



# The Legal 500 Country Comparative Guides

## New Zealand: Cartels

This country-specific Q&A provides an overview of cartels laws and regulations applicable in New Zealand.

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## 1. What is the relevant legislative framework?

New Zealand's competition legislation is the Commerce Act 1986 ("Act"). The relevant cartel provisions are contained in Part II of the Act.

Cartel conduct is prohibited *per se*, regardless of competitive effects. The Act establishes civil liability provisions and (from April 2021) criminal offences for entering into, or giving effect to, a contract, arrangement or understanding that contains a 'cartel provision'.

A 'cartel provision' is defined in s 30A to mean any provision in an arrangement between actual or potential competitors that has the purpose, effect or likely effect of:

- Price fixing: competitors agreeing to fix the price (including discounts or rebates) of goods/services that they buy, or sell, in competition with each other.
- Restricting output: competitors agreeing to restrict the production of goods/services that they sell in competition with each other (or to restrict the acquisition of goods/services that they purchase in competition with each other).
- Market allocating: competitors agreeing to carve up markets by allocating customers or territories between competitors.

The enactment of the *Commerce (Criminalisation of Cartels) Amendment Act 2019* established a new criminal offence of up to 7 years jail time for cartel conduct which from April 2021 will run in parallel with the current civil regime. The criminal cartel offences require proof that the accused had intended to engage in cartel conduct. It will not suffice that their conduct inadvertently had that effect or likely had that effect. Inadvertent behaviour will not give rise to criminal liability, but may still fall within the civil prohibition. Equally, if the conduct is intentional, ignorance of its illegality is not an excuse.

There are a number of specific exceptions to cartel conduct, including for or in relation to:

- collaborative activities;
- vertical supply contracts; and
- joint buying and promotion agreements.

If any of the exceptions apply, then the relevant provision will not be treated as *per se* illegal. The arrangements may, however, still be caught by the prohibition in the Act against contracts, arrangements containing provisions with the purpose, effect or likely effect of substantially lessening competition.

The Act also contains other exceptions which apply to but are not specific to cartel conduct, including for: conduct specifically authorised by any enactment; provisions for the conduct of a partnership; provisions relation to conditions of employment including remuneration; and provisions relating exclusively to the export of goods from New Zealand or the supply of services outside of New Zealand provided full and accurate particulars are provided to the

New Zealand Commerce Commission (“NZCC”) within 15 working days of entering into the agreement.

**2. To establish an infringement, does there need to have been an effect on the market?**

No, cartel conduct is prohibited per se, irrespective of its competitive effects.

**3. Does the law apply to conduct that occurs outside the jurisdiction?**

Yes, the cartel provisions apply the conduct of a foreign person outside New Zealand where the foreign corporation or individual:

- is resident, or carries on business, in New Zealand and the conduct affects a market in New Zealand; or
- has a subsidiary or agent in New Zealand that gives effect in New Zealand to the arrangement entered into by the foreign person.

**4. Which authorities can investigate cartels?**

The NZCC is responsible for investigating cartel conduct, managing the immunity/leniency processes and instituting civil cartel proceedings.

When the criminal cartel provision is enforced from April 2021, the NZCC will refer serious cartel conduct to a specialist cartel panel who will then initiate the criminal proceedings.

**5. What are the key steps in a cartel investigation?**

The NZCC has extensive powers to investigate suspected cartel conduct, and can use these powers if it has reason to believe that a person has information relating to a breach or potential breach.

The NZCC’s investigation process can be summarised into the following stages: screening and prioritisation, investigation and outcome.

During the screening and prioritisation stage, the NZCC considers whether a matter which has come to their attention, warrants an investigation. This involves assessing the nature of the matter and considering:

- whether there is a reasonable basis for suspecting that a breach of the Act has occurred;
- the NZCC’s enforcement criteria and;
- the NZCC’s competing priorities and any current enforcement focus areas.

Consistent with international trends, the majority of cartel cases begin with a leniency application, which the NZCC will consider before deciding whether to open an investigation.

The procedural steps of a leniency application are discussed in greater detail below.

In some cases, rather than opening an investigation, the NZCC may take low-level steps to resolve the issues underlying a complaint such as referring the complaint to another agency (in circumstances where the cartel laws are not the appropriate mechanism for resolving the complainant's issue), a dispute resolution body, or the subject of the complaint. In other cases, after initial screening and prioritisation, the NZCC will open an investigation.

The fact of the NZCC having opened a formal investigation is public, and is notified on the NZCC's case register on its website; however, given the importance of confidentiality to its investigative process the NZCC typically will not disclose the names of the parties under investigation, or the nature of the alleged conduct it is investigating. Rather, the case register will generally state the broad industry in which the parties operate, and the section of the Act to which the alleged conduct relates.

The investigation stage involves gathering and analysing relevant information so that the NZCC can form a view on what happened, whether what happened breaches the Act and if so, what is the most appropriate enforcement response.

To determine whether a breach of the cartel provisions may have occurred, the NZCC gather information from sources such as: the investigated party, other market participants (including competitors, suppliers or customers), public, experts, third parties and/or information that is publicly accessible. The NZCC may also seek and receive information voluntarily from persons or entities who are willing to supply of information. This process can involve searches of business or private premises, requesting that parties voluntarily provide documents or information, or attend meetings with the NZCC; and, if parties are not willing to cooperate voluntarily, compelling the provision of documents/information or attendance at interviews, via the NZCC's fact gathering powers described in greater detail below.

The NZCC can, at any stage during the investigation, seek more information as a result of new facts or issues that arise, or to cross check information, revisit and change the scope and focus of the investigation, conduct research or analysis and seek external opinion. Once the NZCC investigation team has completed its inquiries and assessed the evidence, the investigation team prepares for the senior staff or a Division of Commissioners (i.e. a group of 3-4 Commissioners/Associate Commissioners, tasked with evaluating the facts and determining the NZCC's course of action):

- the facts and a summary of the evidence and legal or economic issues arising;
- an assessment of whether or not there is likely to have been a breach of the Act, and;
- if so, a recommendation as to the enforcement options and the most suitable type of enforcement response.

The senior staff or Commissioners may ask that further inquiries are made before a final

decision is made. In some circumstances these enquiries may include approaching an investigated party to understand their willingness to change their behaviour or to compensate affected parties.

Decisions to take a high-level enforcement response, such as court action or settlement, are taken by a Division. Decisions to take a low-level enforcement response, such as warning, infringement notice, or compliance advice letter, are often taken by authorised senior staff.

There is no statutory time frame within which an investigation must take place, but proceedings by the NZCC for recovery of pecuniary penalties for cartel conduct must be instituted within three years of the matter giving rise to the contravention having been discovered or when it reasonably ought to have been discovered and, no later than 10 years after the matter occurred. Investigations often last between 2 and 3 years before a decision is made whether to resolve it with a high or low level enforcement response.

## **6. What are the key investigative powers that are available to the relevant authorities?**

The Act equips the NZCC with significant investigatory powers.

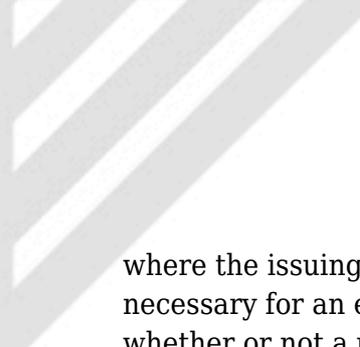
The primary tool the NZCC uses to gather information is a notice under section 98 of the Act. This enables the NZCC to require any person to produce specified documents or information to the NZCC or to attend a meeting with the NZCC to give evidence, including on oath, provided that the NZCC consider it is necessary or desirable for it to do so in carrying out its functions.

Section 98 notices do not need to be authorised by a judicial officer. They can be issued by the Chair of the NZCC, or by any person within the NZCC with the Chair's delegated authority to issue such notices; i.e. currently the NZCC Commissioners.

The NZCC cannot issue broad section 98 notices to conduct a general audit of an industry and any notice must be founded on a reasonable belief that there may be undiscovered facts that could give rise to a contravention of the Act (see *Astrazeneca Ltd v Commerce Commission* [2010] 1 NZLR 297).

Failure to comply with a section 98 notice, is a criminal offence and any party found guilty, is liable for a fine of up to NZ\$10,000 for individuals and NZ\$30,000 for bodies corporate (per breach). In *Commerce Commission v Aerolineas Argentinas SA* (District Court at Auckland CRI-2008-004-011467, 21 January 2009), the accused was criminally prosecuted and fined NZ\$11,000 in total for multiple counts of failing to provide required documents within the due date.

Further, under section 98A of the Act, the NZCC can apply to a Judge of the District Court or High Court, or another issuing officer, for a search warrant. A search warrant will be issued



where the issuing officer is satisfied that there are reasonable grounds to believe that it is necessary for an employee of the NZCC to search that place, for the purpose of ascertaining whether or not a person is engaging (or has engaged) in conduct that constitutes or may constitute a contravention of the Commerce Act.

The NZCC will apply for a search warrant where it is unlikely to be able to obtain in a less intrusive way specific evidence required for an investigation, such as by using a voluntary request or a s 98 compulsory notice as described above. This may include where the NZCC is concerned that the evidence or information may be removed, concealed destroyed, or where a person is being uncooperative with the NZCC's investigation where it believes them to be in control of relevant evidence.

A search warrant enables the NZCC to carry out unannounced searches of business and residential premises, search and seize information, documents and other things, in any form specified in the search warrant, which could include personal mobile phones, laptops, computer hard drives and other evidence.

To be effective, search warrants must sufficiently identify the specific underlying offence or contravention, or the specific material to be seized, or the specific location to be searched. General search warrants are invalid at common law, and entry under an invalid warrant is treated at common law as trespass.

Under s 152 of the Search and Surveillance Act, if a photograph or a copy of a seized exhibit will be adequate for the NZCC's investigative or evidential purposes, the NZCC may in its discretion return that thing to the owner or to a person entitled to possession. This is the NZCC's standard practice, as set out in its Competition and Consumer Investigation Guidelines.

Owners of seized items can apply to the NZCC to ask it to return the items, or give the owner reasonable access to them. The NZCC has stated that it is usually agreeable to giving owners reasonable access to their own records, but given that it often needs original items to use in evidence, will usually provide reasonable access to copies of documents (rather than returning the originals).

In any case, within six months of seizing the items the NZCC must either bring proceedings, return the seized items, or seek permission from the Court to retain them for a further period.

Because criminal cartel conduct will be punishable by up to 7 years imprisonment, the NZCC will also have access to those powers under Part 3 of the Search and Surveillance Act 2012 which may only be used in relation to suspected offences that are punishable by a term of imprisonment of 7 years or more.

In particular, the NZCC will be able to apply to the Court for surveillance device warrants (i.e. “wiretaps”) by demonstrating to a Court reasonable grounds for suspecting that a criminal cartel offence has been, is, or will be committed, and that the use of a warrant will obtain relevant evidence.

**7. On what grounds can legal privilege be invoked to withhold the production of certain documents in the context of a request by the relevant authorities?**

Legally privileged information does not need to be disclosed to the NZCC under a section 98 notice or section 98A search warrant. Legal privilege extends to advice provided by:

- Lawyers who hold a current practising certificate in New Zealand or any state in Australia; and
- Overseas lawyers who according to the laws of their country are entitled to carry out work that in New Zealand is normally undertaken by a lawyer or patent attorney (i.e. a lawyer with a current practising certificate in an overseas country).

New Zealand law does not distinguish between external and in-house lawyers provided that the in-house lawyer is acting in their capacity as a lawyer and providing legal advice, not general business advice.

**8. What are the conditions for a granting of full immunity? What evidence does the applicant need to provide? Is a formal admission required?**

Under the NZCC Cartel Leniency Policy, an immunity applicant (corporation or individual) will be eligible for and granted conditional civil immunity if the applicant:

- is the first party to qualify for conditional immunity;
- is or was a participant in that cartel;
- admits that the cartel conduct may breach the Act;
- has either ceased, or promises to cease, their involvement in the cartel (Save for circumstances where the applicant is lawfully directed or permitted to continue such involvement by the NZCC or a partner agency of the NZCC for the purposes of gathering information);
- has not coerced others to participate in the cartel;
- makes submissions in relation to actions that are genuinely corporate acts as opposed to those undertaken by individuals; and
- agrees to provide full and continuing cooperation to the NZCC in its investigation and in any subsequent proceedings, including, in the case of a body corporate, makes best efforts to secure the complete and truthful cooperation of current and former directors, officers and employees.

Additionally, corporate applicants have the following three further requirements:

- that the admissions made are a truly corporate act, based on the actions of the company's employees, directors, servants or agents, rather than isolated confessions by individual representatives;
- the company must provide the NZCC with the names of all current and former directors, officers, agents and employees of the company who were involved in the conduct. The current or most recent position held by each individual must be stated. The company must provide additional names if it later becomes aware of more individuals being involved in the conduct;
- the company must:
  - identify one individual in the organisation or an external lawyer as the primary contact point for all matters related to the investigation, unless the NZCC agrees otherwise. Ideally, the person identified should be available for the duration of the investigation; and
  - commit to giving the NZCC unfettered access (to the best of its ability) to its personnel and information, and swiftly respond to the NZCC's queries.

The immunity does not apply to proceedings brought by third parties. Immunity sought by a corporation extends to all current and former directors, officers and employees (unless specifically excluded) as long as the disclosures are 'a truly corporate act'. Any immunity sought by a director, officer or employee in their personal capacity will not extend to the corporation.

The terms of an applicant's conditional immunity will be recorded in a conditional immunity agreement prepared by the NZCC and executed by the applicant.

**9. What level of leniency, if any, is available to subsequent applicants and what are the eligibility conditions?**

Immunity is only available for the first cartel participant to notify the NZCC of the cartel. However, other cartel participants that cooperate with the NZCC are nevertheless able to obtain cooperation concessions - for Commission-initiated proceedings only - in the form of a lower level of enforcement action or a recommendation to the Court for a reduced penalty. A decision to proceed with a lower level of enforcement action is at the NZCC's sole discretion. In exceptional circumstances, it may exercise that discretion by deciding to take no enforcement action against an individual whose assistance is considered critical to the successful outcome of an investigation and proceedings, even if that person does not qualify for conditional immunity.

As regards potential penalties, the NZCC has noted:

The penalty or penalty range that the NZCC is prepared to agree will depend on the usual sentencing considerations, including principally the value of the information provided by the cooperating party and its contribution towards the investigation and any resulting litigation. While the courts are willing to receive such recommendations, the court is the decision-

maker and can impose penalties or recognise discounts that differ from the agreed recommendation. In previous cases, the courts have typically recognised cooperation discounts of 25-50%, but this indication should not be treated as a commitment by the NZCC in any specific case.

Cooperation with the Commission does not have any effect on claims for compensatory or exemplary damages by third parties who may have suffered loss as a result of the cartel conduct.

**10. Are markers available and, if so, in what circumstances?**

Yes, markers are available. To obtain a marker, the applicant must provide the NZCC with sufficient details of the nature of the cartel, such as the main participants, products and/or services involved and the impact of the cartel in New Zealand. Provided that these details are given, the applicant's legal counsel is able to seek a marker from the NZCC on an anonymised basis.

**11. What is required of immunity/leniency applicants in terms of ongoing cooperation with the relevant authorities?**

The person seeking immunity must provide full and ongoing cooperation to the NZCC in respect of both the initial investigation and subsequent proceedings. In the case of a body corporate, they must make best efforts to secure the complete and truthful cooperation of current and former directors and employees. If the person fails to fully cooperate with the NZCC at any time, in accordance with the terms of their conditional immunity agreement, the NZCC may rescind the protection of immunity, and initiate proceedings against that person.

Applicants may not disclose to any third party:

- that they have enquired about conditional immunity, a marker application or gaining formal status of a cooperating party in relation to a cartel;
- their application;
- any information that they have provided to the Commission for their application;
- that they have been granted a marker, conditional immunity or cooperation; and
- communications from, or information created by, the Commission.

The only exceptions to the above are where:

- disclosure is required by law;
- disclosure is for the purposes of making a leniency application to another competition authority; or
- the applicant has the NZCC's prior written consent.

## 12. **Does the grant of immunity/leniency extend to immunity from criminal prosecution (if any) for current/former employees and directors?**

Criminal sanctions for cartel conduct have not yet come into force in New Zealand, and the NZCC has not yet released updated Cartel Leniency Policy Guidelines that take the new criminal regime into account. It is therefore currently unclear whether, and in what situations, a grant of civil leniency will flow over to criminal immunity.

What is clear is that:

- there is no legal basis in NZ for a guaranteed flow-over of civil leniency to criminal immunity;
- as with the current civil leniency regime, the granting of criminal immunity will be discretionary, and according to a multitude of factors; and
- the civil and criminal regimes are separate tracks, and the final decision-making authority for enforcement responses in each track resides in separate entities (the NZCC in the civil context and the Crown in the criminal context). On this basis, it is ultimately the Crown prosecutor that will make the decision as to whether it is appropriate to exercise its prosecutorial discretion by abstaining from prosecuting a leniency applicant.

However, for public policy reasons, it is expected that the NZCC is likely to recommend that an immunity applicant in the civil context is also granted with immunity from criminal prosecution by the Crown so as to continue to encourage and incentivise parties to self-report cartel conduct.

## 13. **Is there an 'amnesty plus' programme?**

Yes. If a cartel member is not eligible for immunity in relation to a cartel, but notifies the NZCC about its involvement in a separate, second cartel, they may be eligible for 'Amnesty Plus'. In order for Amnesty Plus to be available, the second cartel must be separate from the first cartel.

Under Amnesty Plus an applicant will be entitled to:

- conditional immunity for their participation in the second cartel; and
- be given the formal status of a cooperating party for the first cartel if they do not qualify for immunity but agree to cooperate with the NZCC.

If the NZCC agrees to proceed under the Amnesty Plus scheme, it will exercise its discretion to take a lower level of enforcement action against an individual or business in exchange for information and full, continuing and complete cooperation.

**14. Does the investigating authority have the ability to enter into a settlement agreement or plea bargain and, if so, what is the process for doing so?**

Parties under investigation may at any time approach the NZCC to make a settlement proposal or to initiate a plea discussion. Such approaches may, in relation to civil proceedings, be made or accepted on a 'without prejudice' basis at any point in the investigation process. This means that any concessions or proposals that are discussed will not be used in Court if a negotiated settlement cannot be achieved.

Decisions to enter into settlement discussions are taken by a Division of Commissioners.

The NZCC may not agree to settle where: the conduct is of significant public interest or concern, there has been a disregard for the law, the harm is so widespread or likely to spread if the NZCC do not intervene, or the NZCC wants to recover compensation or obtain orders that only a court can make. As a result, typically settlement discussions are progressed later in the investigation process, once the NZCC has indicated at least an initial view of whether a breach of the Act has arisen.

Settlement can either be 'in-court' or 'out-of-court' depending on the circumstances:

- 'In-court' settlements can occur once proceedings have commenced. The Court must be involved where the settlement requires payment of a pecuniary penalty (the most common form of settlement), or any other order that only the Court has jurisdiction to impose.
- 'Out-of-court' may occur during an investigation or where proceedings have not been issued. This typically requires reaching agreement on terms that do not require the Court's approval to implement. This can include agreement to cease the conduct, admissions of likely breach of the law, compensation payments, costs paid to the NZCC, publicity, and other terms.

Hybrid settlements are possible, however if the settlement involves any payment of a pecuniary penalty then the Court must approve the settlement.

The NZCC can also settle with some defendants and not others. In the recent *Lodge v Commerce Commission* price fixing case (discussed further below), the appellants Lodge Real Estate Ltd and Monarch Real Estate Ltd (and their respective principals) were two of thirteen real estate agencies that the NZCC had commenced proceedings against for price fixing.

Eleven of the real estate agencies ultimately settled with the NZCC and received penalties from the High Court. Lodge and Monarch elected not to settle, and were prosecuted in contested hearings.

**15. What are the key pros and cons for a party that is considering entering into settlement?**

Key advantages of settling before the NZCC file proceedings include:

- a non-contested penalty hearing, in which the NZCC and the defendant advocate for the same penalty;
- access to the maximum available discount off the penalty the NZCC believe would otherwise apply
- possible reputational advantages relative to an adverse court decision;
- greater certainty around the penalty imposed (subject to the ultimate discretion of the Court).

Key disadvantages of settling before proceedings are filed may include:

- settlement requires an admission of cartel conduct that some companies may not be willing to make;
- follow-on impacts on the ability to defend third party damages claims or other parallel ongoing investigations; and
- reduced ability to appeal the penalty decision other than in circumstances where the High Court imposes a penalty different to the agreed penalty.

## 16. **What is the nature and extent of any cooperation with other investigating authorities, including from other jurisdictions?**

The NZCC's powers to engage in inter-agency cooperation have been strengthened by the enactment of the Commerce (International Cooperation, and Fees) Amendment Act 2012 (the "**Cooperation Act**") in October 2012. The Cooperation Act amends the Commerce Act and provides a specific legislative framework for the sharing of information between overseas regulators and the NZCC, including allowing the NZCC to share compulsorily acquired information (including information acquired before the Cooperation Act came into force) and to perform searches for the purposes of assisting an overseas regulator.

The NZCC maintains links to other competition agencies via its participation in the International Competition Network. It liaises with the Australian Competition and Consumer Commission ("**ACCC**"), the European Commission, the US Department of Justice and Federal Trade Commission and the Canadian Competition Bureau ("**CCB**"). The NZCC has formal cooperation agreements for cartel investigations with the ACCC and CCB.

Leniency applications, settlement agreements, and penalty decisions in other jurisdictions do not give rise to any legal presumption or carry any special weight, in New Zealand. The burden remains on the NZCC, or third party plaintiff, to establish the necessary elements of the cartel provision.

## 17. **What are the potential civil and criminal sanctions if cartel activity is established?**

Criminal sanctions

From 8 April 2021, an individual convicted of intentionally engaging in cartel conduct in breach of section 82B of the Act will face a penalty of:

- imprisonment for up to seven years; and/or
- a criminal fine of up to \$500,000 (the same as the current maximum civil pecuniary penalty for an individual under the civil enforcement regime).

### Civil sanctions

The Act currently provides that any party who engages in cartel conduct can be ordered to pay the following pecuniary penalties:

- for bodies corporate, up to the greater of:
  - NZ\$10 million; or
  - three times the commercial gain from the conduct; or
  - if such gain cannot be readily ascertained, 10 per cent of turnover of the group of which the party is a part; and
- for individuals, up to NZ\$500,000.

The Act does not prescribe any minimum level of penalty. The court must order an individual who has engaged in cartel conduct to pay a pecuniary penalty, unless the court considers that there is good reason for not making that order, or unless criminal cartel proceedings have been brought against that person. As well as imposing penalties, the court may also:

- upon application, grant a permanent or interim injunction preventing a party from engaging in particular conduct;
- vary or cancel any provision of a contract that, if given effect, would contravene the Act and require a party to the contract to pay restitution or compensation to any other party to the contract;
- make any other order that it sees fit where any other party to the proceedings has suffered or is likely to suffer loss or damage as a result of the prohibited conduct; or
- order that a person who has been found to have engaged in price fixing must not take part in the management of a body corporate for a period not exceeding five years.

### **18. What factors are taken into account when the fine is set? In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels?**

Section 80 of the Act requires the court to determine the appropriate penalty subject to the statutory maximum by having regard to all factors, and having particular regard to the nature and extent of any commercial gain. Apart from this section, there are no formal sentencing guidelines under the Act, and the NZCC has not issued any guidelines as to how it quantifies the penalties it recommends to the court. The primary source of guidance in respect of penalties for cartel conduct is previous sentencing decisions by the courts, including in

criminal proceedings.

Typically, an agreed statement of facts and submissions on penalties will be submitted to the court, but the level of penalty to be imposed is still a matter of discretion for the court. In recent cases, the court's penalty-setting approach has been to determine the maximum penalty, establish an appropriate starting point for the offending that achieves the objective of deterrence in light of relevant factors, and adjust the starting point for mitigating factors. The courts have stated that an assessment of appropriate penalties must take into account all the circumstances of the particular case, including:

- the need for deterrence, which the court has consistently referred to as a significant factor to be considered in the imposition of penalties for anti-competitive behaviour;
- the nature and extent of the defendant's act or omission;
- the gravity of breaches;
- the extent of any loss or damage suffered by any person as a result of the act or omission, if reliable evidence of this has been brought before the court;
- whether the defendant has previously breached the Act; and
- whether any commercial gain was achieved.

The NZCC has also released guidelines for a cooperation policy, under which it may offer to reach an agreed settlement with a defendant to reflect cooperation deserving of a discount and make submissions to the court recommending a reduction in penalty accordingly.

Although the level of penalties sought by the NZCC in any particular case is a matter of discretion, and the level of penalty that the court will impose is ultimately fact-specific, there is a general expectation that the NZCC and the courts will continue to discount penalties to encourage cooperation in future.

The highest penalty against a company for cartel conduct to date has been the NZ\$7.5 million agreed to by Air New Zealand for its part in the air cargo cartel, which included a 20% discount for settling before a full substantive trial. Consistent with international trends, the NZCC is continuing to seek higher penalties for cartel conduct on the basis that penalties at the existing levels have limited deterrent effect.

**19. Are parent companies presumed to be jointly and severally liable with an infringing subsidiary?**

There is no presumption of parental joint and several liability. However, if a corporation is a party to a cartel provision in a contract, agreement or understanding, related bodies corporate are taken to be a party to that contract, agreement or understanding and any party that is "knowingly concerned in" a breach of the Act by another party, itself commits a breach of the Act and is liable to the same maximum penalty as the primary offender.

**20. Are private actions and/or class actions available for infringement of the cartel**

## **rules?**

Yes, although historically extremely rare in New Zealand, private or class actions are available against cartel participants for damages as well as other relief. Recent developments in the ability to bring opt-out class actions has enhanced the likelihood of such actions in the future.

### **21. What type of damages can be recovered by claimants and how are they quantified?**

The Act does not provide any guidance as to how damages are to be quantified. Although cases state the measure of damages is similar to those recoverable under common law in tort, damages are not confined to those recoverable in tort.

### **22. On what grounds can a decision of the relevant authority be appealed?**

Any substantive decision of the High Court in respect of proceedings for cartel conduct can be appealed on questions of fact or law to the New Zealand Court of Appeal, New Zealand's principal intermediate appellate court, with leave from either Court. An application for leave must be made within 20 working days of the decision. The Court of Appeal sits in panels of three or five judges, depending on the nature and wider significance of the particular case.

Further appeals on questions of law to New Zealand's highest court, the Supreme Court, are available, subject to leave being granted. The Supreme Court comprises the chief justice and not fewer than four nor more than five other judges.

### **23. What is the process for filing an appeal?**

Parties have a right to apply for leave to appeal a High Court decision to the Court of Appeal. Such an application must be made to the court, within 20 working days of the High Court's decision. Parties may apply for an extension.

An appeal is brought when the appellant files a notice of appeal in the court, files a copy of the notice of appeal in the administrative office, and serves a copy of the notice of appeal on every other party directly affected by the appeal.

Applications for judicial review are also available in relation to the exercise of delegated authority by the NZCC, but where a right of appeal exists, this must generally be exhausted first. Applications for review are heard exclusively by the High Court, with subsequent appeals available where leave is granted.

### **24. What are some recent notable cartel cases (limited to one or two key examples, with**

## **a very short summary of the facts, decision and sanctions/level of fine)?**

The Supreme Court has recently upheld a Court of Appeal judgment which found Lodge Real Estate Limited and its director Jeremy O'Rourke, were part of an anti-competitive price fixing agreement with four other Hamilton real estate companies to pass on to vendors the cost of advertising properties on Trade Me. This was the final appeal by two of the original 13 real estate agencies prosecuted by the NZCC for price fixing.

In 2013, Trade Me (an online platform which includes property listings) introduced a new fee structure for residential property listings which had the effect of increasing the cost of advertising for real estate agencies. In response to this scheme, real estate agencies moved to a model of "vendor funding" to pass on to vendors the cost of advertising properties on Trade Me. The NZCC brought proceedings against 13 real estate agencies, alleging that by agreeing to the "vendor funding" scheme, real estate agencies breached the prohibition on price fixing in the Act.

The High Court held that while there was an arrangement between the real estate agencies, the arrangement was not sufficient to fix or control the price of real estate services as the parties still retained a discretion to depart from the arrangement on an ad hoc basis. The NZCC appealed to the Court of Appeal who overturned the High Court's decision.

In April 2020, the Supreme Court upheld the ruling of the Court of Appeal, finding that the agencies' arrangement breached the prohibition on price fixing, on the basis that:

- there was an arrangement between the agencies' representatives to establish the passing on of listing fees as a default position;
- although the agencies retained some discretion to depart from that default option, it did not remove the arrangement from the scope of the price fixing prohibition; and
- although the arrangement related to a small component of the overall charges by the agencies to customers, it was nevertheless a sufficiently significant component of the overall price to bring the arrangement within the ambit of the price fixing prohibition.

A penalty hearing is yet to be scheduled and the NZCC has stated it will make no further comment while the matter remains before the Court.

However, of the 13 real estate agencies, eleven companies and one individual have been ordered to pay a total of just under \$19 million dollars over related cases taken by the NZCC. They are the following:

- Hamilton real estate agency Online Realty Limited(trading under the Ray White banner) fined \$1.05 million (August 2017);
- Property Brokers Limited and its director Tim Mordaunt fined total of \$1.5 million(April 2017);
- Hamilton real estate agency Lugton's Limited fined \$1 million(December 2016);

- Head offices of Barfoot & Thompson, Harcourts, LJ Hooker and Ray White fined total of \$9.825 million(December 2016);
- Manawatu 1994 Limited (trading under the LJ Hooker banner) fined \$1.25 million(November 2016);
- Bayleys Corporation Limited and Hamilton-based Success Realty Limited fined \$2.2 million and \$900,000 respectively(July 2016); and
- Unique Realty Limited fined \$1.25 million (May 2016).

**25. What are the key recent trends (e.g. in terms of fines, sectors under investigation, applications for leniency, approach to settlement, number of appeals, etc.)?**

- an increase in the NZCC's cartel investigation activity in the last 12 months; an increase that may be attributable in part to the NZCC's new Chair, Anna Rawlings, who took over the position from Dr. Mark Berry in May 2019.
- The Lodge decision discussed above is the first time a cartel case has reached the NZ Supreme Court since 2010.

**26. What are the key expected developments over the next 12 months (e.g. imminent statutory changes, procedural changes, upcoming decisions, etc.)?**

In April 2021, amendments to the cartel laws will take effect, such that criminal penalties will be available for cartel conduct from that date.