuidelines2013.pdf>

2019	6
2020	8
2021	6
2022	19
2023 (as at 5 May 2023)	5

21. This last year the NZCC saw an upward trend in the number of applications - in the 2022 calendar year we had 19 leniency applications. We understand this goes against the worldwide trend where a number of regulators have experienced a decreasing number of leniency applications.

22. At the NZCC we distinguish between two different types of applications:

- where an applicant comes forward about conduct that we are not aware of; and
- where an applicant comes forward when we already have an open investigation. If no leniency marker already exists, we then need to assess the evidence that we hold. Leniency/immunity may still be available to the applicant if we are aware of the conduct but do not yet have sufficient evidence to issue proceedings and the applicant is able to provide valuable evidence that could not be reasonably obtained elsewhere.

23. The latter type of application, ie, where an open investigation already exists, can still be valuable to the NZCC as having a leniency applicant often means there is more efficient evidence gathering and consequently an expedited investigation and enforcement response.

24. Recently, the NZCC has seen a relatively even number of both types of applications, with a slight upward trend in respect of the latter. To date, the threat of criminal sanctions appears to have had a positive impact on cartel participants making use of the leniency policy.

#### 4. Other tools NZCC uses to detect cartel conduct

25. As set out in the introduction, the NZCC uses various other tools that sit alongside our leniency policy to identify potential cartel conduct. One of these is through a secure anonymous whistleblowing tool on our website. We recognise that there are sometimes situations where a person has knowledge or information about a cartel but may be reluctant to report it for fear of negative consequences or reprisals. This tool uses encryption methods to allow a person to submit a report anonymously. The information that is provided via this tool cannot be traced back to the submitter, so long as the information that they provide does not identify them. This tool is important as a detection tool. Although it does not provide witnesses for enforcement, it does enable cartel matters to be detected and investigated.<sup>5</sup>

26. The NZCC also has a complaint process. A person can make a complaint about suspected cartel conduct by phoning or emailing our complaints centre. All our complaints are then assessed and if we decide to make further enquiries are allocated to an investigator within the cartels team.<sup>6</sup>

<sup>5</sup> For more information see <https://comcom.govt.nz/business/avoiding-anti-competitive-behaviour/what-is-a-cartel/reporting-cartel-conduct/anonymous-whistleblower-tool>

<sup>6</sup> For more information see <https://comcom.govt.nz/make-a-complaint/complaint-process>

27. If a complainant considers that reporting the conduct to the NZCC puts them at risk, we may consider treating that person as a confidential informant and putting in place measures to protect their identity. This is done on a case-by-case basis.

28. The NZCC also runs regular outreach programmes to educate individuals and businesses about what cartel conduct is, what it can look like, and why it is harmful to business and consumers.

29. Both leading up to and following the criminalisation of cartels we have run several digital (social media) and radio media campaigns to increase awareness of:

- what constitutes cartel conduct;
- the risk of a criminal conviction (and imprisonment) for involvement in cartel conduct; and
- how to report conduct (along with the potential risk of being reported). This has included highlighting our leniency policy alongside other reporting methods.<sup>7</sup>

30. This campaign resulted in all-time record levels of traffic to the NZCC's website, and there was a really pleasing level of engagement with our social media advertising.<sup>8</sup>

31. Combined with these campaigns, we also have a programme of work related to specific cartel outreach to various industries. This involves NZCC staff engaging with a range of industries/organisations with interactive presentations and articles around what cartel conduct is and how to report it to us.

32. The NZCC is currently running an outreach programme which focuses specifically on public sector procurement, arising from adverse weather events earlier this year in New Zealand. Linked to that, the NZCC is also undertaking outreach to industry sectors to help us build connections with individuals in key business sectors. These human intelligence connections with individuals are important as they are an area where we can get informal leads on cartel conduct.

33. We also uncover conduct by getting referrals and information from other teams within the NZCC and more generally other government agencies. To ensure these referrals continue, we consider it is important to frequently educate both inside and outside of our organisation. The NZCC cartel investigation team works closely with the NZCC mergers team to educate them around what may be a cartel conduct lead and the cartel investigation team will endeavour to prioritise assessing any leads from that team. Finally, through international cooperation we have received helpful leads from competition agencies overseas where conduct in their markets may also be occurring in New Zealand or in global markets. This does not involve sharing any leniency information without appropriate waivers.

## 5. Detection tools that the NZCC is developing

34. At the NZCC, we are looking to increase our intelligence gathering capabilities across our competition enforcement function, including in cartels. This includes building

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<sup>7</sup> For more information see our media release here <https://comcom.govt.nz/news-and-media/media-releases/2022/businesses-warned-about-the-consequences-of-cartels>

<sup>8</sup> See our media release on this here <https://comcom.govt.nz/news-and-media/bulletin/cartels-campaign-drives-record-traffic-to-commission-website>

an intelligence team that looks at human intelligence as well as examining data, trends along with specific requests for discrete pieces of intelligence from case teams.

35. As part of this we are developing a screening tool that analyses publicly available data to create an additional information source that can be used as part of our intelligence gathering, outreach programme and prioritisation toolkit. This tool combines both qualitative and quantitative data and elements of both structural and behavioural screening.

36. Although this tool may not generate leads that are sufficient in themselves to warrant opening an investigation into particular conduct, we consider it can assist with wider industry trends and competition issues. As we are using publicly available data it avoids problems such as inability to access data and confidentiality issues that are sometimes associated with obtaining data from a third party.

37. Alongside this, we are also considering a more sophisticated screening tool that specifically looks at identifying collusion and cartels in public tenders.

## 6. Conclusion

38. The NZCC leniency policy is working well, with a steady number of applicants making use of the benefits that the policy offers. However, we are cognisant that this could easily change, and are wary of being too reliant on leniency for being the main way that we detect cartel conduct.

39. Consequently, we are continually looking at new ways we may be able to detect conduct and how we can improve the tools that we already use. Part of this is also looking at how we engage with external stakeholders and how we can encourage individuals, businesses and other organisations to recognise cartel conduct and come forward with relevant information.