



INDEPENDENT CONSUMER AND
COMPETITION COMMISSION

A Public Consultation Document on “Leniency Policy Guidelines”

Issued by ICCC on 24th February, 2017

A policy guideline for corporations and individuals intending to apply for leniency for cartel conduct.

Executive Summary

The Independent Consumer and Competition Commission (“ICCC”) developed this consultation paper on the “Leniency Policy” (Policy) setting out the policy guidelines for the Independent Consumer and Competition Commission (ICCC) to award leniency to a corporation or an individual from liability for reporting cartel conduct to the ICCC if certain conditions are met.

The Policy was prepared in accordance to section 7(3) of the ICCC Act which empowers the ICCC to publish such documents relating to the performance of its functions.

The consultation document addresses the process an individual or corporation must follow when submitting an Application for Leniency and conditions under which leniency applies. The Policy also sets out how the ICCC deals with an application, when one is made.

The ICCC seeks comments and submissions on the Policy as part of this Public Consultation Document. Persons wishing to respond are invited to submit written comments or submissions to the address below by **Monday 20th March, 2017**.

Public Consultation Process

The objective of this Public Consultation document is to provide stakeholders with the opportunity to make comments and submissions to the ICCC on the contents and implications of the Policy.

The ICCC invites members of the public, private sector stakeholders, public sector stakeholders and commercial entities to participate in this Public Consultation Process.

All comments and submissions should be addressed to **Mr. Paulus Ain, Commissioner and Chief Executive Officer** of the ICCC using the address provided below.

All queries relating to this matter should be directed to Mr. Steven Sugl, Executive Manager, Competitive Markets & Fair Trade Division or Mr. Emmanuel Auru, Manager-Markets on telephone 325-2144 or e-mail to: ssugl@iccc.gov.pg or eauru@iccc.gov.pg, respectively.

Please note that all submissions relating to this consultation will be treated as public information and will be published in the ICCC Public Register, except where information is designated “confidential” by the person submitting. Where information is designated confidential, the person submitting must provide reason(s) as to why that particular information should not be disclosed to the public. The ICCC will assess it and decide on the confidentiality claim(s), but please note that not all such claims are granted.

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The “Leniency Policy” is shown below in **Annexure A**.

ANNEXURE A – Leniency Policy



INDEPENDENT CONSUMER AND
COMPETITION COMMISSION

April 3

Leniency Policy

2017

A policy guideline for corporations and individuals intending to
apply for leniency for cartel conduct.

Table of Contents

Introduction	6
Relevant provisions.....	6
Conditions under which leniency applies	7
How to apply for leniency	8
Invited applicants	9
Confidentiality of information	9
What to expect after lodging an application	10
Withdrawal of application for leniency	10
Miscellaneous.....	11
ATTACHMENT A – Form 4 Confidentiality	12
ATTACHMENT B – Letter of Agreement.....	14
ATTACHMENT C – Relevant Provisions of the ICCA Act	17

Introduction

1. This Leniency Policy is a policy guideline for the Independent Consumer and Competition Commission (ICCC) to award leniency to a corporation or an individual (collectively referred to in this guideline as the “Applicant”) from liability for reporting cartel conduct to the ICCC if certain conditions are met.
2. The ICCC endeavours to apply and interpret this policy consistently and fairly for the benefit of all applicants.
3. For the purposes of this Leniency Policy, leniency means reduced sanctions upon prosecution or total exemption from prosecution.
4. Cartel conduct can be any of the following activities:
 - a) Price fixing;
 - b) Restricting outputs in the production and supply chain;
 - c) Allocating customers, suppliers or territories; or
 - d) Bid rigging.
5. The ICCC takes cartel conduct very seriously and where necessary, will not hesitate to prosecute offenders for the maximum penalty.

Relevant provisions

6. Although the *Independent Consumer and Competition Commission Act 2002* (ICCC Act) does not use the words ‘cartel conduct’ or ‘cartel activity’, as do other jurisdictions, the same principle of abuse applies where the end consumer loses out on competitive market prices, wider choice and better services. The provisions that invoke cartel like activity under the ICCC Act are Sections 50, 52 and 53.
7. Section 50 is the broad provision that covers cartel like conduct. It prohibits contracts, arrangements, or understandings that may substantially lessen competition.
8. Section 52 goes one step further to prohibit contracts, arrangements or understandings between competitors that contain exclusionary provisions.¹
9. Section 53 essentially, prohibits price fixing.²

¹ These are provisions that have the purpose of preventing, restricting or limiting the supply or acquisition of goods or services to or from particular persons or classes of persons either altogether or in particular circumstances or on particular conditions.

² Where rival companies come to an illicit agreement not to sell goods or services below a certain price or at a fixed price.

10. Intending applicants should note that Sections 50 and 52 referred to above can be authorized by the ICCC under Section 70 Subsections (1), (2), (5) and (6). If a corporation or an individual is found to be engaging in Section 50 and 52 activities in the absence of authorization from the ICCC, this will be treated as cartel conduct and prosecuted accordingly.
11. A Section 70 application for authorization, allows the ICCC the power to impose conditions as well as the power to vary or revoke the authorization, though this may be limiting to the recipient, it is good practice to seek the ICCC's authorization rather than allow for possible prosecution for cartel conduct.
12. Pursuant to Section 87 of the ICCC Act, where a corporation or an individual is found to be in breach of any cartel provision, a pecuniary penalty of K500, 000.00 (for individuals) to K10, 000 000.00 (for a corporation) applies. The ICCC can also seek damages for losses incurred by third parties as a result of the cartel conduct,³ injunctions preventing persons from engaging in the cartel conduct,⁴ and request the Court to prohibit individuals from holding managerial positions in other corporations if they are found guilty.⁵
13. Corporations and individuals are free to approach the ICCC at any time to discuss the specifics of their case and to seek the ICCC's view on availability of leniency. At the request of the corporation or individual concerned, the discussions may be treated with anonymity.

Conditions under which leniency applies

14. Leniency will be granted to a corporation reporting cartel activity, if the following conditions are met:
 - a) The corporation, whether with or without its knowledge, was at all material times a member of the cartel and participated in the cartel activity;
 - b) The corporation, upon its discovery of the cartel activity being reported, took prompt and effective action to terminate its part in the activity;
 - c) The corporation reports the cartel activity with honesty and provides full, continuing and complete cooperation to the ICCC throughout the investigation process;
 - d) The confession of wrongdoing is reported at the corporate level, as opposed to isolated confessions of individual executives or officials; and
 - e) The corporation did not coerce another party to participate in the cartel activity and clearly was not the leader in, or originator of, the activity.
15. Corporations or individuals are free to apply for leniency regardless of whether or not investigations have already been commenced or concluded by the ICCC.
16. Leniency will be granted to an individual reporting a cartel activity, if the following conditions are met:

³ Section 94.

⁴ Section 93.

⁵ Section 90.

- a) The individual, whether with or without his or her knowledge, was at all material times a member of the cartel and participated in the cartel activity;
 - b) The individual, upon his or her discovery of the cartel activity being reported, took prompt and effective action to terminate his or her part in the cartel activity;
 - c) The individual reports the cartel activity with honesty and provides full, continuing and complete cooperation to the ICCC throughout the investigation process; and
 - d) The individual did not coerce another person or corporation to participate in the cartel activity and clearly was not the leader in, or originator of, the cartel activity.
17. It is important to note that where a corporation applies for leniency, the leniency will also apply to the corporation's directors or officers. However, if a corporation is found guilty of participating in a cartel activity, the corporation's directors or officers will be deemed to be guilty unless they can prove that the cartel activity was committed without their knowledge⁶ or that they complied with paragraph 16.

How to apply for leniency

18. All applications for leniency must be made in writing, addressed to the ICCC, and should contain the following information:
- (a) Name of Applicant
 - (b) Reliable contact details
 - (c) Type of cartel conduct
 - (d) Names of parties or persons involved in the cartel conduct
 - (e) Details of cartel conduct such as:
 - (i) Dates, times and places
 - (ii) reliable evidence to support the claim such as, meeting minutes, agreements both oral and written, photographs,
 - (iii) Full details of all known facts including when the cartel arrangement was made, who was involved, who had the knowledge, how the arrangement began and how it was implemented.
 - (f) Formal request for leniency addressing the conditions listed in paragraph 14 or 16.
19. The ICCC does not allow joint applications by more than one corporation or individual.
20. The ICCC will however, consider a second or third Applicant if that Applicant demonstrates that the information it is willing to provide is new information that the first Applicant has not been able to provide. In this case, the Applicant must also satisfy conditions under paragraph 14 or 16 and provide information required under paragraph 18.
21. Where the first Applicant has requested for a time extension to provide information pursuant to paragraph 18, the first Applicant's application will be treated as a 'marker'.⁷ Any

⁶ Section 135.

⁷ A marker allows a prospective leniency applicant to approach the authority with some initial information about their participation in a cartel in exchange for a commitment by the Commission to hold the applicants

subsequent applications for leniency for the same cartel will be reviewed as and when the first Applicant's agreed time extension has lapsed.

Invited applicants

22. Where the ICCC has information that leads it to suspect certain corporations of engaging in cartel conduct, the ICCC can approach these corporations or individuals within the corporation to inform them about the Leniency Policy and invite them to apply. Where a corporation or an individual has been invited to apply, the same conditions under paragraph 14 and 18 will still apply.

Requesting for a time extension

23. Pursuant to paragraphs 14(c) and 16(c), where the Applicant is required to provide full and continuing cooperation to the ICCC, the Applicant is at liberty to request a time extension from time to time in the investigations, to provide the information requested by the ICCC. Any requests for extension must be made in writing.
24. The ICCC must meet with the Applicant requesting an extension, to determine the amount of time that is needed to provide information pertaining to the cartel. The ICCC reserves its discretion to extend this time.

Confidentiality of information

25. The ICCC will use its best endeavors to preserve any information provided to it, including the identity of the Applicant seeking leniency.
26. All Applicants are free to apply for confidentiality pursuant to Section 131 of the ICCC Act, when supplying information that is commercially sensitive in an application for leniency.
27. Where the Applicant would like to apply for confidentiality, the Applicant must first read the ICCC's Confidentiality Guidelines to have a basic understanding of how to complete Form-4. See Attachment A.
28. The ICCC may reject any claim for confidentiality if it considers that disclosure is in the best interest of the public. If the ICCC decides to disclose any information claimed to be confidential, the Applicant will be provided an opportunity to withdraw that information.
29. The Applicant is not allowed to disclose to any third party any discussions or dealings with the ICCC, all disclosure must be authorised by the ICCC.

'place in line' for grant of leniency, for a set period of time, while the applicant gathers additional information to complete its leniency application. See <http://www.oecd.org/daf/competition/markers-in-leniency-programmes.htm> for more information on markers.

What to expect after lodging an application

30. Once an application for leniency is received, the ICCC will review the application against the conditions listed in paragraph 14 and 16 as well as sufficiency of information provided under paragraph 18.
31. It will typically take 10 working days for the ICCC to review the application and revert with a decision on whether or not to grant leniency. If leniency is granted the Applicant will be required to sign a letter of agreement. The letter of agreement sets out the terms and conditions of leniency. See Attachment B.
32. Where the ICCC requires more time to review the application, the Applicant will be informed accordingly in writing.
33. Grant of leniency can be either of the following:
 - (a) Full leniency; or
 - (b) Conditional leniency
34. Full leniency is where the ICCC is satisfied that the evidence provided through full cooperation by the Applicant is sufficient to prove a breach in prosecution. Where full leniency is granted, the recipient is either:
 - (a) Exempt entirely from prosecution; or
 - (b) Entitled to reduced sanctions in court.
35. Conditional leniency is where, leniency is granted on the basis of fulfilment of certain conditions as imposed by the ICCC. Conditional leniency means the ICCC reserves its discretion to revoke that leniency if a condition has been breached by the Applicant.
36. If granted leniency (whether full or conditional) the Applicant must be readily available to respond to any queries that the ICCC may have and to respond in a full and truthful manner, including if the Applicant is a corporation, making all relevant directors, officers and employees available at the request of the ICCC to respond to queries and attend interviews. This also extends to making all former directors, officers and employees available as well.
37. When providing evidence and information, the Applicant must do so promptly, meeting all the deadlines set by the ICCC for provision of information.

Withdrawal of application for leniency

38. Where an investigation has been closed by the ICCC for reasons set out in paragraph 40 and an Applicant has already lodged its application for leniency, or leniency has already been granted by the ICCC, that Applicant will be given an opportunity to withdraw its application.

39. Where an application has been withdrawn, that Applicant loses its leniency status and may be investigated by the ICCC for cartel activity if the ICCC chooses to re-open investigations.
40. The grounds upon which the ICCC can elect to close or re-open its investigations into a cartel activity includes, but is not limited to, instances where:
 - (a) the leniency was granted on information that was false or misleading at the material time it was submitted; or
 - (b) there has been a material change in circumstances since the leniency was granted; or
 - (c) a condition upon which the leniency was granted has not been complied with.

Miscellaneous

41. The provisions quoted here (Sections 50, 52, 53, 70, 87 and 131) fall within the ambit of this Leniency Policy. All intending Applicants are encouraged to read these provisions very carefully and understand them before deciding to apply for leniency. See Attachment C.
42. If a corporation or an individual who is not a member or party to a cartel activity but informs the ICCC of the existence of a cartel (Whistle Blower), the Whistle Blower shall be entitled to receive 10 percent of the total fine that is imposed by the Courts on the cartel members, if the case is successful.
43. Paragraph 42 is subject to the following conditions:
 - a) The Whistle Blower was at all material times not a member of the cartel and did not participate in the cartel activity;
 - b) The Whistle Blower, upon his or her discovery of the cartel activity being reported, took prompt and effective action to inform the ICCC;
 - c) The Whistle Blower reports the cartel activity with honesty and provides full, continuing and complete cooperation to the ICCC throughout the investigation process; and
 - d) The Whistle Blower did not coerce another person or corporation to participate in the cartel activity and clearly was not the facilitator of, leader in, or originator of, the cartel activity.
44. There can be more than one Whistle Blower to a particular cartel activity in which case the 10 percent of the total fine that is imposed by the Courts on the cartel members shall be divided equally amongst the number of Whistle Blowers.

ATTACHMENT A

INDEPENDENT STATE OF PAPUA NEW GUINEA
Independent Consumer and Competition Commission

Form 4

APPLICATION FOR CONFIDENTIALITY

An Application for Confidentiality is made pursuant to Section 131 of the *Independent Consumer and Competition Commission Act of 2002*.

1. Applicant/s

Name of Applicant:

Address in PNG for service of documents:

(a) Physical address:

(b) Postal address:

(c) Phone and email address:

2. Purpose for submitting the information

The information will be used for:

3. Confidentiality claim/s

Create on a separate sheet of paper, a table as shown below. Fill out the table and provide the facts and contentions in support of the confidentiality claim. Please note that the ICC does not give 'blanket confidentiality'.

No.	Name of Document	Page and line number	Confidential Information	Reasons of confidentiality
1.				

2.				
3.				
4.				
5.				

4. Statement of confidentiality

The undersigned declares that, to the best of his/her knowledge and belief, the information identified in the list under Part 3 of this application is confidential and thus requests that it be treated as such.

The undersigned are aware of Section 131 of the ICCA Act, in that the ICCA reserves the right to either grant or decline confidentiality if it deems that disclosure is in the public's interest.

Signature of authorized person

Office held

(Print) Name of authorized person

This ____ day of _____ 20____

ATTACHMENT B

Dear [Name]

This letter sets forth the terms and conditions of an Agreement between the Independent Consumer and Competition Commission (ICCC) and [name of corporation/individual] in connection with [description of cartel conduct e.g price fixing, bid rigging, contracts substantially lessening competition etc] constituting a contravention of [insert section 50, 52 or 53] in the [insert industry and geographic market where applicable].

This Agreement is conditional and depends upon [name of corporation/individual]:

1. Satisfying the ICCC that it is eligible for leniency pursuant to paragraphs 14 and 16 of the Leniency policy; and
2. Cooperating with the ICCC's investigation as required by paragraphs 14(c) or 16(c) of the Leniency Policy.

After [name of corporation/individual] satisfies the ICCC that it is eligible for leniency and provides the required cooperation in investigations, the ICCC will notify, in writing that it has been granted unconditional leniency.

By signing this Agreement, [name of corporation/individual] acknowledges that it is fully familiar with the ICCC's Leniency Policy dated 16 December, 2016 (attached).

AGREEMENT

1. Eligibility

The Applicant would like to report to the ICCC [cartel conduct e.g price fixing, bid rigging, contracts substantially lessening competition etc] constituting a contravention of [insert section 50, 52 or 53] in the [insert industry and geographic market where applicable]. The Applicant submits to the ICCC that it is eligible to receive leniency for the following reasons:

- (a) The corporation/individual, whether with or without its knowledge, was at all material times a member of the cartel and participated in the cartel activity
- (b) The corporation/individual, upon its discovery of the cartel activity being reported, took prompt and effective action to terminate its part in the activity;
- (c) The corporation/individual reports the cartel activity with honesty and provides full, continuing and complete cooperation to the ICCC throughout the investigation process;
- (d) The confession of wrongdoing is reported at the corporate level, as opposed to isolated confessions of individual executives or officials;

- (e) The corporation/individual did not coerce another party to participate in the cartel activity and clearly was not the leader in, or originator of, the activity.

The Applicant agrees that it bears the burden of proving its eligibility to receive leniency, including providing accurate information and that it fully understands the consequences that might result from revocation of leniency as explained in paragraphs 38, 39 and 40 of the Leniency Policy.

2. Cooperation

The Applicant agrees to provide full, continuing and complete cooperation to the ICCC throughout the investigation process, including but not limited to the following:

- (a) Full details of all facts known to the Applicant relating to the cartel conduct being reported;
- (b) Providing promptly and without requirement of a court order, all documents, information or material in its possession, custody or control wherever located, not privileged under the attorney client privilege or work product privilege requested by the ICCC in connection with the cartel conduct being reported;
- (c) Using its best efforts to secure the ongoing, full and truthful cooperation of current (and former) directors, officers and employees of the Applicant and encouraging such persons to voluntarily provide the ICCC with any information they may have that is relevant to the cartel conduct being reported;
- (d) Facilitating current (and former) directors, officers and employees to appear for such interviews or testimony in connection with the cartel conduct being reported as the ICCC may require; and
- (e) Using its best efforts to ensure current (and former directors, officers and employees who provide information in connection with the cartel conduct) being reported, make no attempt either falsely to protect or falsely to implicate any person or entity.

3. Leniency

Subject to verification of the Applicant's submission under clause 1 and subject to full, continuing and complete cooperation to the ICCC throughout the investigation process under clause 2, the ICCC agrees to grant [*indicate whether full or conditional*] leniency as explained in paragraph 33 of the Leniency Policy. Pursuant to the Leniency Policy, the ICCC agrees not to prosecute [*name of corporation/individual*] for any contravention in connection with the cartel conduct being reported prior to the date of this Agreement. This Agreement is binding on the ICCC. If at any time the ICCC finds:

- (a) that the Applicant has not made good on its submission under clause 1 of this Agreement and is not eligible for leniency; or
- (b) has not provided the cooperation required under clause 2 of this Agreement,

this Agreement shall be void and the ICCC may revoke conditional leniency.

The Applicant will be informed in writing on the ICCC's determination to revoke leniency and will be provided an opportunity to make a response. Should the ICCC continue to revoke leniency, the ICCC may proceed to prosecute the Applicant. The Applicant understands and agrees that discretion to prosecute lies with the ICCC and will not seek judicial review of the ICCC's decisions to revoke leniency.

4. Non-Prosecution

Subject to verification of the Applicant’s submission under clause 1 and subject to full, continuing and complete cooperation to the ICCC throughout the investigation process under clause 2, the ICCC agrees that current (and former) directors, officers and employees of the Applicant who admit to the ICCC their knowledge of and participation in, and fully and truthfully cooperate with the ICCC in its investigations of the cartel conduct being reported shall not be prosecuted by the ICCC for any act or offense prior to the date of this letter in connection with the cartel conduct being reported.

5. Agreement

This Agreement is between the ICCC and the Applicant and supersedes all prior understandings, if any, whether oral or written, relating to the subject matter herein. This Agreement cannot be amended except in writing, signed by both parties.

6. Authority and Capacity

The signatories below acknowledge acceptance of the terms and conditions contained herein.

Date: _____

Yours sincerely,

MR. PAULUS AIN
Commissioner & Chief Executive Officer

[Name]
[Position]
[Name of corporation]

Date: _____

[Name of Witness, may be legal counsel]

Date: _____

ATTACHMENT C

Section 50

CONTRACTS, ARRANGEMENTS OR UNDERSTANDINGS SUBSTANTIALLY LESSENING COMPETITION PROHIBITED

- (1) A person shall not enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
- (2) A person shall not give effect to a provision of a contract, arrangement or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
- (3) Subsection (2) applies in respect of a contract or arrangement entered into, or an understanding arrived at, whether before or after the commencement of this section.
- (4) No provision of a contract, whether made before or after the commencement of this section, that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market, is enforceable.

Section 52

CONTRACTS, ARRANGEMENTS OR UNDERSTANDINGS CONTAINING EXCLUSIONARY PROVISIONS PROHIBITED

- (1) Subject to Subsection (2), for the purposes of this Part, a provision of a contract, arrangement or understanding is an exclusionary provision if –
 - (a) it is a provision of a contract or arrangement entered into, or understanding arrived at, between persons of whom any two or more are in competition with each other; and
 - (b) it has the purpose of preventing, restricting or limiting –
 - (i) the supply of goods or services to; or
 - (ii) the acquisition of goods or services from,any particular person or class of persons, either generally or in particular circumstances or on particular conditions, by all or any of the parties to the

contract, arrangement or understanding, or if a party is a body corporate, by a corporation that is related to that party; and

- (c) the particular person or the class of persons to which the provision relates is in competition with one or more of the parties to the contract, arrangement or understanding in relation to the supply or acquisition of those goods or services.
- (2) A provision of a contract, arrangement or understanding that would, but for this subsection, be an exclusionary provision under Subsection (1) is not an exclusionary provision if it is proved that the provision does not have the purpose, or does not have or is not likely to have the effect, of substantially lessening competition in a market.
- (3) For the purpose of Subsection (1)(a) and (c), a person is in competition with another person if that person or any related corporation is, or is likely to be, or, but for the relevant provision, would be or would be likely to be, in competition with the other person, or with a related corporation of that person, in relation to the supply or acquisition of all or any of the goods or services to which that relevant provision relates.
- (4) A person shall not enter into a contract or arrangement, or arrive at an understanding, that contains an exclusionary provision.
- (5) A person shall not give effect to an exclusionary provision of a contract, arrangement or understanding.
- (6) Subsection (5) applies to an exclusionary provision of a contract or arrangement made, or understanding arrived at, whether before or after the commencement of this section.
- (7) No exclusionary provision of a contract, whether made before or after the commencement of this section, is enforceable.

Section 53

CERTAIN PROVISION OF CONTRACTS, ETC., WITH RESPECT TO PRICES DEEMED TO SUBSTANTIALLY LESSEN COMPETITION

- (1) Without limiting the generality of Section 50, a provision of a contract, arrangement or understanding is deemed for the purposes of that section to have the purpose, or to have or to be likely to have effect, of substantially lessening competition in a market if the provision has the purpose, or has or is likely to have the effect, of fixing, controlling, or maintaining, or providing for the fixing, controlling, or maintaining of, the price for goods or services, or any discount, allowance, rebate or credit in relation to goods or services, that are –

- (a) supplied or acquired by the parties to the contract, arrangement or understanding, or by any of them, or by any corporations that are related to any of them, in competition with each other; or
 - (b) resupplied by persons to whom the goods are supplied by the parties to the contract, arrangement or understanding, or by any of them, or by any corporations that are related to any them, in competition with each other.
- (2) The reference in Subsection (1)(a) to the supply or acquisition of goods or services by persons in competition with each other includes a reference to the supply or acquisition of goods or services by persons who, but for a provision of any contract, arrangement or understanding, would be, or would be likely to be, in competition with each other in relation to the supply or acquisition of the goods or services.

Section 70

COMMISSION MAY GRANT AUTHORIZATION FOR RESTRICTIVE TRADE PRACTICES

- (1) A person who wishes to enter into a contract or arrangement or arrive at an understanding, to which he considers Section 50 would apply, or might apply, may apply to the Commission for an authorization to do so, and the Commission may grant an authorization for that person to enter into the contract or arrangement or arrive at the understanding.
- (2) A person who wishes to give effect to a provision of a contract, arrangement or understanding to which he considers Section 50 would apply, or might apply, may apply to the Commission for an authorization to do so, and the Commission may grant an authorization for that person to give effect to the provision of the contract, arrangement or understanding.
- (5) A person who wishes to enter into a contract or arrangement, or arrive at an understanding, to which he considers Section 52 would apply, or might apply, may apply to the Commission for an authorization to do so, and the Commission may grant an authorization for that person to enter into the contract or arrangement or arrive at the understanding.
- (6) A person who wishes to give effect to an exclusionary provision of a contract, agreement or understanding to which he considers Section 52 would apply, or might apply, may apply to the Commission for an authorization to do so, and the Commission may grant an authorization for that person to give effect to the exclusionary provision of the contract, arrangement or understanding.

Section 87

PECUNIARY PENALTIES

- (1) If the Court is satisfied on the application of the Commission that a person –
- (a) has contravened any of the provisions of Section 50 to Section 67 inclusive; or
 - (b) has attempted to contravene such a provision; or

- (c) has aided, abetted, counselled or procured any other person to contravene such a provision; or
- (d) has induced, or attempted to induce, any other person, whether by threats, promises or otherwise, to contravene such a provision; or
- (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of such a provision; or
- (f) has conspired with any other person to contravene such a provision,

the Court may order the person to pay such pecuniary penalty as the Court determines to be appropriate.

- (2) In determining an appropriate penalty under this section, the Court shall have regard to all relevant matters, including the nature and extent of any commercial gain arising from engaging in the conduct referred to in Subsection (1).
- (3) The amount of any pecuniary penalty shall not, in respect of each act or omission, exceed –
 - (a) in the case of an individual, K500, 000.00; or
 - (b) in the case of a body corporate, K10, 000, 000.00.
- (4) The standard of proof in proceedings under this section is the standard of proof applying in civil proceedings.
- (5) Proceedings under this section may only be commenced within three years after the occurrence of the matter giving rise to the contravention.
- (6) Where conduct by any person constitutes a contravention of two or more provisions of Section 50 to Section 67 (inclusive), proceedings may be instituted under this Part against that person in relation to the contravention of any one or more of the provisions, but a person shall not be liable to more than one pecuniary penalty under this section in respect of the same conduct.

Section 131

ACCESS TO INFORMATION

- (1) Subject to Subsection (2), the Commission shall make available for public inspection information submitted to it in the course of the performance of its functions except information that is designated “confidential” by the person who submits it.
- (2) A member of or person employed by the Commission, shall not knowingly or recklessly disclose or knowingly or recklessly allow to be disclosed information designated “confidential” to any person in any manner that is calculated or likely to make it available for the use of any person who may benefit from such information or use such information to the detriment of the person to whose business or affairs the information relates, and the provisions of this subsection shall apply whether or not the person who discloses such information has ceased to be a member or employee of the Commission.

- (3) Where information designated “confidential” is submitted to the Commission, the Commission may disclose or require its disclosure if it determines, after considering any representation from interested persons, that the disclosure is in the public interest.