

# Commerce Commission Investigations

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**BANKSIDE**  
CHAMBERS

# Commerce Act Penalties

## Maximum penalties

- ◆ Company \$10 million or 3 times gain (or 10% turnover if cannot assess gain)
- ◆ Individual \$500,000
- ◆ Also exposure for damages if any competitor, customer or supplier has suffered loss
- ◆ Cartel conduct also gives rise to potential criminal penalties (up to 7 years imprisonment)

*ACCC v BlueScope Steel* [2023] FCA 1029 (29 August 2023) at [175]

*“If Mr Ellis were to claim and obtain indemnity for the pecuniary penalty under the D &O policy, the pecuniary penalty would be entirely devoid of sting or burden.”*



# Is it potentially cartel conduct? (s30 and s82B)

Prohibits entry into, or giving effect to, “*Cartel Provisions*”

A cartel provision is a provision with the purpose, effect or likely effect of:

- ◆ Price fixing or
- ◆ Restricting output (includes restrictions on supply) or
- ◆ Market allocating

Only applies where cartel provision is

- ◆ in a contract, arrangement or understanding
- ◆ with a competitor or “*likely*” (potential) competitor

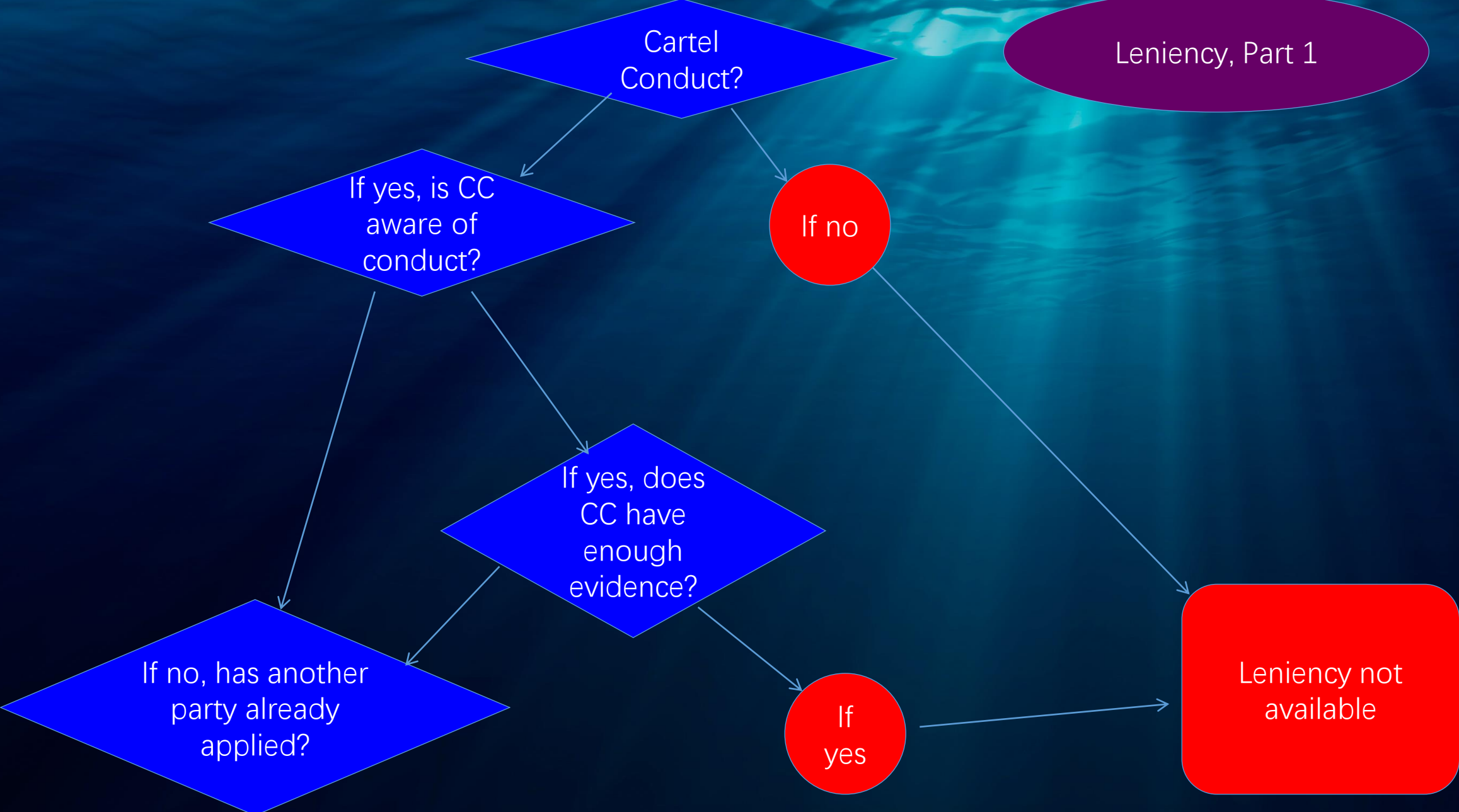
## Leniency Process

Potential full immunity to claims by Commission (and, if Solicitor-General also grants) to criminal prosecution

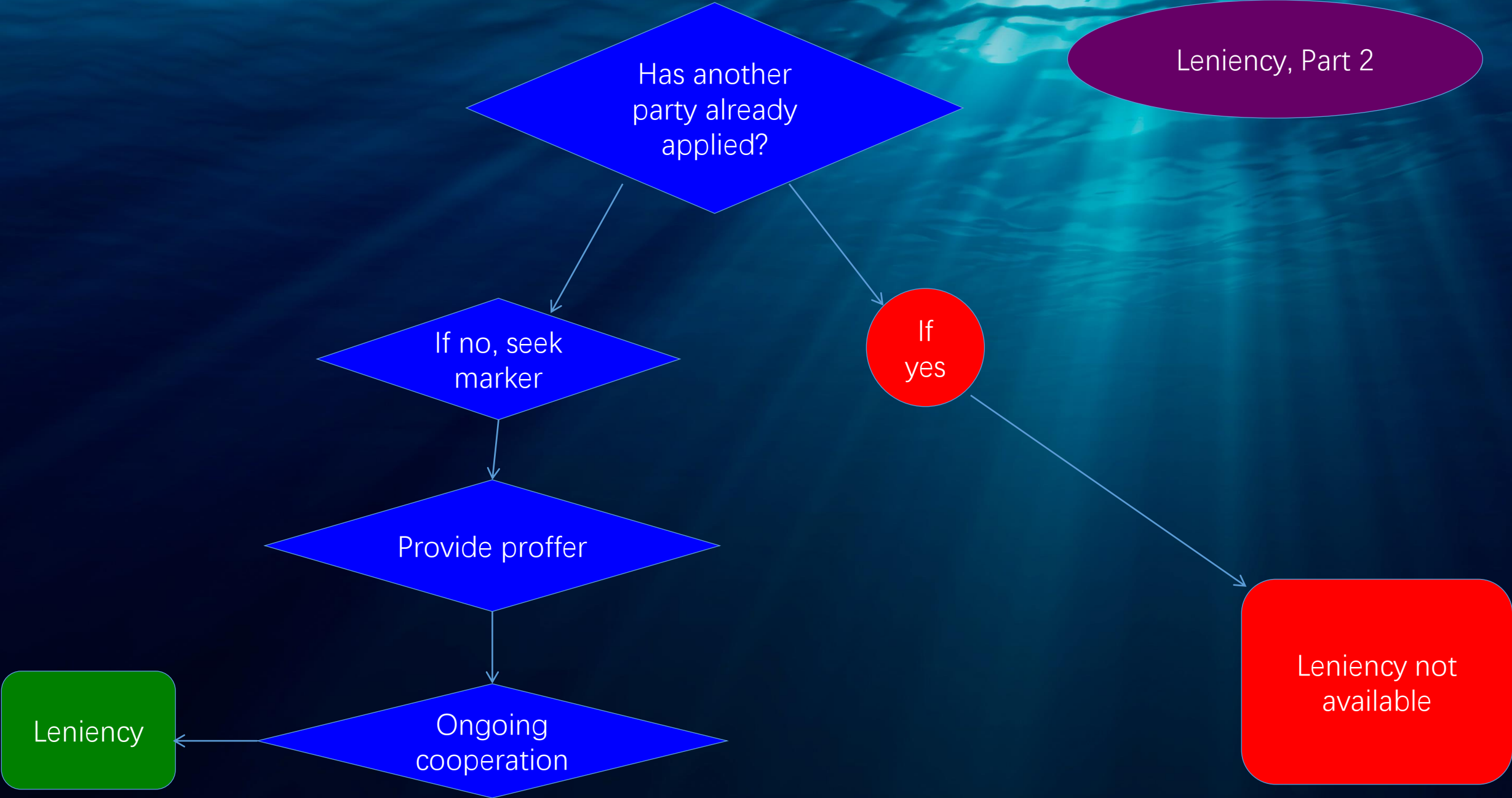
No immunity to claims by third parties (eg customers, competitors)

Consider “*paperless*” process

Leniency, Part 1



Leniency, Part 2





Choice of Process,  
Formal or Informal?

# Informal



- Ability to Intervene/ Refuse to Answer
- Show Cooperation
- Witness less nervous
- Avoid release information to foreign regulators

# Formal



- Avoid breach confidentiality
- Avoid breach privacy
- Ensure protection of s106(5)
- Commission member present at interview



## Confidentiality Considerations

Restriction on discussing investigation with other parties  
(particularly others under investigation)

Note confidentiality when supplying commercially sensitive  
information to Commission in responses to information  
requests or in interviews

# Supply of Information and Documents

Legal Counsel may need early interviews with key personnel to 1) plan search methods  
2) assess client exposure

Engage early with Commission on

- \*clarification of requests (where unclear)

- \*negotiation of scope (where burdensome)

- \*time limits (where unrealistic)

See *Perpetual Trust Ltd v Financial Markets Authority (No 3)* [2012] NZHC 2307 at [34]

Consider privilege and confidentiality

Offence to mislead Commission

## Search Warrants 1

Validity may be challenged where not “*necessary*” or nature of alleged contravention not specified- *Tranz Rail Ltd v District Court at Wellington* [2002] 3 NZLR 780

Contact legal counsel and request Commission defer starting search in meantime (but don't obstruct)

## Search Warrants 2

Checklist of steps to take includes:

- \*asking what purpose of search is

- \*staff to cooperate with Commission but not answer substantive questions

- \*monitor search (what officers are searching, what files are removed, protect privileged material)

- \*discuss with Commission procedures for protection of privileged materials on computers which warrant allows Commission to clone

- \*after search have staff prepare summary of events including details as to documents on which search focussed and any questions asked by Commission