LAW COMMISSION REVIEW OF OFFICIAL INFORMATION LEGISLATION – COMMERCE COMMISSION RESPONSE

This paper has been prepared in response to the enquiry received from the Law Commission office regarding the views of officials regularly affected by the OIA. The Commission is principally involved with the OIA and so the comments in this response relate to the application of that Act rather than the LGOIMA.

A summary of suggested changes and/or improvements to the operation of the OIA is set out in the first part of the paper followed by answers to the specific questions contained in the Law Commission survey (using the same numbering system).

Summary of suggested changes/improvements to the OIA

The Commission considers that the following changes to the OIA or procedures relating to it would be beneficial:

Procedural

- Creation of a standard procedure for dealing with more routine categories of request; e.g. copies of investigation reports during an investigation or after it has been closed;
- Examples and recommendations for how recurring categories of information should be treated. Relevant categories include guidance on the most appropriate treatment of information provided under the Commission's leniency programme and whether such information falls within the section 6 (c) exemption and specific situations which the "free and frank expression" ground (section 9) is aiming to protect;
- Guidance on how to interpret and apply more abstract concepts within the OIA e.g. 'public interest' and the likely effect that the disclosure of information would have when assessing whether it should be disclosed;

Specific areas of difficulty

- Guidance is needed on how the two regimes of the High Court Rules and the OIA interact with each other and which should prevail in the event of conflict;
- Where section 9 (2) (a) is used to redact out officials' names that accompany advice to decision-makers it would be useful to have more guidance on whether any such redaction is appropriate and if so in what circumstances;
- More detailed guidance on the circumstances in which it is appropriate to refuse an information request;
- Clarify whether section 15A enables a time limit for compliance with an information request to be extended more than once, and if this is considered not to be the case, consider amendment of the OIA to allow further extensions to be granted in appropriate circumstances.

Changes to the role of the Ombudsman's Office

- Introduction of a requirement that the Ombudsman provide comprehensive formal reasons for reaching any decision to assist in developing best practice;
- Introduction of a procedure whereby an agency can seek guidance from the Ombudsman's Office (or another appropriate body) for a ruling on a particular information request issue so that the most appropriate position can be taken at an early stage (query whether such rulings should be binding);

Changes to the OIA

- Amend section 9(1) so that the organization relying on it to withhold information must expressly refer to a ground (or more than one) under section 9(2) and expressly demonstrate to the requestor that the process of balancing the public interest has occurred before relying on that ground.
- Amend the statutory timetable for the response to an information request to allow an extra specified period of time whereby, if it is necessary to consult with parties who have provided information or are affected by an information release, this can be taken into account before the response is finalised. This would provide for an extension as of right rather than the current discretionary position under section 15A (1)(b);
- Amend the OIA charging provisions to allow for the cost of legal staff working on information requests to be charged for as part of those provisions. This recognises the importance of compliance with legal obligations.
- Consider amending the OIA to require all organizations carrying out public functions, including Cabinet, to be subject to the OIA. Any need to withhold information can be adequately dealt with under the existing parameters of the OIA.
- Linked to the previous point, consider a form of 'public function' test when deciding on the scope of entities subject to the Act. The Act deals with the exercise of any function or power that is public in nature or affects the public interest. Such functions/powers can reach further than purely public bodies. Examples of industry-led regulation with arbitrary information obligations are discussed at question 4(c).

Response to the Law Commission survey

1. Overview of the Act

(a) Do you find the OIA and/or LGOIMA easy to read and understand?

The OIA is easy to read and understand but some aspects of it are open-ended and accordingly open to interpretation. In order to properly understand our obligations as a government agency we have found it necessary to go beyond the Act and consider interpretative aids such as Court cases (e.g. *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385; *R v Taylor* CA 130/02 17 December 2003) and the Ombudsman's Practice Guidelines which provide some discussion of considerations to take into account when assessing whether the statutory criteria, principally under sections 6 and 9, are met.

(b) What changes would make the Acts easier to follow?

Whilst the case by case approach is considered appropriate it is possible that similar requests might result in different interpretations of the relevant statutory provisions as each request is

considered afresh potentially by different personnel. If it was possible for there to be a standard procedure in place for dealing with certain categories of request; e.g. copies of investigation reports during an investigation or after it has been closed; along with more definitive examples of what would or would not be appropriate in given circumstances, this may assist in finding the most appropriate outcome in each case. In turn this would support a consistent and more predictable approach to information requests.

(c) Do you have any comment on the overall framework of either Act?

The structure is logical to follow. Any improvements sought would be in the nature of further guidance on how to apply the Act rather than on the form of the Act.

(d) What advantages or disadvantages would there be in having the official information legislation for both local and central government in the same act?

The Commission is principally concerned with interpretation of the OIA and so has little experience with the LGOIMA. However, legislation dealing with the release of official information, whether at central or local level, is likely to involve consideration of the same principles. Accordingly, it is logical to have any rules regarding the release of information in the same Act to minimize the potential for inconsistencies in interpretation. .

Merging the two Acts would result in the development of a single comprehensive body of jurisprudence to be applied when considering requests for the release of information. This in turn should lead to a consistent approach to information requests irrespective of the category of official body from which the information is sought.

.

2. Applying the Act

2.1 Case by case consideration

(a) What is your experience with the case by case approach?

The case by case approach to information requests is considered appropriate. It provides necessary flexibility and allows for the Act to be applied to the specific facts of the case under consideration.

There is no binding procedure to be followed when considering an information request. The quality of any OIA response can vary depending upon the knowledge of the individual(s) dealing with the request at the time. The Ombudsman's Office Practice Guidelines are helpful but these are not binding and it would be useful to have more examples of how different categories of information should be treated. Suggested changes for this are discussed below.

The two stage aspect of the test is considered an essential part of the information request process to ensure that, even where grounds for withholding information are prima facie established, the counter veiling consideration of the public interest has been consciously considered. The first stage requires the official to consider whether there is a reason for withholding information and the second stage requires consideration of whether that reason is outweighed by the public interest favouring disclosure. The need for further guidance on the 'public interest' aspect of the approach is discussed below at 2.1(c).

(b) How important is it for upholding the principles of the Act?

The case by case approach is an essential aspect of the Act. Each case is fact specific and should be looked at in light of its own facts and context. Official information that can be sought is broad in nature and constantly evolving. Applying the OIA principles afresh each time information is sought is critical in ensuring the continued working of the legislation, bearing in mind the underlying and at times competing principles of availability and protection of information.

The development of a set of rules for processing information requests could be attractive in terms of certainty, but subject to the need that requests still be dealt with in light of their own unique facts.

(c) Have you any suggestions for improvement?

Greater availability of more fulsome reasoned decisions from the Ombudsman's Office would assist requesters and agencies in understanding and fulfilling their respective rights and obligations. If the Ombudsman was required to provide formal reasons for reaching any decision this would assist in developing an understanding of best practice when dealing with these requests. Whilst each request is specific to the information sought, published common principles to be considered when similar categories of information are sought by others would be of assistance.

Application of abstract terminology of the 'public interest' leaves individual officials or agencies to decide what is that such an interest constitutes. It would be helpful to have some guidance on what this concept ought to include.

Similarly, further guidance on how to consider the likely effect that the disclosure of information would have when assessing whether it should be disclosed would be helpful.

(d) Would you like more general guidance from the Ombudsmen on frequently recurring situations?

It would be helpful if the Ombudsman's guidelines and/or Parliament provided more guidance on recurring categories of request which would provide more predictable outcomes of routine information enquiries.

It would also assist if there was a procedure whereby an agency could seek guidance from the Ombudsman's Office (or another appropriate body) in order to obtain a ruling on a particular information request issue so that the most appropriate position can be taken at an early stage.

2.2 Two stage test

(a) What is your experience with the two stage test?

As a general comment, legal staff dealing with information requests are well acquainted with the two stage test. Having said that, it is possible that this second stage of balancing the public interest may not always be properly applied. Some parties considering an information

request may not be aware of the second stage, or perceive that, once a request falls into one of the section 9(2) categories, the information can be withheld.

(b) How important is it for upholding the principles of the Act?

The two stage test is a very important aspect of the OIA as it aligns the counterbalancing test for disclosure or withholding of information with the principles that underpin the OIA; namely the presumption of availability being weighed against protection of information in appropriate cases.

(d) Have you any suggestions for improvement?

It may be appropriate to amend section 9(1) so that the organization relying on it to withhold information must expressly refer to a ground (or more than one) under section 9(2) and expressly demonstrate to the requestor that the process of balancing the public interest has occurred. This should not change the workload of officials, as the exercise is already required, but it does require them to specifically turn their minds to this aspect of the test in every case.

3. Reasons for Withholding

3.1 Maintenance of the law

(a) What is your experience with the s6 conclusive grounds for withholding information?

The main section 6 ground which the Commerce Commission relies on is section 6 (c). This provides a conclusive reason for withholding official information where making it available would "prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial".

(b) What is your experience with the s6 maintenance of law ground?

At times there is a lack of clarity over when this section applies. The Commission argues that it should apply, for example, with regard to information provided to the Commission by a leniency applicant under the leniency programme (part of the Commission's cartel detection/ deterrence programme). There was a complaint to the Ombudsman on this point in May 2009, and the Commission made a detailed submission[1] in relation to it, but the complaint was withdrawn and so there was no final determination issued. Whilst it may not be appropriate for the OIA itself to be amended to discuss the treatment of information provided under the Commission's leniency programme, it would be useful to have confirmation e.g. via the Ombudsman's Guidelines, that such information falls within the section 6 (c) exemption.

(c) Should any of the grounds in s6 be subject to the public interest test?

No. It is considered appropriate that there remain two categories of test when deciding on an information request. The more serious reasons for withholding information remain conclusive under section 6 and section 9 provides for circumstances that might qualify but are subject to consideration of the public interest. The section is a necessary tool for the

[1] The background section of the submission, of July 2009, is attached at Annex 1.

Commission in appropriate circumstances. A useful example of this is the withholding of documents in order to protect the leniency programme. If this did not occur it is likely that the leniency programme would be ineffective, in turn failing to detect and deter cartels, resulting in significant harm to New Zealand businesses and consumers.

(d) Should any other conclusive grounds be added to s6?

No suggestions are made at this stage.

(e) In what circumstances do you commonly apply the s6 maintenance of law ground?

The Commission applies this ground in the context of leniency applications. Similarly, the Commission considers that information provided to it by way of 'cooperation' by cartel members should be protected under section 6 (c), in order to ensure the efficacy of the Commission's cartel-detection programme.

A lack of clarity exists concerning the release of court documents held by the Commission. The High Court Rules (HCR) provide a framework for the courts (judge or registrar) to use when deciding whether to grant access to such documents. These rules set out "matters to be taken into account" which are similar to the OIA considerations[2]. In most instances if disclosure is not permitted by the HCR, then it would be reasonable to withhold under s6 (c) OIA (or indeed under s 18 (c) (ii) if there was a court order and breaching it would constitute contempt of court). However, for clarity, it would be helpful if the OIA or the Ombudsman's Guidelines could set out how the two regimes (HCR and OIA) interact with each other and which should prevail.

Finally, the Commission often relies on the s 6 (c) exemptions when documentation is sought during an investigation, particularly documentation prepared in order to assess whether or not to litigate a matter. The ability to withhold such information during the investigation phase is a critical and important safeguard for enforcement agencies.

3.2 Good government

Topic 3.2 Questions:

(a) What is your experience of the provisions that enable information to be withheld on the basis of enabling good government?
(b) Have you any suggestions for improvement?
(c) Which of the "good government" grounds is most often relied on?
(d) How is it decided whether the Agency or Minister makes decisions about the release of information?

---

[2] 3.16 HCR – this requires the Judge or Registrar, when determining an application under 3.9 (request for access to documents during the substantive hearing stage) or 3.13 (request for access to documents other than at the hearing stage), to take into account "each of the following matters that is relevant to the application …:
a) the orderly and fair administration of justice
b) the protection of confidentiality, privacy interests (including those of children and other vulnerable members of the community), and any privilege held by, or available to, any person
c) the principle of open justice, namely, encouraging fair and accurate reporting of, and comment on, court hearings and decisions
d) the freedom to seek, receive, and impart information
e) whether a document to which the application or request relates is subject to any restriction under rules 3.12
f) any other matter that the Judge or Registrar thinks just."

The Commission uses section 9(2) (g) of the OIA where it is necessary to withhold information in order to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between officers and employees of the Commission. This is of course not a conclusive reason, but exists only where the public interest in disclosure does not outweigh the reasons for withholding. We find that this section is of particular application with regard to draft documents and documents from staff to Commissioners setting out staff views and recommendations. We consider it would be useful if further clarity could be provided on the application of this in the Ombudsman's Guidelines. For example, if there are specific situations which the "free and frank expression" ground is aiming to protect, it would be helpful for these to be set out in more detail.

3.3 Commercial interest

Topic 3.3 Questions:

(a) What is your experience of the commercial interest withholding provisions and the way they are applied?

(b) Have you any suggestions for improvement?

The Commission withholds information under section 9 (2) (b) and 9 (2) (ba), where the interest in withholding is not outweighed by the public interest to disclose. We often seek the views of the parties to whom the information pertains, with regard to what commercial harm might arise from disclosure and in turn this can impact upon the timetable for the OIA response. It would be helpful to set out a procedure whereby, if such parties are consulted, there is provision to automatically extend the timetable.

Sections 9(2)(b) and (2)(ba) might be invoked where traders have provided significant information about their business operation relating to matters such as the performance of their business, their future business plans, and margins that apply to goods/materials bought and onsold. Such information would not be made available by such traders publicly in the ordinary course and if it was made available through the Commission it could significantly affect their ability to operate effectively against competitors.

Information is also commonly withheld under section 9 (2) (ba) where it has been provided during the course of an investigation under an obligation of confidence. Investigations can rely, at least in part, on the provision of information confidentially in order to establish accurate factual information behind an alleged breach and/or information that assists in obtaining evidence of a breach. Such assistance can come from traders, competitors, customers and other informants including employees of a potentially offending entity. If it were not possible for the Commission to give such informants an assurance of confidence in appropriate circumstances it is likely that the extraction of information could be piecemeal, inaccurate, time consuming and a significant drain on resources.

3.4 Privacy

Topic 3.4 Questions:

(a) What is your experience of the privacy withholding provision, and of its alignment with the Privacy Act 1993?

(b) What might improve the situation?

The privacy provisions of the OIA, section 9 (2) (a), can sometimes be difficult to apply given the Privacy Act interface. For example, OIA requests may cover emails from a private person and that person may claim that this is personal information and that release of it would infringe their rights under the Privacy Act. However, under the OIA the interests in withholding private information under s 9 (2) (a) may be outweighed by the public interest in disclosure of that private information. Thus, there is potentially a conflict between the Privacy Act and the OIA.

However, it is rare that the release of information would lead to the identification of a natural person unless of course that person's name is specifically in it, in which case the name could be removed and the rest of the information released.

Sometimes s 9 (2) (a) is used to redact out officials' names that accompany advice to decision-makers – in such cases, usually the names of more senior officials are left in and the names of more junior ones are removed. It would be useful to have more guidance as to whether any such redaction is appropriate and if so in what circumstances.

3.5 Processing difficulties

(a) What is your experience of the provisions that enable information to be withheld because release would require substantial work?
(b) How appropriate are they today?
(c) Have you any suggestions for improvement?

It is not uncommon for requests to be so broad that they require, unless narrowed, substantial work in compiling a response. In such circumstances the Commission contacts the requester and discusses what is being sought in an effort to narrow or particularise the request to a more specific and manageable level. The Commission does consider extending the timetable beyond the 20 working days outer limit if a large amount of work is required to deal with the request.

It would be useful to have more detailed guidance as to the circumstances in which a request could be refused.

It is also noted that the OIA charging provisions do not permit charging for legal work done in relation to that response. It is the experience of the Commission that a large percentage of the time spent on an OIA response is often in relation to legal or quasi-legal work, including assessing the material held by the Commission and seeking comment from third parties affected by the request. It may be appropriate to allow for the cost of legal staff working on information requests to be charged for as part of the charging provisions of the OIA in order to recognise the importance of compliance with legal obligations in the OIA context.

3.6 Withholding provisions in general

Topic 3.6 Questions:
(a) Do you have comment about any other grounds for withholding information?
(b) Should additional grounds for withholding information be added to those already provided in the Acts?
(c) Should any of the current grounds be removed, amended or clarified?

The Commission withholds information under s 9 (2) (h) OIA which is the ground for withholding on the basis of maintaining legal professional privilege. We consider this ground is an important and appropriate one and have little difficulty in applying it.

The provision "because the information will soon be publicly available" (section 18 (d)) is appropriate. Answering OIA requests can be cumbersome and time-consuming for officials so if the information will soon to be available in any event, that is an appropriate reason for not releasing it. It would be useful to have guidance on what is meant by "soon" for these purposes.

Under s18 (f) OIA, a request can be refused if the information requested "cannot be made available without substantial collation or research". As stated above, the Commission aims in such cases to contact the requester and discuss how the request might be particularised so that the information that is specifically sought can be provided.

4. Scope of the Act

(a) Are there organizations covered by the OIA or LGOIMA that should be excluded?

No.

(b) Are there organizations not covered by the OIA or LGOIMA that should be included?

Ideally it is desirable that all organizations carrying out public functions, including Cabinet, be subject to the OIA. The ad hoc nature of entities subject to the Act runs counter to the principle of open and transparent government that underpins the Act. Any need to withhold information can be adequately dealt with under the existing parameters of the OIA.

(c) What rationale should be applied to determine which organizations should be in the scope of OIA and LGOIMA?

Consideration could be given to a form of 'public function' test when deciding on the scope of entities subject to the Act. The Act relates to the exercise of any function or power that is public in nature or affects the public interest. Such functions/powers potentially reach further than purely public bodies. The use of industry-led regulation in particular has created a number of bodies which perhaps ought to be subject to the OIA, but are not. For example:

- the Broadcasting Standards Authority is subject to the OIA, while the Press Council and Advertising Standards Authority are not;
- the Electricity Commission is subject to the OIA, while the Gas Industry Company not.

5. Information Technology

(a) How is IT transforming information management, and what will this mean for the OIA and LGOIMA?

Information continues to be created in an increasingly wide range of technologies and formats. Many of these are proprietary and all change versions frequently. With the almost universal use of email and the increasing use of text messaging, information can be quickly created and distributed to a wide range of people both within and outside the agency. The online discussions that can ensue frequently create a complex exchange of comments, which can be difficult to capture and follow.

There is also an increasing convergence of information to include voice, audio, video and image types and increasingly agencies link to external databases. In the case of websites, these are increasingly supported by databases where information changes almost constantly. This can make it difficult to reliably reproduce information. In addition, the growth of Web 2.0 technologies creates a highly collaborative environment, not just within government agencies but also between outside organisations and individuals. This blurs the boundaries between official and non-official information.

The IT environment presents major challenges for information managers in terms of security and ongoing accessibility. Agencies need to ensure that business rules and processes are in place and readily understood by all staff (and contracted externals) in terms of what does and does not need to captured. Where these systems and processes are not in place or are not operating effectively, there is a risk that requests will be incomplete or will require significant time for compliance.

This issue might be addressed at least in part, internally, by staff giving preliminary consideration to whether information is likely to be withheld under OIA and at the time it is received flagging it accordingly. This might assist in reducing the time needed to make final decisions on the release of information.

(b) What changes to the OIA and LOGIMA would encourage better use of the efficiencies and advantages available through IT?

We do not have any suggestions for this area, as the legislation is technologically neutral and in our opinion should remain so.

(c) Should the OIA and LGOIMA include provisions to require or encourage pro-active publication of information by agencies?

Agencies already proactively publish large amounts of information in the course of performing their functions, especially through their websites. In the Commission's case this is targeted to those who are known to be the main users of such information. While supporting open government, there needs to be some consideration of the level of public benefit to be gained against the public loss of spending tax-payer funded time preparing and publishing large amounts of information. This is considered to be more appropriately an organisational rather than legislative decision.

6. Administrative Compliance

6.1 Timeframes & Delay; Extension of time; Transfer of requests; Charges

(a) What problems do you experience with timeframes, transfer of requests and charging?

Identifying who is going to answer a request, compiling all potentially relevant information, assessing what might be considered for withholding, considering grounds for withholding and balancing the public interest element can be a very time consuming process. In smaller agencies there are likely to be only a very limited number of people who have sufficient knowledge to conduct such an exercise. Added to this major resource constraint, in most cases agencies will not know that a request is coming until it is actually received. Such requests must then be prioritised along with existing and anticipated work due for completion in the 20 working days that follow receipt.

Whilst the 20 working day limit ought not to be treated as a deadline, in practice and despite internal guidelines to the contrary, the volume of information required and competing work priorities can make earlier compliance difficult so that the 20 working days outer limit becomes the deadline.

While transferring requests to another agency is not a problem in principle, it can depend on the awareness and knowledge of the individual handling the request. Sometimes vague requests are received, such that even after discussion with the requestor the agency is obliged to make its own enquiries with other agencies to determine which would be the most appropriate to process the request.

While charging is very rarely applied at the Commission, it is considered for time-consuming requests. As the final cost will not be known until the request is complete, the requestor is given an estimate and asked to confirm their willingness to pay. It may be difficult to provide accurate estimates of charges at the outset of an information request because the volume of information is unknown at that time.

(b) What other problems do you find with the administration of the Acts?

There is a lack of certainty over whether it is permissible to extend the time for compliance with information requests (section 15A) more than once. This is considered to be a necessary tool to allow for unforeseen circumstances which impact upon delivery date.

(c) What measures might alleviate the problems you experience?

It is always necessary to carefully assess a request, in spite of the limited resources at the disposal of small agencies and competing work priorities. The focus needs to remain on improving staff understanding of the Act, increased communication with the requestor and improved information management for ready access to internal information. The further guidance sought from the Ombudsman's Office or another independent appointed body would assist in this area.

7. Administrative issues for officials

7.1 Workplace management

(a) What procedures are in place to ensure administrative compliance with time frames, transfers and charges?

All requests are logged centrally and assigned as a Microsoft task to a staff member and their manager and are copied to an in-house solicitor. Requests must be electronically accepted. Each request also includes a coversheet for the responder to complete, including time spent, others consulted and whether the request will result in charges. Reception staff track requests and remind responders when the due date is near.

Policy and procedures are available on the Commission's intranet for staff.

(b) How well is the OIA and LGOIMA understood by officials responding to requests?

This is variable, depending on the seniority of the staff member and their level of experience in handling OIA requests.

(c) What support and training do officials receive and what might improve skills?

The Legal Services Branch provides additional training to other branches within the Commission as requested.

7.2 Large requests & workload

(a) What is the impact of OIA and LGOIMA inquiries on your other work?

Requests must be factored in to existing workloads. This can result in extensions being necessary in some cases.

(b) How do you deal with wide-ranging "fishing" requests?

The Commission will contact the requestor to develop an understanding of the request and assess whether the information can be better particularised and/or refined, and act otherwise in accordance with its obligations under section 18, 18A, 18B and 19 of the OIA.

(c) Have you any suggestions for improving the situation?

As mentioned previously each request is received into an environment with limited resources and competing work priorities. The focus needs to remain on improving staff understanding of the Act, increased communication with the requestor and improved information management.

7.3 Interface with the Public Records Act 2005 (OIA only)

(a) What is your experience of compliance with the Public Records Act 2005 and its relationship to the OIA?

Compliance with the Public Records Act presents similar challenges to those under the OIA as all information received or created by an agency is covered. This is so particularly in terms of ongoing accessibility, with changing formats and the linking of content inside and outside their agency. Technology allows individuals to delete content easily, whether deliberately or inadvertently. Records managers need to ensure that business rules and processes are in place

and readily understood by all staff (and contracted externals) in terms of what needs to captured and what can be legitimately disposed of.

Ensuring that all Commission information is recorded inside its recordkeeping framework with its requisite metadata not only goes a long way towards PRA compliance, it makes assessment and completion of each OIA request a more efficient and effective process.

(b) Have you any suggestions for improvement?

Answered above.

8. Possible sanctions

(a) Should sanctions be imposed for any breach of these Acts?

The existing sanctions are sufficient in the Commission's view.

The recommendations of the Ombudsmen are effectively binding on the agencies that are under review and that review process is rigorous. It is not considered necessary to impose sanctions for a breach of the OIA as government agencies follow the Ombudsmen's recommendations and take their obligations seriously. An adverse finding from the Ombudsmen's Office is considered by government agencies to be a serious sanction.

In the Commission's experience, some investigations can take, or be perceived to take, a long time to resolve. Delay in resolving investigations undermines the perception that an Ombudsmen's ruling is an effective sanction. Otherwise the system appears to work well as it stands.

(b) *If so, what sort of breaches, and what sort of sanctions?*

N/A.

9. Role of Ombudsmen

(a) What is your view about the dual functions of the Ombudsmen?

The dual functions referred to here are those of investigating complaints on a case by case basis and the provision of informal guidance on the OIA and LGOIMA. It is logical that a body such as the Ombudsman's Office that has developed specialist expertise and experience in the interpretation and operation of these Acts should both investigate complaints and provide guidance on them. Such an approach is not unique e.g. IRD investigate breaches of the Income Tax Act 2007 and related legislation and issue binding rulings and guidelines, with these processes taking place within separate teams under the umbrella of the IRD.

(b) Should the Ombudsmen continue to investigate OIA and LGOIMA complaints?

Yes - it has developed an expertise in the operation and interpretation of these Acts. Any issues relating to the timeliness etc of the execution of these roles by the Ombudsmen appears to relate more to resources than having the expertise/ability to carry out the required function. Effective execution of these roles will always have resource implications and it would make

sense for the Ombudsmen's Office to be more appropriately resourced rather than to develop an entirely new body to administer one or other of the functions currently undertaken by that Office.

(c) Should the Ombudsmen provide guidance and assistance with training?

Again this role in itself has budgetary implications. As a specialist body the Ombudsmen's Office has the ideal background to provide such training assistance but it is also the obligation of each agency that is subject to the Act to ensure that staff have adequate knowledge and understanding of their obligations.

(d) Is a single review mechanism sufficient?

Yes.

ANNEX 1

The Commission's anti-cartel programme

Cartels: the legal framework

1. Broadly speaking, the Commission has regulatory and enforcement functions in respect of much of the legislation it administers. This is true of the Commission's functions under the Commerce Act 1986 (the Act), which sets out framework provisions applicable to all business competition in New Zealand as well as specific statutory regimes providing for the regulation of certain businesses under particular circumstances.

2. The Commission's cartel enforcement programme falls within the general framework provisions contained in Parts 2 and 3 of the Act (as opposed to the regulatory provisions contained in Part 4 of the Act). The provisions in Parts 2 and 3 of the Act represent the substantive competition law of general application in New Zealand. As in other developed economies, New Zealand's competition law addresses primarily three types of anti-competitive conduct:

   2.1. acquisitions of assets or shares that substantially lessen competition in a market (i.e. mergers that result in the creation or enhancement of market power);

   2.2. unilateral conduct by a firm that takes advantage of that firm's market power for an anti-competitive purpose; and

   2.3. agreements or understandings between firms that have the purpose or effect of substantially lessening competition in a market.

3. Cartels are a sub-set of the third category of anti-competitive conduct noted above. Cartels are groups of businesses or executives who, instead of competing against each other to offer the best deal, agree to collude to keep prices high or restrict output. Cartels harm competitors by sharing customers with other cartel members, rigging bids, agreeing to charge higher prices than they would be able to charge in a competitive market, restricting volumes and by squeezing non-cartel members out of the market. Cartels harm the New Zealand economy by making consumers and other businesses pay inflated prices for goods and services. This also results in exports being more expensive and thus less competitive in overseas markets.

4. Competition agencies around the world universally regard cartel conduct to be the worst variety of anti-competitive conduct. In the words of the United States Supreme Court, cartels are the "supreme evil of antitrust".[3] They are covert, artificially produce monopoly conditions and cause severe and quantifiable harm to consumers and competition. In one recent study of international cartels during the period from 1990-2005, it was calculated that the total volume of commerce affected by the cartels totalled about US$1.2 trillion while overcharges attributable to the cartels totalled about US$300 billion.[4]

---

[3] *Verizon Communications v Law Offices of Curtis V Trinko* (2004) 540 US 398, 408.

[4] J.M. Connor & C.G. Helmers, "Statistics on Modern Private International Cartels, 1990-2005", American Antitrust Institute Working Paper 07-01 (10 January 2007).

5. Given the unambiguously harmful nature of cartel conduct many jurisdictions, including New Zealand, have specific provisions in their competition laws to make cartels outright illegal, without need to demonstrate competitive harm. Whereas most competition laws require some analysis of the actual effects of alleged anti-competitive behaviour on competition before condemning that behaviour, cartel conduct is not considered to have any potentially redeeming qualities and therefore tends to be made *per se* illegal. This is the effect of s 30 of the Act in New Zealand, which deems arrangements between competitors to be anticompetitive, and illegal, if they tend to fix, control or maintain the price of goods or services.

6. Similarly, the seriousness with which cartel conduct is viewed around the world is reflected in the fact that more and more important jurisdictions are addressing such behaviour under their criminal laws. The analogy between covert cartel behaviour and criminal fraud has contributed to a growing sense that contravention of cartel prohibitions should be punishable by imprisonment for individuals and criminal fines for corporates. Cartel conduct has long been a criminal offence in the United States and Canada and has more recently become a criminal matter in the UK and Australia. The Commission understands that criminalisation of cartel conduct is similarly being mooted in New Zealand.

7. Given the foregoing, deterring cartel conduct is predictably the Commission's highest enforcement priority. Cartel behaviour is the most egregious form of anti-competitive conduct and directly undermines dynamic and responsive markets. Cartels are insidious and cause extensive damage to the New Zealand economy. They are difficult to detect and extremely difficult to investigate because of their secretive nature. The Commission has emphasised the importance of its anti-cartel enforcement programme on countless occasions in speeches and other public fora.

8. In the Commission's Statement of Intent for the period 2009-2012,[5] the Commission Chair notes that cartels remain a key enforcement priority, stating that:

   ... since the introduction of the Commission's leniency programme, significant evidence of price fixing has emerged. In times of financial stress, it may be predicted that such evidence will continue to emerge. Price fixing is deemed to be unlawful, and this area of enforcement is likely to remain one of priority.

9. In the outline of the Commission's work programme, it is further stated that:

   ...[I]t is appropriate that the Commission continues its strategic focus on the cartel programme in 2009/10. With globalisation, many cartels impact directly on a number of countries. Generally, large economies such as the United States and the European Union take the lead in prosecuting these international cartels; this breaks up the cartel and destabilises other worldwide cartels. This has a positive impact on New Zealand. To this extent, the Commission supports these investigations by large economies where possible. However, such prosecutions are country specific, and do not address the harm to consumers in individual countries such as New Zealand. It is for this reason that in most cases it is not desirable for New Zealand to "free ride" on international cartel investigations. By investigating an international cartel's operations in New Zealand, the

[5] Commerce Commission, Statement of Intent 2009-2012, available online at http://www.comcom.govt.nz//TheCommission/PlansandReports/ContentFiles/Documents/SoI%202009-12.pdf.

specific local harm can be identified, and enforcement action can be taken against the responsible international and local entities.

In previous years the Commission has been successful in detecting both national and international cartels through its leniency programme. A current review of this leniency and co-operation policy and the introduction of sentencing guidelines are likely to further enhance the Commission's detection capability. Since late 2004 leniency has been granted in relation to twelve investigations. Many of these cases are now either in the litigation process or about to complete the final stages of investigation. The outcome of these cases is anticipated to confirm and extend the Commission's jurisdiction with respect to international cartels. They will demonstrate the very substantial economic harm caused by cartel activity and the consequences for those who engage in the conduct. The Commission will be arguing for very substantial penalties. The Commission will also be looking to increase the speed of its resolution of these cases through a greater focus on leveraging leniency and encouraging early settlement. In addition, the Commission will continue to build on the benefits obtained through its International Competition Network membership, particularly through sharing information with its counterpart enforcement agencies and through sharing best practice learning.[6]

10. And further, the Commission sets out its view on trends in this area of its work:

The Commission expects to see the trend of increasingly large and sophisticated cartels (both international and domestic) applying for leniency to continue over 2010-2012. Some large, high-detriment cases (Air Cargo, Interchange) are now in the early litigation phase. As they move through the court process, these cases will increase awareness of the illegality of cartel conduct, resulting in increasing destabilisation of cartels and the likelihood of a steady flow of cartel members coming forward under the leniency policy. The current review of the leniency policy, along with the development of penalty guidelines, is also expected to lead to an increase in leniency applications.[7]

Cartels: Enforcement Tools and the Leniency Policy

Leniency policy

11. The Commission's leniency policy covers cartel conduct under Part 2 of the Act, expressly including price-fixing, competitor exclusion, collusive tendering, bid-rigging, production of sales quotas and market sharing. It does not extend to conduct of taking advantage of a substantial degree of market power.

12. The leniency policy increases the chance of detecting a cartel by creating distrust among its members. It achieves this by granting immunity from Commission-initiated proceedings to the first person to come forward with information about the cartel and co-operate fully with the Commission in its investigation and prosecution of the cartel.

13. By "first" person, the policy states that this means the first person to make a formal leniency application. The Commission will advise an applicant as soon as possible whether he or she is first, and will grant that person conditional immunity.

[6] Ibid at p 17.
[7] Ibid at p 29.

14. The Commission has not yet adopted a 'marker' system for reserving a place in the leniency queue. For the present, the race for leniency is to the swift.

15. Strict adherence to the conditions of leniency is required. The terms set out in the Commission's Conditional Grant of Immunity Agreement include that the applicant confirms that his or her involvement in the cartel has ceased. If the Commission determines that the applicant has failed to meet these conditions the Commission is not bound by the grant and may use information provided by that person to initiate proceedings against that person.

16. The main elements of the 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 co-operation.
- Immunity extends to the company's directors, officers and employees, provided they also co-operate 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 business 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 application confidential where possible.
- The co-operating party must supply the Commission with all information in its possession, including documentary and electronic evidence, in relation to the cartel. Full, free, and frank information is the key to satisfying a party's obligations under the leniency programme.

17. The Commission can be materially advantaged through co-operation with a cartel participant, and these potential benefits provide the incentives for the Commission to discuss workable terms of co-operation. The Commission may avoid significant investigation and trial costs, secure evidence as well as an admission of liability, achieve greater certainty as to penalty and deter future arrangements.

18. Corresponding and powerful incentives also exist for cartel participants to seek to co-operate with the Commission such as immunity, the avoidance of the costs of contested litigation, lower penalties, and in some cases, increased certainty of the outcome, diluted media interest, mitigation of harm in the eyes of customers and the avoidance of business disruption.

Protecting leniency applicants

19. While the policy offers advantages for cartel participants, the Commission and the Courts are also well aware of the seriousness of self-reporting cartel conduct, and the

disincentives that exist. In essence, self-reporting of cartel conduct is intuitively against the interest of the reporting party. In a recent Australian case the Court noted:[8]

> Approaching the ACCC and admitting cartel conduct is not a step to be taken lightly. Admission cannot be made without prejudice. There is the risk that somebody else may have already made admissions, or that the ACCC may be already aware of the cartel. Even if immunity is granted, a corporation is not protected from the prospect of massive claims by parties claiming to have suffered damage by the cartel (as has occurred in this case) or, in the case of an individual, dismissal from highly paid employment in humiliating and career-threatening circumstances.

20. The possibility of private enforcement action and 'massive claims', especially through class actions or their equivalent, either in New Zealand or elsewhere, can discourage applicants from applying for leniency or co-operation. In particular, the scope for class action law suits in multiple jurisdictions (including the US) may act as a powerful disincentive.[9] The US, for this reason, has removed 'treble damages' for leniency applicants in that jurisdiction with a leniency party now liable only for single damages.[10]

(i) Paperless process

21. The so called "paperless" leniency application arises from the desire of applicants not to provide admissions of liability, further evidence, or a 'road-map' of the conduct to private plaintiffs.[11] It is also a growing trend for co-operating parties wanting to be treated in the same way for exactly the same reasons. The need for a paperless application for immunity came into sharp focus as a result of the case *In Re Vitamins Antitrust Litigation*.[12]

22. In that case, a class action was commenced by third party plaintiffs in the United States claiming damages as a result of alleged cartel conduct in the vitamins industry. The plaintiffs sought discovery from the defendants of copies of written submissions provided in support of leniency applications to the US and Canadian Department of Justices, the European Commission (EC), the Australian Competition and Consumer Commission (ACCC), NZ Commerce Commission, and the competition authorities of Brazil, Mexico, Switzerland and Japan. The Special Master[13] held that the defendants had waived any legal privilege or work product protection that otherwise may have applied to the leniency information. The concerns of overseas regulators were noted:

> The ACCC and EC say generally that in carrying out their antitrust enforcement responsibilities, they rely on voluntary cooperation, including submissions of information and documents, by targets of their investigations; and that, if such submissions were discoverable in U.S. civil litigations, this cooperation would dry up. In the words of the Director of the EC's Cartel Unit,

---

[8] *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd (No 2)* [2007] FCA 444 at [91].
[9] *Interaction Of Public And Private Enforcement In Cartel Cases*, Report by the International Competition Network Working Group on Cartels (ICN 2006) at 39-43.
[10] Antitrust Criminal Penalty Enhancement and Reform Act of 2004.
[11] See for example *Review of Leniency Policy for Cartel Conduct*, ACCC (2005) at 40.
[12] *In re Vitamin Antitrust Litigation* (2002) 211 FRD 1; *In re Vitamin Antitrust Litigation* 2002 U.S. Dist. LEXIS 26490 and *In re Vitamin Antitrust Litigation* 2002 U.S. Dist. LEXIS 25815.
[13] Special Masters are officers of the court who serve in a quasi-judicial role. The role of the Special Master is to supervise those falling under the order of the court to make sure that the court order is being followed.

> "the effectiveness of the EU antitrust procedures could indeed be seriously undermined."
>
> I conclude that the concerns expressed by the representatives of the [agencies], including the [ACCC's] claim to public interest immunity, are insufficient to protect the defendants' submissions to these authorities from disclosure standing on their own and when weighed against the U.S. interests in open discovery and enforcement of its antitrust laws.[14]

23. In response to the *Vitamin* case, the EC changed its procedures regarding leniency applications and allowed oral or 'paperless' leniency applications.[15] Many competition agencies around the world, including the ACCC have followed suit. While the Commission has not incorporated the paperless process into its Leniency and Co-operation Policies, it retains a degree of flexibility on this issue, and is prepared to use such a process in appropriate cases.

24. A paperless process generally does not mean that the enforcement agency creates no records but rather the competition agency endeavours to ensure that the records of the application and its investigative practices (such as the recording and transcribing of interviews) do not prejudice the applicant's interests. One example is the preparation of witness briefs, which may be delayed until proceedings have been commenced, such that drafts will likely be covered by litigation privilege, which may not necessarily be the case if drafts are provided earlier in the investigative stage of the case. In addition, the fact of a leniency application of itself will normally trigger litigation privilege. The leniency applicant will provide a confession of its involvement in the cartel and the Commission from that point at least will be contemplating litigation against the other cartel members.

(ii) Confidentiality

25. In addition to the paperless process, competition agencies recognise the importance of protecting the confidentiality of the information provided by the leniency applicants. In its Anti-Cartel Enforcement Manual, the International Competition Network (ICN) states:

> **2.6.3 Protection of Information**
>
> … the protection of information is necessary to allay any fears that such information may be used against the applicant in private civil actions or shared with another government agency, foreign or domestic, which may use that information against the applicant without awarding it equivalent protection.
>
> …
>
> It is good practice to keep the identity of the leniency applicant and any information provided by the leniency applicant confidential unless the leniency applicant provides a waiver or the agency is required by law to disclose the information.[16]

26. The International Chamber of Commerce (ICC), who acts on behalf of business in making representations to governments and intergovernmental organisations and, therefore

---

[14] *In re Vitamin Antitrust Litigation* 2002 U.S. Dist. LEXIS 26490 at p 41.

[15] See paragraph 9(a) of the *Commission Notice on Immunity from fines and reduction of fines in cartel cases* (2006/C 298/11) referred to as the 2006 Leniency Notice.

[16] ICN Cartel Working Group (April 2006) Anti-Cartel Enforcement Manual, Chapter 2: Drafting and Implementing an Effective Leniency Program, at p 8.

represents the thinking of would-be leniency applicants, also supports this view. In submissions to the Organisation for Economic Co-operation and Development, the ICC noted:

> Unless there is a commitment, either of the Requested Party not to exchange information disclosed under "immunity"/"leniency" programs, or of the Requesting Party not to use such information (for the purpose of an investigation or for imposing sanctions and not to provide it to third parties for the purposes of litigation), many enterprises will hesitate to apply for "immunity" or "leniency".[17]

27. The Commission is careful to protect a leniency applicant and any information it provides to the Commission. The Commission will, as far as the law allows, withhold disclosure to make certain that an applicant is not placed at a disadvantage compared to other defendants who have not provided similar assistance, and to ensure that future applicants are not discouraged from notifying the Commission of cartel conduct. This is to a significant extent reflected in the Commission's Protocol for Providing Information, which states that:

> **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].

28. The Commission has frequently emphasised the importance of protecting information it receives from leniency applicants. In a paper presented to the Competition Law and Policy Institute of New Zealand, the Commission General Counsel noted:[18]

"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."

29. Protecting such information provides the necessary incentive for a cartel member to break ranks and admit their behaviour. To this end, the Commission will avail itself of litigation privilege, without prejudice privilege, public interest immunity and any other legal means of protecting such information from disclosure. However, the Commission's approach to this issue will always be subject to the Commission's obligations as a responsible public sector enforcement litigant.

30. The need to withhold such information is heightened by the fact that cartel conduct often involves repeat offenders. A study of cartels exposed between 1990 and 2005, found that

---

[17] ICC submission to the Working Party on International Co-operation of the Competition Law and Policy Committee of the OECD at its meeting on 11 February 2004, available online at http://www.iccwbo.org/id590/index.html.

[18] At p 13.

in 280 cartel cases, there were at least 170 companies who were price-fixing recidivists, including 11 companies who fixed prices between 10 to 26 times.[19]

31. As the DOJ recently noted:

> [R]oughly half of the Division's current international cartel investigations were initiated by evidence obtained as a result of an investigation of a completely separate market. Most of the corporate defendants in international cartel cases are multinational companies selling hundreds of different products. It will come as no surprise then to learn that the Division's experience is that if a company is fixing prices in one market, the chances are good that it is doing so in other markets as well. If an executive readily meets with competitors to allocate customers, then he or she has likely done it before in his or her career. And, if you go back further in time, you will likely find a mentor who taught the colluding executive the tricks of the trade.[20]

32. Equally, the Commission has found that, in many cases, investigation of the material provided by a leniency applicant leads to further possible cartels. These have included alleged cartels involving:

32.1. similar facts to the conduct for which immunity was granted, but temporally and factually distinct from initial conduct;

32.2. the same industry participants, but different products or markets from the conduct for which immunity was granted; and

32.3. the same products, but different participants or geographic regions from the conduct for which immunity was granted.[21]

33. While it is important that private actions for compensation can proceed, the Commission considers that this must not be allowed to undermine leniency, and the benefits that flow from public enforcement of the Act. It is also mindful to make certain that an applicant is not worse off for having applied and been granted leniency. This position is set out in the Commission's Protocol for Providing Information:

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

34. Similar to New Zealand, confidentiality is a critical element in the leniency policies of Australia, the US, the EU and the UK. For example, to protect the viability of its immunity programme 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.

---

[19] Statistics on Modern Private International Cartels, 1990-2005, Connor & Helmers (2007).
[20] Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations, US DOJ (2006).
[21] A paper from the Commission General Counsel explaining the need to protect the integrity of the Commission's leniency programme dated August 2007.

35. The Australian courts have recently referred to the rationale for protecting the leniency applicant, by preventing disclosure of material provided under the leniency programme. In *Cadbury Schweppes Pty Ltd v Amor Limited*, Gordon J held:

> The ACCC's submissions and the evidence from its witnesses demonstrated a concern that the increasing threat of private suits for damages brought by cartel victims will interfere with the ACCC's ability to obtain the cooperation from cartel participants necessary for it to bring and prosecute penalty actions. The interference was said to arise because potential cooperators will be deterred from coming forward, notwithstanding offers of leniency, by the prospect of having essentially given away the store in the inevitable damages actions. In other words, in considering whether to confess, the potential costs in damages may be seen by a cartel player to outweigh the potential savings in penalties. Distilling the point still further, one can see that the real concern of the ACCC — that is, the real deterrent to cooperation faced by the Amcors of the world - is damages exposure itself.[22]

Success of the leniency policy

36. The advent of leniency programmes has completely transformed the way competition authorities around the world detect, investigate and deter cartels. Leniency programmes have led to the 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.[23]

37. 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.[24] In the US the experience with leniency programmes is demonstrated by their success with their revised programme introduced in 1993:[25]

> … 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 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.

38. 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. In particular, a leniency policy must have three elements:

---

[22] [2008] FCA 88 at para [46].
[23] Paper presented to the Competition Law and Policy Institute of New Zealand Conference by the Commission General Counsel in August 2005, p 1.
[24] 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.jftc.go.jp/e-page/pressreleases/2005/june/050630.html.
[25] Cornerstones of an effective Leniency Program by Scott D. Hammond Director of Criminal Enforcement Antitrust Division US Department of Justice 2004 available at www.usdoj.gov/atr/public/speeches.

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

Former Leniency Policy

39. The Commission launched its first leniency policy in 2000 (the former policy). 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 co-operated with the Commission differently from those who did not.

40. The 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.

41. However, a review of the Former Policy demonstrated that it had not 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, as 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.

Modern Leniency Policy

42. In 2004, the leniency policy was updated and specifically styled the Leniency Policy for Cartel Conduct.[26] It was modelled on international best practice with the aim of maximising the Commission's prospects of uncovering cartel activity and of taking effective action against cartels.

43. The introduction of the modern leniency policy revolutionised the Commission's cartel enforcement programme. Indeed, two leniency applications were received the day after the policy's introduction.

44. Today, the majority of cartel investigations (and the vast majority of large-scale cartel investigations) conducted by the Commission are triggered by leniency applications. It is the Commission's primary enforcement tool against cartels.

45. The Commission currently has 14 active cartel investigations. Eight of the 14 cases originated through the leniency programme, proving how successful it has been. Given this success, it is clear that in its absence the vast majority of hard core cartel conduct would continue to go undetected and unenforced as it relates to New Zealand markets. The modern policy has been particularly effective in encouraging admissions and the

[26] The policy is available online at http://www.comcom.govt.nz/TheCommission/LeniencyPolicy/leniencypolicynew.aspx together with PDFs of the Application Letter, Conditional Grant of Immunity Letter, Conditional Grant of Immunity Agreement and Protocol for Providing Information to the Commission.

provision of evidence that have had a 'domino-effect' on other persons and companies engaged in the same cartel.

46. Relevantly, in the Commission's media release relating to the High Court's judgment against Schneider, the Commission Chair stated:[27]

"This was a covert, sophisticated and long-running cartel which took considerable efforts to hide from regulators and affected consumers. The Commission's investigation was made possible by the Commission's leniency policy, where a member of the cartel receives leniency in return for exposing the cartel. Cartels are the very worst kind of anti-competitive behaviour and the leniency policy is our best tool to fight them."

47. The Commission is committed to continue to improve upon the policy and preserve the incentives for co-operation. The Commission is currently revising the policy including by proposing the introduction of formal procedures for a paperless process and marker system. This is a significant project, taking up considerable resources within the Commission, which reflects the importance the Commission attaches to the policy's ongoing effectiveness**.**

Co-operation policy

48. The co-operation policy is also an extremely valuable tool in ensuring the expeditious and efficient investigation and prosecution of breaches of the Commerce Act. It provides flexibility and can be utilised to enhance the Commission's enforcement effort without reducing the efficiency of the leniency policy. In particular, the co-operation policy allows the Commission to obtain further co-operation and assistance (not limited to that which the leniency applicant can provide).

49. If an investigation is already underway, or a leniency application has already been received by the Commission, a co-operation agreement may be sought by a cartel participant. Under this policy, the Commission has discretion to take a lower level of enforcement action (or none at all) against an individual or company, in exchange for information about the cartel and co-operation in pursuing the other participants. The principal respects in which this policy differs from the leniency policy are:

- it does not require the Commission to be unaware of the cartel when the applicant approaches the Commission;
- it is not all-or-nothing, and the 'return' for co-operation can range from full immunity to a partial settlement; and
- the co-operation policy extends beyond cartel conduct.[28]

50. The Commission requires that the co-operating party supply to it all information in his or her possession, including documentary and electronic evidence, in relation to the cartel. This includes information held overseas, in circumstances where the Commission may be unable to access that information but for the co-operation.

---

[27] A copy of the media release is available online at http://www.comcom.govt.nz/BusinessCompetition/Anti-competitivePractices/schneidertopay11millionforcartelac.aspx.

[28] The policy covers the Commerce Act 1986, Credit Contracts and Consumer Finance Act 2003, Dairy Industry Restructuring Act 2001, Electricity Industry Reform Act 1998 and Fair Trading Act 1986.