

This policy deals with the Australian Competition and Consumer Commission's position in relation to immunity or leniency in circumstances flowing from cooperation in enforcement matters. The policy is expressed in terms of flexible guidelines because it continues to evolve in the light of Commission experience and marketplace changes.



July 2002



ACCC COOPERATION POLICY FOR ENFORCEMENT MATTERS

Introduction

Commitment to active enforcement of the law is fundamental to achieving the Commission's objectives of promoting competition and fair trading.

It is not possible for the Commission to pursue all potential or alleged breaches of the Trade Practices Act or other legislation under which it has responsibilities. The effective use of resources in the public's best interests require that the Commission has clear priorities in its selection of matters for enforcement and that it chooses the most appropriate enforcement vehicle.

This policy deals with one aspect of the Commission's approach to enforcement—its policy on the adoption of leniency in circumstances flowing from cooperation. Because the policy continues to evolve in the light of Commission experience and changing markets it is presented in terms of flexible guidelines.

There are separate, but in many respects similar, policies for individuals and corporations. It is emphasised that they are flexible and intended only as an indication of the factors the Commission will consider relevant when considering leniency.

It is not necessary that all the criteria be met in order for leniency to be granted. The Commission assesses each case on its merits.

The Commission's purpose in publishing this policy is twofold:

- to promote awareness of it, and
- to encourage participants possibly in breach to come forward to assist Commission investigations.

Recognition of such cooperation and assistance takes a variety of forms, for example, complete or partial immunity from action by the Commission, submissions to the court for a reduction in penalty or even administrative settlement in lieu of litigation.

The policy on litigation necessarily relates only to civil matters. The Commission does not have power to grant immunity for actions for criminal conduct under Part V of the Trade Practices Act. In such cases the discretion lies with the Commonwealth Director of Public Prosecutions.

Individual conduct

The policy applies to directors, managers, officers or employees of a corporation who come to the Commission **as individuals** and not on behalf of a corporate entity with evidence of conduct contravening the Trade Practices Act (or other legislation administered by the Commission).

Leniency, including immunity, is most likely to be considered appropriate for individuals who:

- come forward with valuable and important evidence of a contravention of which the Commission is either otherwise unaware or has insufficient evidence to initiate proceedings
- provide the Commission with full and frank disclosure of the activity and relevant documentary and other evidence available to them

- undertake to cooperate throughout the Commission's investigation and comply with that undertaking
- agree not to use the same legal representation as the firm by which they are employed
- have not compelled or induced any other person/corporation to take part in the conduct and were not a ringleader or originator of the activity.

Immunity would not be granted where the person seeking leniency has compelled or induced any other person/corporation to take part in the conduct or was a ringleader or originator of the activity.

Corporate conduct

The policy toward corporations necessarily differs in some respects, but is similar in spirit.

Leniency is most likely to be considered for a corporation which:

- comes forward with valuable and important evidence of a contravention of which the Commission is otherwise unaware or has insufficient evidence to initiate proceedings
- upon its discovery of the breach, takes prompt and effective action to terminate its part in the activity
- provides the Commission with full and frank disclosure of the activity and all relevant documentary and other evidence available to it, and cooperates fully with the Commission's investigation and any ensuing litigation

- has not compelled or induced any other corporation to take part in the anti-competitive agreement and was not a ringleader or originator of the activity
- is prepared to make restitution where appropriate
- is prepared to take immediate steps to rectify the situation and ensure that it does not happen again, undertakes to do so and complies with the undertaking
- does not have a prior record of Trade Practices Act, or related, offences.

Immunity would not be granted where the corporation seeking leniency has compelled or induced any other person/corporation to take part in the conduct or was a ringleader or originator of the activity.

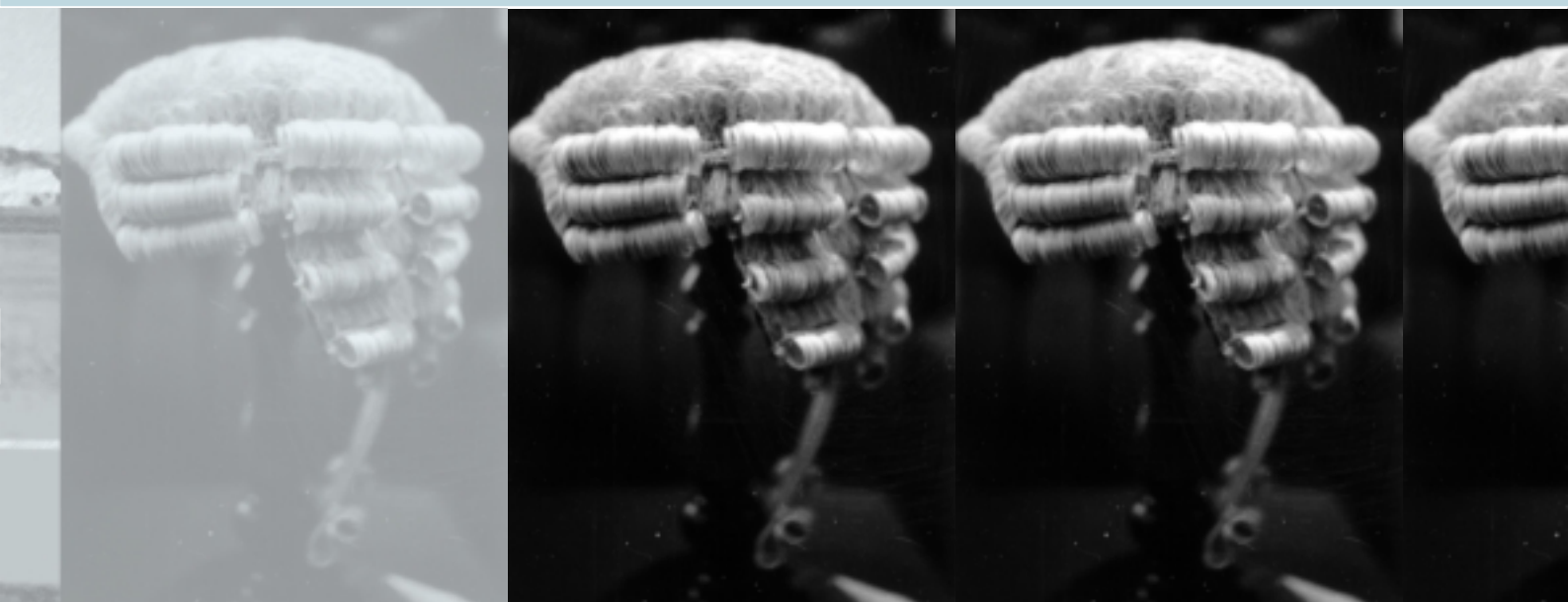
Submissions to the court

It is the responsibility of the court to determine penalties for contraventions of legislation administered by the Commission.

However, the Commission is free to reach an agreement with parties about joint submissions to be placed before the court for adjudication. It exercises this right if it is satisfied that a corporation or individual, which has not been granted an immunity, has cooperated with it in a substantive way.

In determining whether to reach an agreement on penalties, and what the agreement should be, the Commission takes into consideration factors including:

- whether the company or individual has cooperated with the Commission
- whether the contravention arose out of the conduct of senior management, or at a lower level
- whether the company has a corporate culture conducive to compliance with the law
- the nature and extent of the contravening conduct
- whether the conduct has ceased
- the amount of loss or damage caused
- the circumstances in which the conduct took place
- the size and power of the company
- whether the contravention was deliberate and the period over which it extended.



Procedure

Individuals or corporations wishing to take advantage of the Commission's cooperation policy for leniency should approach the Commission through an appropriate contact officer listed below, making reference to the policy. The Commission determines each request case by case.

The Commission is open to the discussion of hypothetical scenarios about involvement in conduct that contravenes legislation for which it is responsible.

Applicants or their legal representatives may freely approach the Commission in an attempt to gain some indication of the likelihood of immunity or leniency. The Commission will not be able to give definitive answers in such cases, but will provide guidance as to the probable course of action it would take.

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