

Department of Internal Affairs

Leniency and Cooperation Policy

Background

1. The purpose of the Secretary for the Department of Internal Affairs' ("the Department") Leniency and Cooperation Policy ("the Leniency Policy") is to assist in the prevention and detection of behaviour that contravenes the Parts 1, 2 and 4 of the Gambling Act 2003 and its secondary legislation ("the Act").
2. The Department administers the Act which regulates the provision of gambling in New Zealand. The Act categorises gambling into four different classes and makes further provision for casino gambling, sales promotion schemes and private gambling. Classes 2-4 gambling is typically conducted to raise net proceeds for applying or distributing to authorised community purposes. This can include activities such as the conduct of lotteries, prize competitions, housie and gaming machine operations.
3. The Leniency Policy applies to all gambling that is conducted in New Zealand. This includes all illegal activities ranging from underground casinos to breaches of the conflict of interest provisions of the Act with respect to gaming machine operations.
4. The Leniency Policy seeks to:
 - provide an incentive to persons who may qualify for conditional immunity to report their participation in illegal activities to the Department;
 - provide an incentive to persons who are under investigation and do not qualify for conditional immunity to cooperate with the Department's investigations and proceedings; and
 - provide transparency and certainty on what conditional immunity and cooperation applicants must do, and what they can expect in return.
5. The availability of conditional immunity and concessions for cooperation reflect the exercise of the Department's discretion as to how it will deal with persons who offer significant assistance in detecting and proving a breach of the Act. The Department considers that conditional immunity from proceedings is justified where the cooperation and full admission by a party enables the Department to detect, prove and address a breach of the Act.
6. Reduced penalties for persons who do not qualify for conditional immunity are considered appropriate to provide incentives for full cooperation with the Department. Cooperation allows the Department's investigation and proceedings to be undertaken more quickly and effectively with fewer resources.

7. The Leniency Policy does not apply to actions that may be taken by third parties whether they are the actions of the New Zealand Police, Serious Fraud Office or any other party. The policy reflects the exercise of the Department's discretion under the Act. It is not a full immunity from prosecution and third parties may still be able to bring an action against an applicant whether civil or criminal.

Leniency Policy

8. The Leniency Policy has two parts:
 - **Immunity:** Conditional immunity will be granted where an applicant is the first participant in an illegal activity to apply to the Department and meet prescribed conditions. Immunity is "conditional" in that the holder must continue to meet the prescribed conditions to maintain their immunity status.
 - **Cooperation:** The Department may exercise its discretion by taking a lower level of enforcement action or, in exceptional circumstances for individuals, no action at all, in exchange for information and full, continuing and complete cooperation throughout the investigation and any subsequent proceedings.
9. The Leniency Policy applies to any proceedings taken by the Department with respect to a breach of the Act and its secondary legislation (e.g. licence conditions, game rules etc). These proceedings may take the form of a prosecution and/or an administrative action (e.g. licence cancellation).

Conditional Immunity

10. Applications for conditional immunity from proceedings initiated by the Department may be made by individuals or by societies/companies. These are both referred to below as "persons" except where it is necessary to distinguish individuals from companies.
11. Conditional immunity will be available to an applicant who is the first person to apply to the Department and who meets the prescribed conditions outlined below. Applicants who do not have sufficient information to qualify immediately for conditional immunity may request a "marker" to confirm, and preserve for a limited time, their position as the first applicant for conditional immunity. Immunity is "conditional" in that the holder must continue to meet the prescribed conditions to maintain their immunity status.
12. In granting conditional immunity, the Department will not usually object to societies/companies and/or lawyers representing the persons included within the grant of conditional immunity. If the interests of a society/company with conditional immunity diverge from those of any of its directors, officers or employees, the Department recommends that the individuals concerned consider obtaining separate legal representation.

Markers

13. Applicants who consider that they do not have sufficient information to qualify for conditional immunity may request a “marker” to confirm, and preserve for a limited time, their position as the first applicant for conditional immunity. The value of a marker is that it allows the applicant to approach the Department as soon as they have decided to apply for conditional immunity, rather than having to first assemble all relevant information.
14. A prospective applicant must provide the Department with sufficient information on the nature of the breach of the Act. This must be to the best of the applicant’s knowledge and belief. The Applicant must then agree with the Department the information and evidence which must be supplied before an agreement for conditional immunity is reached (see *Attaining Conditional Immunity and Perfecting a Marker* below).

Immunity Conditions

First Person

15. Conditional immunity is only available to:
 - the first person who applies to the Department for a marker or conditional immunity in respect of a breach of the Act that the Department is not aware of; or
 - the first person to apply for a marker or conditional immunity for a breach of the Act the Department is aware of but does not yet have evidence that is likely to warrant issuing proceedings. (This may be after the Department has started investigating, including exercising its statutory information gathering powers.)
16. If conditional immunity has already been granted, or a marker issued, any subsequent applicants will be told that neither is available
17. The time and date of applications will be recorded, and this will identify who would be next eligible to obtain a marker or conditional immunity, if the initial holder fails to meet the prescribed conditions. The availability of conditional immunity for later applicants is subject to whether the Department has evidence likely to warrant issuing proceedings.
18. Applicants that are not first to seek conditional immunity should consider applying to be treated as a cooperating party.

Societies and Companies

19. An application for conditional immunity from a company requires that the admissions made, and the cooperation provided, must be a truly corporate act, as opposed to isolated admissions and cooperation by individual representatives.

20. Where an application for a marker or for conditional immunity is made by a society or company, it must be made by an officer who has authority to represent the company for this purpose, or by the organisation's authorised legal representative.
21. Individuals within a company or society may act independently and seek conditional immunity for their role with respect to a breach of the Act. On the grant of conditional immunity to an individual acting independently from a corporate society or company, immunity will not then be available to the corporate society or company as a whole.
22. If a company or society has qualified for conditional immunity, all its present or former directors, trustees, officers or employees who admit their involvement in a breach of the Act, and cooperate as required with the Department's investigation, will be covered by the conditional immunity granted to the company or society ("derivative immunity").
23. When an application is made by a society or company, the company must provide the Department with the names of all current and former directors, trustees, officers, and employees who it considers appropriate to include in the scope of the conditional immunity. Additional names should be added later if the society becomes aware of further relevant individuals.
24. A company or society applying for conditional immunity or a marker should not initially inform its current and past trustees, directors, officers and employees that they are eligible for conditional immunity, except as required by law, or with the prior written consent of the Department. If individuals are aware of their society or company's conditional immunity during the Department's investigation, they could alert other parties and thus jeopardise the investigation.
25. In some circumstances, the Department may specifically exclude a particular person or persons from the scope of the society or company based conditional immunity (see *Savings* below)

Full Co-operation

26. Conditional immunity is underpinned by the requirement to provide the Department with full and continuing cooperation. The Department will discuss with each applicant the specific voluntary actions they will be required to undertake to meet the requirement for full and continuing cooperation.
27. Any information provided to the Department is done so voluntarily and not as a result of the Department's statutory information gathering powers.
28. In general, the Department will require the person to:
 - provide the Department with access to all information available to that person regarding the activities or arrangement in question;

- maintain continuous, complete and expeditious cooperation with the Department throughout the Department's investigation and any ensuing proceedings initiated by the Department;
- provide promptly all further information requested by the Department;
- confirm that the person has now ceased its involvement in the activity or arrangement, or otherwise has acted or will act as directed by the Department; and
- fully and truthfully cooperate with the Department on a continuing basis;

and in the case of a corporate society or company, the Department will require the person to:

- use the person's best efforts to secure the complete and truthful cooperation of current and former trustees, directors, officers or employees;
- encourage and facilitate the person's current and former trustees, directors, officers or employees to voluntarily provide the Department with any information, and to appear for interviews and to give evidence in court or before the Gambling Commission as required by the Department;
- use the person's best efforts to ensure that each of its related entities (if any) provides all assistance reasonably requested by the Department; and
- in some cases, conduct an internal investigation to obtain more detailed information (e.g. where the breach was conducted by mid-level staff without the knowledge of management or the board);

or in the case of an individual, the Department will require the person to:

- make themselves available for interviews and respond fully and truthfully to all inquiries of the Department in relation to the activity or arrangement; and
- appear as a witness or produce evidence in any proceeding relating to the activity or arrangement, if required to do so by the Department.

29. A person who is granted conditional immunity will enter into an "immunity agreement" with the Department. An example of this agreement can be found on the Department's website: www.dia.govt.nz

Confidentiality

30. The Department and applicants for, and holders of, markers and conditional immunity have obligations in relation to confidentiality. The Department will endeavour to protect to the fullest extent confidential information provided by holders of a marker or conditional immunity and also endeavour to keep confidential the identity of successful and unsuccessful applicant's for leniency.

31. Applicants for, or holders of, conditional immunity (including employees of societies granted immunity) must not disclose to any third party, except as required by law, or with the prior written consent of the Department:

- the person's conditional immunity or marker application;

- any request by the person for clarification regarding the conditional immunity or marker application;
 - any grant of conditional immunity or marker by the Department;
 - any information provided by that person to the Department in connection with the conditional immunity or marker application; and
 - communications from, or information created by, the Department by reason of, or as a consequence of, the person's conditional immunity or marker application.
32. A grant of conditional immunity may become public when the Department issues proceedings against persons who have breached the Act, or when persons that have been granted conditional immunity give evidence in proceedings.

Use of Information Provided to the Department

33. Information provided to the Department to support an application for conditional immunity will be received on the basis that it will not be used as evidence in proceedings against the applicant or an individual who would qualify for derivative immunity in respect of a breach of the Act to which the information refers. Information provided by the holder of a marker to perfect the marker will be treated on the same basis. Such information may, however, be retained by the Department and used against other persons.
34. Where conditional immunity is revoked (see *Revocation* below) or a marker is not perfected because of the holder's failure to meet the prescribed conditions, the Department will be entitled, in accordance with the agreement under which either had been granted, to use the information provided. Where conditional immunity has been revoked, the Department is likely to continue its investigation.

Savings and Revocation

Coercion

35. Immunity will not be available to any person who has coerced other participants to take part in the breach of the Act. Coercion includes conduct such as threats of physical or serious economic harm, or intimidation, to compel or force persons to take part in the breach. While coercion is likely to be rare, the Department considers it inappropriate that any person who has played such a role should be eligible for immunity.

Inability to provide immunity from all sanctions

36. There may be circumstances where the Department is unable to provide conditional immunity from all sanctions that result from an investigation. For example, if a class 4 society were to gain conditional immunity from its role in a breach that involved a venue operator, the society may escape prosecution and action against its operator's licence, but a prosecution of a venue operator may result in a consequential loss of that class 4 venue licence.

37. The circumstances will differ with respect to each breach of the Act. The affect of varying levels of sanction can be explored at the point of application.

Suitability

38. In some circumstances, the Act requires the Department to be satisfied of the suitability of some persons involved in the conduct of gambling (e.g. key persons in the class 4 sector). While conditional immunity may protect persons from prosecutions or licence cancellations, there may be circumstances where an individual who is granted immunity (or derivative immunity) may lose their suitability status for continued involvement in the gambling sector.

39. This outcome is only likely in situations where the individual granted conditional immunity is the person who is primarily responsible for organising and/or undertaking the illegal activity.

Personal Enrichment

40. Some breaches of the Act may lead to an individual or company being enriched by the illegal activity. The extent of any enrichment and the ability to make reparations may be a factor in a marker or conditional immunity being granted. This can be discussed with the Department on a without prejudice basis during any initial enquiry.

Revocation

41. To maintain conditional immunity, applicants must continue to meet the requirements for conditional immunity as set out in the immunity agreement signed with the Department. For example, if evidence is discovered that indicates the applicant has materially misled the Department, that may result in the revocation of the immunity.

42. The possibility of revocation also applies to individuals with derivative conditional immunity resulting from the conditional immunity granted to a society or company with which they are associated.

43. If the Department concludes that a person who has been granted conditional immunity has failed to provide full and continuing cooperation the Department will inform the person of this view and specify a time period in which to remedy the shortcomings. If these matters are not remedied within the prescribed time, the Department may revoke the conditional immunity at its sole discretion.

44. If the Department revokes the conditional immunity, it may use information provided to the Department to initiate proceedings against that person.

Attaining Conditional Immunity and Perfecting a Marker

Immunity Procedure

45. The Department's procedure for conditional immunity applications is as follows:

- enquiry;
- proffer and perfecting the marker;
- conditional grant of immunity; and
- final letter.

Enquiry

46. A potential applicant for conditional immunity, or their legal representative, may contact the Department to ascertain if a marker or an application for conditional immunity is available with respect to a particular breach of the Act. This option is only available to genuine prospective applicants. The Department will ask for sufficient information to ensure that the without prejudice enquiry is genuine, such as a description of the breach and the parties involved.

47. The Department will deal with such enquiries on a 'without prejudice' or 'off the record' basis. Any information provided to the Department in this context will not be used by the Department for any purpose other than to provide the requested clarification. The Department will not take into account knowledge obtained from without prejudice enquiries when determining its 'awareness' of sector compliance. Without prejudice enquiries will not be considered to constitute an application for conditional immunity or a marker.

48. The Department will not confirm or deny whether an investigation is underway on any particular breach, unless it considers it is necessary to do this in relation to the possibility of eligibility of applications. If the enquirer is the second in line for a marker, they may still be afforded an opportunity if the initial applicant fails to attain conditional immunity or has it revoked.

49. Early application for conditional immunity by a prospective applicant is strongly recommended given that conditional immunity is only available to one person.

Proffer and Perfecting the Marker

50. Applicants who consider that they do not have sufficient information to qualify for conditional immunity may request a "marker" to confirm, and preserve for a limited time, their position as the first applicant for conditional immunity.

51. An applicant who has gained a marker must then provide the Department with a statement on an agreed list of issues, within an agreed time. This statement is called the "proffer". Supplying a proffer that complies with the prescribed conditions is called "perfecting the marker". The standard time allowed to

perfect the marker is 28 calendar days, but may be negotiated where appropriate.

52. The exact content of a proffer may vary with the circumstances, but its scope must include detailed information and supporting evidence on the breach of the Act for which immunity is sought. The type of information that will typically be required includes:
 - who was involved in the breach of the Act;
 - details of how the Act was breached;
 - specific evidence (including supporting documents where appropriate) proving the breach;
 - details of where further evidence may be gathered;
 - any other available information which would assist the Department in its investigation.
53. The scope of the proffer will be agreed with the Department when the marker is granted. If, after the scope of the proffer has been agreed, the marker holder finds it is unlikely to be able to produce the proffer within the agreed time, the marker holder must inform the Department as soon as possible. The marker holder must provide the Department with sufficient reason as to why the period for perfecting the marker should be extended. If the Department agrees that the reasons for an extension are valid, it will agree to a new date. The marker will expire at the end of the prescribed period unless the Department has agreed to an extension.
54. When the holder of a marker submits a proffer, the Department will assess it to ascertain if it meets the prescribed requirements. If the response is insufficient, the Department may give the marker holder the opportunity to explain or remedy the proffer's shortcomings within a specified time.
55. If a marker expires before it is perfected, other than in exceptional circumstances, the next qualifying applicant will be eligible for conditional immunity or a marker, subject to this policy (e.g. the Department not having sufficient evidence to warrant issuing proceedings).
56. If the Department concludes that a marker holder has met the prescribed requirements, conditional immunity will be granted and the immunity agreement entered into.

Conditional Grant of Immunity

57. Conditional immunity is normally granted following the marker process described above. However, an applicant who is able to provide full information immediately could choose to apply for conditional immunity on their first approach to the Department. In these circumstances, an applicant will be granted a marker initially and the information provided considered as a proffer. This will be converted to conditional immunity if the Department determines the applicant has provided sufficient information and the applicant is eligible for conditional immunity under this policy and an agreement is signed.

58. The Applicant granted conditional immunity will enter into an immunity agreement with the Department. Examples of this agreement can be found on the Department's website: www.dia.govt.nz

Final Letter

59. The Department will advise the person in writing when the Department's investigation and any Department initiated proceedings, are concluded.
60. If the Department decides to conclude an investigation without instituting legal proceedings, a conditional immunity holder will be informed of this. A conditional immunity holder would then have the option of withdrawing from this status or continuing to hold conditional immunity by agreeing to meet any obligations that might arise if the Department were to reopen the investigation.
61. Conditional immunity becomes unconditional when all proceedings have been resolved.

Contact

62. The Department has a dedicated representative for managing conditional immunity applications. Contact details can be found on the Department's website: www.dia.govt.nz

Cooperation

63. Department of Internal Affairs' investigations are often assisted by the input of individuals and organisations. The Department considers that such cooperation should be encouraged. The possibility the Department will agree to a lower level of enforcement action might make some participants more willing to cooperate with the Department in its investigations. It allows the Department to make more effective use of the resources available to it for the investigation of breaches of the Act.
64. A person who is too late to obtain conditional immunity may inform the Department of their willingness to cooperate fully with an investigation.

The Effect of Co-operation

65. The effect of the Department's agreement to proceed under this Cooperation Policy is that the Department will exercise its discretion to take a lower level of enforcement action, or no action at all, against an individual or organisation in exchange for information and full continuing and complete cooperation.
66. A lower level of enforcement action may include a settlement, or a submission made by the Department to the court for a reduction in penalty on behalf of an individual or organisation.
67. An agreement by the Department to proceed under this Cooperation Policy does not prevent third party action.

Cooperation Policy Conditions

68. If an individual or organisation has been involved in behaviour that may contravene the Act and comes forward to the Department, the Department may, after consideration of relevant circumstances, agree to a lower level of enforcement action.
69. To qualify for the exercise of a lower level of enforcement action, the information provided must add significant value to the investigation. The cooperation provided must be full, continuing and complete. Mere compliance where the Department exercises its statutory powers does not constitute cooperation.
70. Information provided early in an investigation will be of more value than the same information provided at a much later stage. Also, the number of parties who seek to cooperate with the Department will also affect the value of the information they can provide. Typically, cooperation provided by the first participant to contact the Department may be of more value than that offered later by any other participants.
71. If a person has agreed to cooperate with the Department's investigation, but fails to provide the agreed cooperation without reasons that the Department considers adequate, the Department may withdraw its indication that it would seek a lesser penalty.
72. The decision to proceed with a lower level of enforcement is at the Department's sole discretion.
73. The Department is more likely to consider requests for a lower level of enforcement action where individuals or organisations:
 - fully inform the Department about the behaviour that may have contravened the Act;
 - fully cooperates with the Department during any subsequent investigation (or investigations) and this includes the full, frank and truthful disclosure of their own behaviour and provision of all relevant information to the Department including written documents and in some circumstances, this may include giving evidence in court;
 - are prepared to pay compensation to injured parties where the Department considers that this is appropriate;
 - upon discovering that their behaviour may contravene the Act stop that behaviour immediately; and
 - are willing to put in place an effective compliance programme or other suitable remedial measures.
74. The Department is unlikely to agree to a lower level of enforcement action where an individual or organisation forced or encouraged others to take part in an activity which contravened the Act.
75. Where possible the Department will keep the identity of the individual or organisation confidential.