



DISCUSSION PAPER

**REVIEW OF THE ACCC'S
LENIENCY POLICY FOR
CARTEL CONDUCT**

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1 Introduction

On launching the *Leniency policy for cartel conduct* (leniency policy) in June 2003 the ACCC stated that it would conduct a future review of the value of the leniency policy at the appropriate time¹. Although the leniency policy is in its early stages of implementation and new issues continue to emerge with every application, it is now appropriate to begin the formal review foreshadowed at the time the policy was released.

The ACCC is seeking comments on the issues discussed in this paper, but also any general comments on the leniency policy and how it is administered. Comments provided to the ACCC during the review will be considered before the ACCC releases a revised leniency policy early in 2005.

2 Background

2.1 History of ACCC offering leniency

In 1998 the ACCC published a guideline dealing with cooperation and leniency in enforcement. In 2002 the ACCC published its *Cooperation policy for enforcement matters* (cooperation policy). The cooperation policy is expressed in general terms and applies to all potential contraventions of the *Trade Practices Act 1974* (the Act). The cooperation policy essentially acknowledged what had been happening in practice, where leniency was given to those parties that disclosed illegal conduct or assisted the ACCC in its investigation and any subsequent litigation. The nature and extent of leniency under the cooperation policy was assessed on a case-by-case basis having regard to the factors it set out.

2.2 The current leniency policy

The leniency policy goes further in relation to cartel conduct to provide greater certainty and incentive for disclosure. Since the release of the leniency policy, there has been a distinction between the leniency policy, which only applies to cartel conduct, and the cooperation policy, which applies to all conduct.

The ACCC's leniency policy came into force on 30 June 2003. The policy is intended to assist the ACCC to detect, stop and deter cartel conduct. Broadly, it provides that:

- where the ACCC is unaware of a cartel, the first cooperative company or individual to come forward will receive an offer of conditional 'immunity' from ACCC-instituted court proceedings (Part A)
- where the ACCC is aware of a cartel but has insufficient evidence to institute court proceedings, the first cooperative company or individual to come forward will receive an offer of conditional 'immunity' from pecuniary penalty (Part B).

2.3 The principles behind the leniency policy

Before outlining some of the significant issues that have arisen out of the operation of the ACCC leniency policy, it may be helpful to restate some of the principles that underpin the policy. It is these same principles which will be considered when proposed changes to the policy are discussed below.

¹ ACCC media release, 'ACCC launches leniency policy to expose hard core cartels in Australia', 27 June 2003.

The ACCC's leniency policy is based primarily on the United States Department of Justice's (DOJ's) corporate leniency policy. The DOJ identifies six key components² of an effective leniency policy, and they are:

- transparency and predictability of the operation of the policy
- maximum possible reward for those who qualify
- the benefits of the policy should be limited to the first to qualify
- the policy should provide full protection for cooperating corporate executives
- the cooperation requirements of the policy should be clear and not related to the value of the evidence
- the policy should provide for prompt notification to the applicant of the outcome of their application.

Many of the elements listed above are also common to leniency policies from other jurisdictions, including the United Kingdom,³ Canada,⁴ the European Union (EC)⁵ and Korea.⁶ There are also some differences between the jurisdictions.

- In the EC, leniency is not automatic and is more akin to plea bargaining, with penalties negotiated at the end of the investigative process. Emphasis is placed on the decisiveness of the evidence provided by the applicant and the level of co-operation provided by the applicant.
- In Canada, which like the US, treats cartels as criminal offences, the first applicant who meets the leniency policy criteria will receive complete immunity. The Canadian Competition Bureau (CCB) makes a recommendation for leniency to the Attorney General in appropriate cases where all requirements, such as cooperation, have been satisfied.
- The UK has a policy similar in terms to the US. Immunity is automatic if the pre-conditions are met. Immunity may also be offered to the first participant who comes forward after an investigation is underway. The UK has recently criminalised cartel behaviour.
- Since early 2002 the Korean FTC (KFTC) has had a revised leniency policy almost identical in terms to those in the current ACCC policy.⁷ Korean law also criminalises cartel behaviour. One interesting point to note is that the KFTC has a sliding scale rewards system that sees informants paid for 'tip offs' that lead to successful cartel prosecution.

Despite differing in detail, the common thread that flows through all of these leniency or amnesty policies is that subject to certain requirements, companies or individuals who disclose to the regulator their role in a cartel and cooperate with subsequent investigations, are rewarded by a reduction of or complete amnesty from penalty or prosecution. This incentive is afforded to the first (and in some cases subsequent) applicants because the regulators in these jurisdictions acknowledge that leniency policies are an invaluable and cost effective way of obtaining evidence, as well as creating greater uncertainty for those persons involved in a cartel.

Many of these leniency policies have had revisions to ensure that they create the right incentives to potential applicants and are administered in a transparent and predictable manner. After almost eighteen months of operation, the ACCC leniency policy is now being reviewed to ensure that the principles on which it is founded are being reflected in its operation, and whether the leniency policy can be further refined to ensure that in its future operation it will provide greater certainty and transparency for prospective applicants and provide a real incentive for prospective applicants to cooperate.

2 James Griffin (2002) 'Key Elements of an Effective Antitrust leniency policy and Criminal Penalties and Deterrence—The American Experience'. These elements should also be considered in light of the criminal sanctions for cartel conduct in the USA.

3 Office of Fair Trading (2001) 'Guidance on the Appropriate Amount of a Penalty' from <http://www.offt.gov.uk/comp-act/leniency.index.html>.

4 Competition Bureau Information Bulletin (2000) 'Immunity Program under the Competition Act' from <http://competition.ic.gc.ca>.

5 Commission Notice on the 'Non-imposition or Reduction of Fines in Cartel Cases' (1996) from http://europa.eu.int/competition/antitrust/legislation/96c207_en.html.

6 Global Competition Review (2004) *The Asia Pacific Antitrust Review* pp. 59–61.

7 *ibid.*

3 The review—some key issues

Since 30 June 2003 the ACCC has received 10 applications for leniency. The implementation and operation of the leniency policy to date has raised several key issues about its future operation and effect. The more significant issues are outlined below for discussion. Many of these issues are interrelated and some proposals are dependant on others to ensure the policy works efficiently.

3.1 Should the leniency policy provide specifically for ‘markers’

Currently, the leniency policy provides (at section 3.16) that applications must include the full name and contact details of the applicant, and an outline of the conduct or course of conduct for which leniency is sought (including details of the industry, product and market in relation to which the alleged conduct took place, the names of the parties involved and when the alleged conduct occurred). However, in some cases, a potential leniency applicant may wish to notify the ACCC of its involvement in a cartel before it is in a position to provide the ACCC with full details of the conduct. This may occur in the context of both domestic and international cartels where the potential applicant does not know the full extent of the conduct, or, in relation to international cartels, whether, or the extent to which, the conduct affected commerce in Australia.

Allowing an applicant to take this approach is consistent with the US and Canadian marker system. The question is whether the ACCC leniency policy should formally incorporate such a marker system.

In the US, it is possible to ‘put down a marker’ by contacting the relevant agency and establishing whether amnesty would be available, thereby saving a company’s place in line before making a formal leniency application. This procedure allows a company to inquire whether there is anyone who is ahead of it, and, if not, to secure the company’s place at the head of the line for some period of time before making a formal leniency application. In the United States, this ‘marker’ may be put down simply by contacting the DOJ to establish that amnesty is available and notifying the agency of an impending application.⁸

Providing specifically for the use of markers may also overcome the perception (that might be held by some lawyers) that an application requires the provision of detailed written information which may be a disincentive for some applicants. This feature would also provide a formal way of identifying potential applicants by chronology and assist in determining, in circumstances where the first applicant withdraws the application or has it rejected, who the next applicant in line for Part B leniency would be.

The leniency policy would need to be amended to provide that potential leniency applicants may place a marker identifying the applicant and giving a broad description of the type of cartel conduct and relevant industry in which the conduct has occurred. The applicant would then have time (for example 28 days) in which to provide full details of the conduct as currently required by the leniency policy.

A number of international applicants have submitted applications under the ACCC leniency policy based on reports prepared by their legal advisors, which were produced predominantly for the purpose of making an application in another jurisdiction. It may be unrealistic to expect applicants to complete an investigation into allegations of cartel conduct before applying for leniency, particularly when it involves a number of jurisdictions. It may be more helpful to require an applicant to provide the ACCC with a summary of the alleged conduct and a full application for leniency within a certain period, for example 28 days.

Another benefit of markers is that because only very basic details are required to put down such a marker, this may encourage ‘the race to the door’.

Comment 1

The ACCC seeks comments on whether ‘markers’ should be recognised and the leniency policy amended to formally provide for such a regime.

Limiting the period in which a marker is valid to 28 days will ensure both that applicants provide details of the conduct in a timely manner, and that the markers regime is implemented in a transparent and consistent manner.

8 B Baird, D Hull and S Rosenbaum, Corporate Leniency Applications, <http://www.globalcompetitionreview.com/ara/international.cfm>

As an alternative to adopting a formal marker regime that specified a period for which a marker remains valid, the leniency policy could be amended to allow the ACCC to exercise its discretion, where appropriate, to accept applications that do not contain all of the details currently required by the leniency policy. This would require only a minor amendment to the leniency policy, but would not have the benefits of a prescribed time limit for the provision of full details as discussed above.

Regardless of which approach, if any, is adopted, the ACCC would not accept any application or marker that did not identify both the applicant and the relevant industry.

Comment 2

The ACCC seeks comments on whether it should amend the leniency policy to provide a 'markers' regime that gives a potential leniency applicant only a certain time period to provide complete details, or to allow the ACCC, at its discretion, to accept applications that do not contain full details of the relevant conduct.

3.2 Are there any circumstances where Part B should be granted to a corporation after a natural person has applied for leniency for the same conduct?

A significant function of a leniency policy is to provide another means for a regulator to gather evidence that it may not otherwise be able to obtain. There will be circumstances where a natural person qualifies for conditional leniency but has limited knowledge of the cartel and no access to relevant documents.

To assist in gathering such evidence, the ACCC may wish to allow a corporation to apply for Part B leniency after a natural person has also applied under Part A or B. This is currently not permitted under the ACCC's leniency policy and the adoption of such a scheme would require an amendment to Part B of section 2.1 of the leniency policy. The effect of such an amendment would be that a corporate applicant may be eligible for conditional leniency even after a natural person has been granted conditional Part A or B leniency.

There does not appear to be a similar justification to refine the policy so that a natural person would be eligible for Part B leniency after a corporate applicant has been granted conditional leniency.

Comment 3

The ACCC seeks comments on whether sections 2.1 and 3.5 of the leniency policy should be amended to specifically allow for a corporation to be eligible for leniency even after the ACCC has received an application for leniency from a natural person from the same or different company but not to allow a subsequent application from another applicant where the first applicant is a corporation.

The ACCC would propose that the corporation only be entitled to Part B leniency.

3.3 If an application for leniency is rejected, revoked or withdrawn, should the ACCC accept another leniency application under Part A or Part B for the same conduct?

If an application for leniency is rejected, revoked or withdrawn, the ACCC should be able to accept another leniency application. The ACCC's current position is that from the time an application for leniency is received, no other person can satisfy the 'first person to make an application for leniency' requirement in the leniency policy. This means at present that, if the first application is rejected, revoked or withdrawn, then subsequent applications cannot be received.

It may be desirable to amend the leniency policy to clarify this position, that the immediate subsequent person to make an application for leniency, where an earlier application for leniency has been rejected or revoked by the ACCC or withdrawn by the applicant, is entitled to leniency. There is a question whether they should be entitled to leniency under Part A or Part B. This issue also relates to discussions below at 3.4 regarding whether the ACCC is 'unaware of a cartel'.

The implementation of a marker system, as discussed above, may make such a change more important.

Comment 4

Comment is sought on:

- (a) whether the leniency policy should be amended to permit that, if an application is rejected, revoked or withdrawn, a subsequent applicant is to be regarded as the first applicant for the purposes of the leniency policy and therefore eligible for leniency, under Part A or Part B of the leniency policy, and if so
- (b) whether there should be a point to which the status of the parties as leniency applicants should be fixed (for example, after proceedings are instituted against the parties).

3.4 What does it mean that the ACCC is 'unaware of a cartel'?

The requirement for Part A leniency applications that the ACCC not know of the existence of a cartel may not be sufficiently flexible. The ACCC may not wish to deny an applicant immunity from prosecution and penalty in circumstances where the ACCC has only very general information pointing to the existence of a cartel. The current position of the ACCC is:

The ACCC will consider itself aware of an alleged cartel where it has in its possession, at the time of the initial application, information from any source suggesting that the cartel has operated in Australia or affected a market in Australia.⁹

There are a number of levels at which the threshold could be set, including whether the ACCC has:

- received any general information about the alleged illegal activity from any source (including the media)
- any suspicion of the cartel
- any particular information that the cartel may exist, including an application for leniency
- any particularised complaint to the ACCC regarding a potential cartel
- an active investigation into the alleged cartel or a cartel participant for the alleged conduct or
- received enough information for the Chairman, Deputy Chair, or Commission to form a reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes or may constitute a contravention of the Act.¹⁰

Whatever the threshold, the aim is to ensure that incentives for applicants to be the first to seek leniency under the policy are maximised.

Comment 5

The ACCC seeks comments on what the threshold for 'awareness' of a cartel should be.

As a related issue, there may be circumstances where the ACCC becomes aware of a cartel other than through information provided by a leniency applicant and believes information from a leniency applicant may further assist its investigation. In these circumstances:

- should the ACCC have a policy about how it approaches alleged participants so as not to give one party an advantage in the 'race to the door'?
- should the ACCC be able to decide who it approaches first and thereby warns of its knowledge and prompts the party to make an application for Part B leniency (perhaps as a matter of strategy, the party likely best placed to assist the ACCC in bringing enforcement action)?

Should the ACCC afford the same opportunity of applying to the ACCC for leniency to all cartel participants? This approach is problematic in a number of ways, not the least being the fact that even if the ACCC uses its best endeavours, it may not have sufficient information to identify all of the cartel participants, as cartels by their very nature are secretive.

⁹ ACCC Leniency policy for cartel conduct (2003) at section 3.6.

¹⁰ *ibid.*

A question arises about the ACCC's duty to ensure that there is transparency and fairness in the administration and implementation of the leniency policy. In circumstances where the ACCC may wish to act proactively, this issue is highlighted.

As for providing an element of certainty to business, if the ACCC becomes aware through means other than from an applicant under the leniency policy, in such circumstances the ACCC may wish to maximise uncertainty for those involved in a cartel, to promote the fact that not only could your fellow cartel members approach the ACCC, but the ACCC could also approach them.

If the ACCC can exercise its discretion to approach any member of the cartel on an individual basis, this may heighten the threat to cartel members that another member may potentially or already be cooperating with the ACCC.

Comment 6

The ACCC seeks comments on how the ACCC should:

- (a) exercise its discretion to approach alleged cartel participants with an invitation to submit a leniency application for consideration under Part B, and
- (b) administer this element of the leniency policy to ensure transparency and accountability.

3.5 How does the leniency policy interact with the ACCC's cooperation policy?

The leniency policy and cooperation policy may be viewed as ways of creating incentives for cartel participants to disclose their participation in an illegal act to the ACCC. In evaluating the incentives that any leniency policy may create and how a corporation may look at a cost/benefit analysis, it is important to consider how those incentives can destabilise even the most secret and longstanding cartel.

There will, of course, be cartels that the leniency policy will not crack. This may be for a number of reasons. By leaving a cartel and seeking leniency, a cartel member may be forgoing the extra profits they would receive under the cartel arrangement and by assisting the ACCC in prosecuting their former cartel members, the company will be branded as one of those who were involved in breaking the law. In contemplating the operation and interaction between the leniency policy and the cooperation policy, consideration must be given to the incentives to entice cartel members to report the cartel to the ACCC.

The leniency policy provides two levels of protection (Part A—immunity from prosecution, and Part B—immunity from penalty) based on whether or not the ACCC was aware of the cartel at the time the application was received. The cooperation policy provides more discretion but would allow the ACCC to give immunity from prosecution and penalty to persons who did not qualify for Part A or Part B immunity under the leniency policy.

The ACCC's use of the cooperation policy will directly impact upon the perceived benefit to applicants of the leniency policy—using the cooperation policy to achieve the same outcome as the leniency policy, in circumstances where preconditions applying to leniency are not met, may reduce the leniency policy's efficacy in destabilising cartels and creating a 'race to the door'. The destabilising effect of the leniency policy's 'winner takes all' approach may be undermined if the cooperation policy creates an equal first or equal second, or a third or fourth place.

Conversely, restricting the use of the cooperation policy would reduce the avenues by which cartel members can seek 'softer' treatment from the ACCC and may therefore increase incentives for cartel members to be the first to come in under the leniency policy or face significant penalties.

There are several options that should be considered. The ACCC could maintain the status quo (with or without indicating that primacy would be given to application of the leniency policy in relation to cartel conduct). Alternatively, the ACCC could decide that in relation to cartels, the leniency policy will apply to the exclusion of the cooperation policy. A third option would be to abolish Part B and rely upon the cooperation policy if the ACCC is aware of the cartel at the time an application is made.

Comment 7

The ACCC seeks comments on whether:

- (a) the status quo should be maintained (alternatives may be to revoke Part B or to provide that the cooperation policy does not apply in relation to cartel conduct), and
- (b) the ACCC's cooperation and leniency policies should be amended, clarifying that in normal circumstances, any treatment under the cooperation policy would be less advantageous than that under the leniency policy.

3.6 Leniency applications, information, documents and confidentiality

3.6.1 Should the ACCC accept a leniency application where the applicant seeks to provide information on a 'without prejudice' basis or otherwise seeks to restrict how information and documents can be used by the ACCC?

A number of leniency applications received by the ACCC have been made on the basis that the information is provided on a without prejudice or confidential basis.

Accepting information on a without prejudice basis prevents the ACCC using the information against the applicant. This may be of particular importance in the event that the application is withdrawn or rejected or if the grant of conditional leniency is subsequently revoked. Indeed, it may reduce an applicant's incentive for full and continuous cooperation.

On the other hand, allowing applicants to provide information on a without prejudice basis will ensure that applicants will not feel that they may be disadvantaged as a result of making a leniency application.

Applicants have also requested that the ACCC keep confidential the application, information and documents in support of the application and the fact that an application has been made. The ACCC recognises that it is necessary to protect the interests of the applicant but must balance the applicant's interests against the needs of the ACCC's investigation into the alleged conduct.

However, it should be noted that neither a without prejudice claim nor a confidentiality claim will be a guarantee that the ACCC can protect the information from being disclosed to third parties.

One consideration may be whether the ACCC should accept without prejudice or confidential information when provided in support of a leniency application and whether there is any justifiable difference between domestic and international applications. To ensure transparency and consistency, the best approach would be to administer the policy in the same manner, regardless of the origin of the application—the ACCC sees no proper basis for distinction between domestic and international applicants.

The ACCC considers that it is desirable for any agreement regarding the basis upon which material is provided by an applicant, or how it can be used by the ACCC, to be written.

3.6.2 Should the ACCC enter into strict protocols which restrict its dealings with information given in support of a leniency application?

Leniency applicants have, on occasion, sought for the ACCC to enter into agreements restricting the use the ACCC may make of material provided to it in support of the leniency application. The ACCC's view is that it will endeavour to reach an arrangement to protect a leniency applicant's legitimate concerns, as long as it does not inhibit the ACCC's investigation into conduct of the participants in the alleged cartel in appropriate cases.

The ACCC has legal obligations which mandate the retention of documents, limiting the undertakings the ACCC can give applicants in relation to destroying or transferring internal documents. Obligations arise under the Archives Act¹¹ and also include a requirement to produce documents when legally compelled to do so, such as pursuant to discovery or subpoena processes.

11 1983 (Cwlth).

Some applicants have sought to provide the ACCC with information supporting their application for leniency on the basis that the ACCC will not commence any investigation of its own without prior consent by the leniency applicant. Other applicants have requested that if their application is revoked, rejected or withdrawn, all information provided by an applicant and any notes made by ACCC staff and lawyers be given to the applicant—a request which may be contrary to the ACCC’s obligations, as outlined above.

The ACCC does not think it is prudent to accept applications under confidentiality regimes which prevent the ACCC from conducting an investigation into the conduct of the members of the alleged cartel. Further, the ACCC does not accept that any confidentiality regime should prevent the ACCC from issuing a media release at the conclusion of any proceedings or after any undertaking has been obtained. The issues surrounding the reporting of outcomes attributed to the policy is discussed below at 3.13.

3.6.3 Should the ACCC accept applications for leniency under a ‘paperless’ or ‘oral-only’ process?

The ACCC has received a number of applications for leniency where applicants have requested that the ACCC leniency application process not generate any new documents or require the provision of any documents which may be discoverable, particularly by private litigants in US-based proceedings. The fear of leniency applicants has been that they may be subject to a class action which may expose them to significant damages, including treble damages.

The ‘oral-only’ or ‘paperless’ leniency application is seen by some applicants as a way of preventing the ACCC being in possession of material which may be vulnerable to a possible discovery order or subpoena directed to the ACCC; the protection of information provided by applicants to the ACCC is seen by applicants as more difficult than the protection of ACCC generated documents.

There are few legislative based protections that would override normal legal processes that may compel the ACCC to release such information at present. Depending on the circumstances, the ACCC may claim public interest immunity or legal professional privilege over its material.

The ACCC is aware that other jurisdictions have legislative and common law protections, such as the work product rule¹² in the US and in New Zealand, the Commerce Act. The provision protecting information under the Commerce Act¹³ is quite wide and states that:

No court or other person shall be entitled to require any member of the Commission, or any officer of the Commission or any other person present at any meeting of the Commission, to divulge or communicate any information furnished or obtained, documents produced, obtained or tendered, or evidence given, in connection with the operations of the Commission.¹⁴

The ACCC seeks comments on whether a similar provision, although limited in scope to information provided to the ACCC in support of a leniency application, should be contained in the Act, and whether such a provision would enhance the operation of the leniency policy by providing additional protection for confidential information.

3.6.4 Contacting the ACCC and making an application for leniency

The ACCC is considering whether to amend its policy to enable applications for leniency to be made either in writing or orally. The policy currently requires that applications be made by facsimile. This requirement may be a disincentive for potential applicants who believe that such documents will be susceptible to discovery, either from the applicant or the ACCC. If the ACCC did accept an oral application, it would be necessary for the ACCC to make its own record of the details of the application, including the name of the applicant and the time of the application.

¹² Where information or material prepared by a legal advisor is usually exempt from discovery. See *2,022 Ranch, LLC v. Superior Court (Chicago Title Ins. Co.)* (2003), 113 Cal. App. 4th 1377 and *People v. Collie* (1981), 30 Cal.3d 43. The privilege rests with the legal advisor, a position which can be contrasted against the concept of client legal privilege. See Division 1 of Part 3.9 of the *Evidence Act 1995* (Cth).

¹³ Commerce Act 1986 (NZ).

¹⁴ Commerce Act 1986 (NZ) s. 106(7).

Comment 8

The ACCC seeks comments on whether or not:

- (a) the ACCC should accept 'without prejudice' or confidential information or other restrictions on the use it can make of material provided to it under a leniency application
- (b) the leniency policy should incorporate the provision of an 'oral-only' or 'paperless' process for leniency applicants.

If such a process was introduced into the leniency policy, the ACCC seeks comment on:

- (c) whether or not there should be any difference in the treatment of domestic and international leniency applicants
- (d) how may an 'oral-only' or 'paperless process' be best implemented
- (e) whether or not it would be desirable for the Trade Practices Act to provide some limits on the ACCC's obligation to communicate information provided in support of a leniency application.

3.7 Should the scope of leniency apply only to cartel behaviour known at the time of application?

The ACCC has received applications for leniency which are worded in such a way that the application covers any possible cartel conduct by the company and its employees anywhere in Australia.

The ACCC understands that when applications are made, the extent of cartel conduct may not be readily ascertainable without further investigation by the company and its legal team. This is particularly the case where a rogue employee is alleged to have been the sole corporate officer participating in the cartel and the employee has subsequently left the organisation.

The ACCC position has been that it is desirable to confine an application for leniency to conduct known at the time of the application. This delineation leaves it open for the company, or any other alleged participant, to apply for leniency in relation to any other conduct, related or not.

The ACCC considers that it would not be appropriate to grant conditional leniency for conduct, the extent of which is not able to be reasonably defined.

This issue may be of less significance if the proposed marker system outlined above is implemented, enabling an applicant to put down a marker while thorough investigation of the alleged conduct is undertaken before a formal application is lodged.

An unsuccessful attempted contravention by an employee acting outside the knowledge of the company would not be covered by the leniency policy (in accordance with section 3.4 of the leniency policy). The ACCC will consider a company's cooperation in these circumstances pursuant to the cooperation policy.

Comment 9

The ACCC seeks comments on whether or not the ACCC should continue to require applications for leniency to be confined to identified conduct in existence at the time of the application.

3.8 Clarification of the ACCC's ability to revoke conditional leniency granted to individuals under Part C who are subsequently uncooperative

Part C of the leniency policy requires individuals seeking leniency to cooperate with the ACCC's investigation. However, Part C does not expressly provide that the ACCC is able to revoke leniency granted under Part C to corporate directors, officers or employees if those individuals do not meet their obligations of full and expeditious cooperation. Part C of the leniency policy may need to be changed to clarify this point.

Comment 10

The ACCC proposes to clarify its ability to revoke conditional leniency where individuals are uncooperative by inserting the following paragraph into the leniency policy in relation to former employees and employees who are uncooperative at section 3.8 of the leniency policy:

The ACCC may, however, choose to revoke conditional leniency to which an individual, director, officer or employee would otherwise be entitled under Part C, if that individual, director, officer or employee does not meet his or her obligations of full and expeditious cooperation.

3.9 How should the ACCC treat applications where it appears that a breach of the Trade Practices Act has not occurred?

It may happen that the ACCC will receive an application for leniency where a breach of the Act does not appear to have occurred. For example, an application may be received in relation to international cartel conduct that does not, in fact, affect Australia.

It is understandable that applicants may, out of caution, seek leniency for conduct that is not likely to have breached the Act. However, this gives rise to a question as to whether the ACCC should grant conditional leniency to such applicants.

On the one hand, it may be useful for the ACCC to grant leniency to an applicant in these circumstances so that it can obtain knowledge about potentially unlawful conduct even if it subsequently appears that the Act has not been breached. Further, although the applicant may not have breached the Act, the ACCC's investigation may reveal that another party has done so. This approach may therefore assist the ACCC to detect, stop and deter cartel conduct, consistent with the broader aims of the policy.

On the other hand, it could be argued that the ACCC should not grant leniency in relation to conduct that does not appear to breach the Act. In addition, it is not desirable that the ACCC devote resources to the consideration of unnecessary applications.

In this context, the ACCC notes that section 3.15 of the leniency policy states that, at least in relation to international cartels, 'the ACCC will grant leniency in accordance with the policy even when there is uncertainty as to liability in Australia as a result of jurisdictional issues'.

Comment 11

Comments are sought on whether the ACCC should grant conditional leniency to applicants in circumstances where the Trade Practices Act does not appear to have been breached, or whether the ACCC should not grant conditional leniency to such applicants on the grounds that the application does not give rise to any need for leniency to be granted.

3.10 Should the leniency policy be clarified in relation to former employees?

Part C of the leniency policy does not extend to former employees of the applicant as a matter of course, as it is difficult for the applicant to ensure the cooperation of such individuals. However, the ACCC may, at its discretion, extend Part C leniency to former employees (see section 3.9 of the leniency policy).

When determining whether or not to extend Part C immunity in this situation, the ACCC will have regard to all the relevant circumstances, including whether the applicant company is interested in protecting its former employees, whether it has an ability to secure their cooperation, and whether the individual is willing to cooperate fully.

The ACCC appreciates that it may be difficult for an applicant to secure the cooperation of a person no longer in its employment, but would expect an applicant to use its best endeavours to facilitate and encourage the cooperation of any former employees to whom Part C immunity was extended.

Comment 12

The ACCC seeks comment on whether the leniency policy should be amended to make it clear that the ACCC may, at its discretion, extend Part C leniency to former directors, officers and/or employees at the applicant's request.

3.11 Cooperation—a prerequisite to final leniency

The leniency policy requires full and frank disclosure as a condition precedent to an applicant receiving final leniency. Cooperation with the ACCC is a continuing obligation, requiring the applicant to provide the ACCC with expeditious access to individuals and information. This is outlined in section 3.8 of the leniency policy.

The degree of cooperation by leniency applicants has been an issue for the ACCC in a number of leniency applications. Although there are incentives to use the policy to seek immunity from penalty and prosecution, once the application has been made, even before conditional leniency being granted, the ACCC's experience has been that some applicants are not providing the degree of cooperation it sees as stipulated in the leniency policy. Examples include limited access to information and individuals and providing the ACCC with the outcomes of internal investigations rather than first hand materials to allow the ACCC to conduct its own investigations.

Comment 13

The ACCC seeks comments on whether there are any aspects of the leniency policy and its implementation that deter an applicant from cooperating fully, and if so, how these issues may be managed to facilitate full cooperation.

3.12 The role of restitution in the leniency policy

The leniency policy includes a condition which requires an applicant to make restitution to injured parties in Australia, where possible. The inclusion of restitution in the leniency policy is recognition of consumers' expectations that the applicant not be able to obtain immunity from penalty or prosecution and keep their ill-gotten gains.

The ACCC recognises that in practice, restitution may be difficult to quantify; indeed the policy confines restitution to situations where there are identifiable victims of cartel conduct.

Restitution is not a requirement in the US policy and it is questionable whether it is a necessary element for a leniency policy. On the other hand, in providing restitution, an applicant is demonstrating that they recognise their conduct was wrong.

Comment 14

The ACCC invites comment on whether the requirement for restitution, as expressed in section 3.16 of the leniency policy, should remain in the policy.

3.13 How should the ACCC report on outcomes attributable to leniency applications?

The ACCC seeks ways of enhancing the transparency of the administration of the leniency policy as well as demonstrating the outcomes of the leniency policy. One way of doing so may be for the ACCC to refer to the role that a leniency application played in prosecuting cartel members at the resolution of proceedings, in a media release.

There is obvious tension between the confidential nature of a leniency application and the need for the policy to be administered transparently. There is also a need for a way of reporting the outcomes of the leniency policy.

Another way for the ACCC to report on the use of the policy may be to include a brief discussion in its annual report. The discussion may include the number of applications over the past year and whether they were in relation to alleged domestic or international cartels. Alternatively, the use of the leniency policy could be highlighted in the descriptions of the enforcement proceedings in the annual report.

Comment 15

The ACCC seeks comments on whether:

- (a) reference should be made in any media release issued after legal proceedings are completed or undertakings obtained, to the role a leniency applicant played in assisting the ACCC to finalise the matter and/or
- (b) the ACCC should include a brief report on the operation of the leniency policy each year in its annual report.

4 Conclusion

Your comments are sought by 31 January 2005 as well as any other suggestions about how the leniency policy should be amended or implemented, to provide greater certainty and increased effectiveness.

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