



Australian
Competition &
Consumer
Commission

ACCC immunity policy interpretation guidelines

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Australian Competition and Consumer Commission
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1. Immunity principles for anti-cartel enforcement in Australia

1.1 Benefits of an immunity policy for the welfare of Australians

1. The objective of Australia's competition laws, contained in the *Trade Practices Act 1974* (TPA), is to enhance the welfare of Australians. There is a direct link between preventing anti-competitive conduct and the significant benefits to consumers of the competitive process such as lower prices, greater choice and better service.
2. In performing its duties in its administration of the TPA to enhance the welfare of Australians the Australian Competition and Consumer Commission (ACCC) endeavours to detect, stop and deter cartel conduct in Australian markets. This type of conduct between otherwise competitive firms is referred to as 'cartel conduct' and is often systematic, deliberate and covert.
3. Cartels harm consumers, businesses and the economy by increasing prices, reducing choice or distorting the ordinary processes of innovation and product development. They increase input prices, adversely affect domestic and international competitiveness and ultimately result in reduced employment opportunities for Australians.
4. Detecting, stopping and deterring significant domestic and international cartels operating in Australian markets involving price fixing, restricting outputs in the production and supply chain, allocating customers, suppliers or territories and bid rigging is a high priority for the ACCC.
5. International experience has demonstrated that an effective immunity policy encourages businesses and individuals to disclose cartel behaviour and this in turn assists the ACCC to stop the harm of the illegal conduct and to prosecute participants.
6. Just as importantly, an immunity policy that provides incentives to businesses and individuals to disclose illegal behaviour is also a powerful disincentive to the formation of cartels, as potential participants will perceive a greater risk of ACCC detection and court proceedings.
7. An immunity policy does not offer a reward to 'good corporate citizens'. It is a detection tool designed to deliver benefits to all Australians by identifying, stopping and prosecuting harmful and illegal behaviour.

1.2 How the immunity policy assists in detecting cartels

8. Cartels usually involve secrecy and deception. Collusion is difficult to detect—there may be little documentary evidence and parties often go to great lengths to keep their involvement secret. In these circumstances, the discovery of and the proof of the existence of cartels can be more difficult than other forms of corporate misconduct. An immunity policy in relation to cartels encourages insiders to provide information and enables the ACCC to penetrate the cloak of secrecy.
9. The ACCC believes that an immunity policy that provides clear and certain incentives to potential applicants to report to the ACCC is a valuable tool in fighting illegal cartel conduct. When the extent of the immunity to be provided is certain, persons are more likely to take advantage of such a policy and disclose illegal and harmful conduct.

1.3 Circumstances where the immunity policy applies

10. For the purposes of this immunity policy, cartel conduct comprises any of the following cartel provisions by parties that are, or would otherwise be, in competition with each other:
 - (a) price fixing or
 - (b) restricting outputs in the production and supply chain or
 - (c) allocating customers, suppliers or territories or
 - (d) bid rigging.
11. The ACCC will apply the same principles that determine eligibility under the ACCC's immunity policy when making a recommendation to the Commonwealth Director of Public Prosecutions (CDPP) that an immunity applicant be granted immunity from criminal prosecution.
12. The immunity policy applies to large and small businesses (whether or not they are incorporated) and to individuals who have engaged in cartel conduct affecting Australian markets.
13. The ACCC will apply the immunity policy to unincorporated businesses and their principals in a manner consistent with the way it deals with corporate entities. When the context permits, the immunity policy applies equally to the various state competition codes as it does to the TPA.
14. The immunity policy does not apply in circumstances where a corporation or individual has unilaterally attempted, without success, to get others to engage in cartel conduct.

1.4 Application to criminal and civil matters

15. The immunity policy applies to cartel conduct and provides protection against civil proceedings instituted by the ACCC.
16. Immunity from criminal prosecution will be determined by the CDPP in accordance with the same principles that determine immunity under the ACCC's immunity policy.
17. The respective roles and responsibilities of the ACCC and the CDPP in relation to possible criminal prosecution of cartel matters are outlined in the memorandum of understanding (MOU) between the ACCC and the CDPP.
18. In summary, while the ACCC is responsible for investigating cartel matters and referring such matters to the CDPP for possible prosecution, it is the CDPP that is responsible for prosecuting cartel offences.
19. These guidelines will apply to the provision of immunity in relation to civil proceedings that the ACCC might otherwise bring in relation to cartel matters.
20. The guidelines, in conjunction with the MOU and the annexure to the *Prosecution Policy of the Commonwealth*, set out the basis upon which the ACCC will recommend to the CDPP that an immunity applicant be granted immunity from prosecution.
21. All applications for immunity from criminal prosecution and civil penalty proceedings should be made to the ACCC, which will then liaise with the CDPP concerning immunity from criminal proceedings in relation to the cartel offence.
22. The CDPP and the ACCC recognise that maximisation of certainty as far as reasonably possible in relation to applications for immunity is crucial to the effective operation of immunity policies for cartel conduct.

1.5 Purpose of these guidelines

23. The purpose of these guidelines is to provide a clear understanding of the availability of immunity, and the conditions under which it will be granted. In its interpretation of the immunity policy the ACCC will seek to:
 - apply the policy consistently and fairly
 - be approachable and accessible
 - interpret the policy in favour of an applicant in cases of ambiguities in the policy.
24. These guidelines may be amended from time to time.

2. The process of seeking immunity

2.1 Making an application

25. All applications for immunity from criminal prosecution and civil penalty proceedings should be made to the ACCC. An application for immunity may only be made by or on behalf of one party to the cartel, be they a corporation or an individual.
26. The ACCC will not accept joint immunity applications by or on behalf of more than one party. In circumstances where partnership or a sole trader is a party to a cartel, relevant individuals should apply and their application for immunity will be considered as a corporate application for the purposes of the immunity policy. As further outlined below, derivative immunity is also available to cover individual employees, directors and officers of a corporate immunity applicant.
27. An applicant must provide the ACCC with sufficient information to satisfy the conditions for a grant of conditional immunity. If an applicant does not provide the ACCC with sufficient information to demonstrate that the applicant satisfies the conditions for a grant of conditional immunity, the applicant will be regarded as having requested a marker (see section 2.5 below).

2.2 Granting of immunity in relation to civil cartel provisions

28. If the ACCC is satisfied that the applicant has met the requirements for conditional immunity, the applicant will be granted conditional immunity in relation to civil proceedings that the ACCC might otherwise have brought against the corporation or individual. The applicant will be advised of this fact in writing.
29. Generally speaking, the ACCC's letter will include a description of the conduct and market in relation to which the applicant has been granted conditional immunity and the terms and conditions upon which conditional immunity is granted.

2.3 Granting of immunity in relation to criminal cartel offences

30. As identified above, it is the CDPP which is responsible for the prosecution of cartel offences. Pursuant to s. 9(6D) of the *Director of Public Prosecutions Act 1983* (DPP Act) the director may, if the director considers it appropriate to do so, give to a person an undertaking that the person will not be prosecuted.
31. Recognising the importance of maximising certainty of the immunity policy, the CDPP and the ACCC have agreed to procedures that will facilitate the granting of immunity in relation to cartel offences at the same time as immunity in relation to civil proceedings.
32. These procedures are provided for in the annexure to the *Prosecution Policy of the Commonwealth*. A summary of the procedures is described below.

33. Where the ACCC is of the view that the applicant satisfies the conditions for immunity under the immunity policy, it will make a recommendation to the CDPP that immunity from prosecution be granted to the applicant.
34. The director will exercise an independent discretion when considering a recommendation by the ACCC. Where the director is satisfied that the applicant meets the ACCC's conditions for immunity the director will grant immunity.
35. The director's decision will be communicated to the applicant at the same time as the ACCC's decision whether to grant conditional immunity in relation to civil proceedings.
36. Where the director decides to grant immunity, the director will provide to the applicant a written undertaking pursuant to s. 9(6D) of the DPP Act that, subject to fulfilment of ongoing obligations and conditions, the applicant will not be prosecuted for the cartel offence for which immunity is sought.

2.4 Request to expand immunity

37. If subsequent investigations determine that the cartel conduct is broader than first reported and outside the scope of conditional immunity granted, it may be appropriate for the applicant to request that their conditional immunity be expanded or make an additional application.

2.5 Requesting a marker

38. Where a person intends to make an application for immunity, that person or their legal representative may approach the ACCC and request a marker be placed. The ACCC anticipates that most applications will be preceded by a request for a marker.
39. A marker allows the person a limited amount of time to gather the information necessary to demonstrate that they satisfy the requirements for conditional immunity. As long as a person holds the marker for particular cartel conduct, no other person involved in the same cartel will be allowed to take the person's place in the immunity queue, even one who is able to satisfy all conditions immediately. This means that it is not necessary for the person to have assembled a complete record of the cartel conduct to hold first place in the queue.
40. To obtain a marker, the person must provide a description of the cartel conduct in sufficient detail to allow the ACCC to confirm that no other person has applied for immunity or obtained a marker in respect of the cartel and that the ACCC has not received written legal advice that it has sufficient evidence to commence proceedings in relation to conduct arising from the cartel. The person is not required to satisfy all the requirements for conditional immunity at the time of the request.
41. A potential marker seeker or their representative should not contact the ACCC unless the marker seeker genuinely intends to seek immunity and cooperate with the ACCC.

42. The ACCC will inform the person requesting the marker if a marker is available. If a marker is available, the ACCC and the person will discuss the amount of time required by the person to complete their internal investigation and provide the ACCC with the information required to satisfy the requirements for conditional immunity.
43. In general, a marker will be valid for a maximum period of 28 days. However, this period may be as short as a few days in some circumstances—for instance, if the applicant has delayed reporting or the ACCC is advanced in a pre-existing investigation. On the other hand, if the ACCC does not have an investigation on foot and the applicant can satisfy the ACCC that its internal investigation will be complex, a longer period may be justified. It is anticipated that an individual holding a marker will be given a shorter period to provide the necessary information than a corporate marker holder, as the individual should not need to conduct significant investigations.
44. The marker period will lapse at the expiry of the nominated time, referred to in paragraph 43. However, the ACCC may, at its discretion, extend the time if requested to do so for a further specified period.
45. As delays at the marker stage may adversely affect the ACCC's ability to obtain evidence or coordinate with other agencies, if the ACCC is to extend the allotted period for a marker holder to provide the information necessary for a valid immunity application it will need to be satisfied that the delays are justified and not disproportionate to the tasks to be undertaken.
46. Where a marker lapses, the same or another person is free to apply for immunity or request a marker in respect of the relevant conduct in respect of the cartel.
47. If a second person has already requested a marker and the first-in marker lapses or is withdrawn, the second-in person will be given an opportunity to satisfy the requirements for conditional immunity.
48. The ACCC may advise a person who has requested a marker or applied for immunity that another person has sought a marker or applied for immunity, but will not disclose the identity of that other person.
49. During the marker period, the ACCC may follow up with the marker recipient on the progress of their investigations. The ACCC expects that a marker holder will promptly notify the ACCC in circumstances where, if following their investigation, the marker holder considers that it will not satisfy the conditions for conditional immunity. Upon the marker holder notifying the ACCC, the marker will lapse.
50. The marker holder will advise the ACCC of what information and evidence they are able to provide on the nature and extent of the cartel conduct from their internal investigation. The ACCC may ask the person to undertake further inquiries.

51. On the basis of the information provided to the ACCC, it will determine whether the marker holder satisfies the requirements for a grant of conditional immunity. If they have satisfied the requirements for conditional immunity, a marker holder will be so advised and will be asked whether they wish to apply for immunity.
52. If a marker holder, having been advised that they have provided sufficient information and evidence to satisfy the requirements for a grant of conditional immunity, applies for immunity, they will be advised in writing that they have been granted conditional immunity.

2.6 Hypothetical inquiries about the availability of a marker

53. Persons considering making an application for immunity may also approach the ACCC on a 'hypothetical' basis. The ACCC cannot confirm or deny the existence of any investigation into cartel conduct but will advise prospective applicants if a first-in marker is available for particular cartel conduct.
54. The ACCC will only provide information about the availability of a marker to genuine potential immunity applicants or their legal representatives.
55. The ACCC encourages parties to come forward as soon as they are aware that they may have been involved in cartel conduct and before the completion of internal investigations.

2.7 Proactive use of the immunity policy

56. In circumstances where the ACCC has information which leads it to suspect that certain persons have engaged in, or may have been engaged in, cartel conduct, the ACCC may, at its discretion, approach any one or more of those persons and inform them of the immunity policy.

2.8 Applications may be oral

57. The ACCC will not require a written application for immunity if so requested by an applicant. The process permits the applicant to make an application without generating any new documents which may involve admissions or assist others.
58. However, the ACCC will create its own records in respect of all marker requests and applications received, whether the applications are oral, written, or partly oral and partly in writing.
59. The administration of the immunity policy requires discussions between the ACCC and the applicant concerning the alleged conduct and the applicant's responses to the ACCC's requests under their cooperation obligations be recorded in writing.

2.9 Use of information provided to the ACCC

60. The information provided by immunity applicants may be used in civil proceedings and/or criminal prosecutions. Information provided by applicants may be shared with the CDPP.
61. Subject to paragraph 62, the ACCC will receive information in support of an application for immunity on the basis that the ACCC will not use the information as evidence in proceedings against the applicant in respect of the relevant cartel. Where the applicant is a corporation, the ACCC will also receive the information on the basis that it will not use the information against entities or employees for the period of which they have the benefit of derivative immunity under the immunity policy. To avoid any doubt, information provided by a marker holder to satisfy the requirements of conditional immunity will be considered by the ACCC to be information provided 'in support of an application for immunity.'
62. However, it will be a condition of accepting information on such a basis that if a grant of immunity or conditional immunity is subsequently revoked because the applicant failed to satisfy the requirements for immunity or conditional immunity, the ACCC will be entitled to use such information against the immunity applicant (and any directors, officers or employees of the applicant) in any obstruction proceedings in respect of s. 155(5) of the TPA and/or proceedings relating to ss. 137.1, 137.2 or 149.1 of the Criminal Code.
63. Except as required by law, the ACCC will not share confidential information provided by the immunity applicant, or the identity of the applicant, with regulators in other jurisdictions without the consent of the applicant, but will seek consent as a matter of course, particularly for international matters. Information obtained from sources other than the immunity applicant, including information obtained as a result of inquiries arising from information provided by the applicant, will not be subject to this limitation and will, in appropriate circumstances, be shared where permitted by law.
64. The ACCC will use its best endeavours to protect any confidential information provided by applicants for immunity.
65. Disclosure obligations may require the CDPP to disclose such information.

2.10 Current and former directors, officers and employees

66. Subject to paragraph 67, when an application for immunity is made by a corporation, any grant of immunity or conditional immunity by the ACCC or undertaking by the director will also extend to named current or former directors, officers and employees who request immunity and who satisfy the requirements for derivative immunity under the immunity policy.

67. The ACCC may, in some circumstances, specifically exclude certain current or former directors, officers and employees from immunity. For instance, executives may be eligible for derivative immunity for their conduct in respect of the cartel if they engaged in such conduct while employed with the corporate applicant. However, derivative immunity is unlikely to be extended to an executive who has left the applicant's employment and continued to participate in the cartel while in the employment of another cartel participant. The ACCC will have regard to the views of the corporation and the individuals concerned (although this will not be determinative).
68. Derivative immunity provided to an individual as a current director, officer or employee will continue even if the person subsequently ceases involvement with the immunity applicant provided they continue to satisfy the requirements for conditional immunity, including ongoing full cooperation.
69. In the ordinary course, an individual with derivative immunity will not be separately notified of the grant of conditional immunity. However, in some circumstances, such individuals may be separately notified—for instance, where there are concerns about whether an individual is cooperating or if the individual is separately represented. In these circumstances, the individual's obligations under the conditional grant would be particularised outlining what they must do to continue to qualify for conditional immunity. Such separately recorded obligations will be consistent with the corporation's obligations.
70. In the event that a current or former director, officer or employee with derivative immunity or conditional immunity fails to comply fully with his/her obligations, the ACCC may revoke the immunity or conditional immunity granted to such an individual. Any statements or information provided pursuant to the corporate immunity application, including by the individual concerned, may then be used in any civil action the ACCC might take against the individual under the TPA for a substantive contravention or offence and further to any obstruction proceedings in respect of contraventions of s. 155(5) of the TPA and/or proceedings relating to ss. 137.1, 137.2 or 149.1 of the Criminal Code. The ACCC will give such an individual a reasonable opportunity to respond to its concerns before revoking immunity or conditional immunity.
71. Corporate immunity applicants must provide to the ACCC the names of the corporate directors, officers and employees it seeks to be covered by derivative immunity. Where requested to do so, the corporate applicant must demonstrate to the ACCC the relationship between the applicant company and the individual. Any immunity will be limited to those named persons.

2.11 Derivative immunity for related entities

72. An application for immunity made on behalf of a corporate group will cover each member of that corporate group where they are wholly owned by the applicant.
73. A member of a corporate group shall not be excluded because it is only partly owned or controlled by the applicant. Factors including the corporate applicant's degree of control and ownership will inform such a decision.
74. The ACCC may also extend derivative immunity in respect of corporations that are partly owned or controlled by the immunity applicant. The ACCC will have regard to the duration of the cartel and how long the related entity has been part of the applicant's corporate group.
75. Corporate immunity applicants must advise the ACCC of the corporate entities it seeks to be covered by derivative immunity. When requested to do so, the applicant must demonstrate to the ACCC the relationship between the applicant company and the entity.

3. Conditions that must be satisfied

3.1 The first application for immunity

76. A person may only be granted immunity if they are the first person to approach the ACCC requesting immunity and they meet the other requirements of the immunity policy. Second or subsequent applicants may only be granted immunity if an earlier applicant has withdrawn their application or is ineligible for immunity or has had immunity revoked.

3.2 Full disclosure and cooperation

77. Immunity is conditional upon full, frank and truthful disclosure; not intentionally withholding any evidence or information in an applicant's possession or available to them; and not under-stating the applicant's role or over-stating the role(s) of any other cartel participant(s).
78. The applicant must cooperate fully and expeditiously at their own expense (unless the ACCC agrees otherwise in writing), on a continuous basis throughout the ACCC's investigation and any ensuing court proceedings.
79. Applicants should be aware that providing false or misleading information to the Commonwealth may constitute an offence. It is also inconsistent with the obligation to provide full, frank and truthful disclosure and cooperation with the ACCC's investigation. Applicants and relevant employees, directors and officers may be asked to acknowledge their understanding of this.
80. Requirements of full, frank and truthful disclosure and cooperation include but are not limited to:
- (a) Providing full details of all known facts relating to the cartel conduct including: when the cartel arrangements operated; who was involved; who had knowledge of the arrangements; how the arrangements began; and how they were implemented (including details of meetings etc.).
 - (b) Not disclosing to third parties any dealings with the ACCC without the consent of the ACCC, except where required to do so by law. If disclosure is required, the ACCC must be notified prior to the applicant releasing any information. This requirement does not prevent disclosure to competition regulators in other jurisdictions.
 - (c) Providing to the ACCC promptly and at the applicant's own expense all evidence and information in their possession or available to them, wherever located, regarding the cartel conduct for the duration of the investigation and any subsequent court proceedings.

- (d) Using its best endeavours to comply with any timetables set down by the ACCC for the provision of information and documents.
- (e) Being available, or making relevant corporate directors, officers and employees available, upon the request of the ACCC and in a timely fashion to respond to queries and attend interviews.
- (f) Responding fully, frankly and truthfully to all inquiries of the ACCC.
- (g) In relation to corporate applicants, using their best efforts to secure and promote the ongoing, full and truthful cooperation of all current and former directors, officers and employees for the duration of the investigation and any subsequent court proceedings, which will include:
 - (i) encouraging such persons to provide the ACCC with any information that may be relevant to the cartel conduct
 - (ii) facilitating such persons appearing for interviews or testimony in connection with the cartel conduct, as the ACCC may require at the times and places designated by the ACCC (including the payment of travel expenses)
 - (iii) encouraging such persons to respond fully, frankly and truthfully to all questions asked in interviews and court appearances and making no attempt to protect or falsely implicate any person or entity.

3.3 Cooperation must be a truly corporate act

81. As noted above, corporate immunity applicants must use their best endeavours to ensure that all relevant directors, officers and employees cooperate. The corporation must ensure that its admissions and cooperation are truly corporate acts.
82. In some circumstances, a corporate immunity applicant may be unable to secure the cooperation of one or more of its directors, officers or employees. This will not automatically prevent the ACCC from granting corporate conditional immunity to the corporation or automatically result in the ACCC revoking corporate conditional immunity, as the case may be.
83. In determining whether admissions and cooperation are a 'truly corporate act' the ACCC will have regard to matters such as:
 - whether the corporation has taken all legal and reasonable steps to cooperate and to secure the cooperation of its directors, officers and employees—this may include dismissing employees who refuse to cooperate
 - the number and the significance of the individuals who elect not to cooperate
 - any explanation for the non-cooperation.

3.4 Coercion and ringleaders

84. A corporation will not be eligible for corporate conditional immunity if it has coerced any person to participate in the cartel or is the clear leader in the cartel.
85. An individual will not be eligible for conditional individual immunity if their employer has coerced another person to participate in the cartel and they have played a role in coercing the other participants.
86. The ACCC recognises that in many cartels there may not be any coercion or clear leader. The mere fact that one cartel participant has arranged a meeting or maintained records will not necessarily exclude the application of the immunity policy to that participant, particularly when the other participants took part willingly.
87. For an applicant to have coerced others, there will need to be objective evidence of coercive behaviour. An applicant for immunity may have coerced other cartel participants where the immunity applicant pressured one or more persons into joining or maintaining the cartel.
88. If ACCC investigations reveal that an applicant or conditional immunity recipient is the clear leader or has coerced others—and so is no longer eligible—but has been cooperating in a manner outlined at 3.2, the ACCC would consider any assistance provided to the ACCC as possible grounds to implement the cooperation policy. The cooperation policy¹ is discussed in more detail in 4.2. In this circumstance, any information provided to the ACCC would be dealt with as outlined in 2.9.
89. In determining whether or not a cartel participant is ‘the clear leader’ the ACCC will have regard to the roles played by each cartel participant. There will be no clear leader if two or more parties are properly considered the joint leaders in the conduct.

Example 1

Company A, Company B and Company C are competitors, each with approximately equal market shares. On a regular basis over a number of years the managing directors of these companies have met at association meetings and have agreed to rig the outcomes of the major forthcoming tenders in the market.

All companies are willing and active participants in the arrangement, but it was the managing director of Company A who first suggested making the arrangement and who subsequently undertook to maintain the records of the arrangement.

The managing director of Company A does not want to be involved in this illegal conduct any longer but does not know how to get out.

Company A and/or its managing director would not be considered to be ringleaders.

¹ ACCC, *Cooperation policy for enforcement matters*, July 2002.

Example 2

Company A is an incumbent in a concentrated industry. Company A is the dominant player with a market share of almost 50 per cent.

Company B is a new entrant. To gain market share it is willing to offer substantial discounts to new customers. A director of Company A contacts the CEO of Company B and says, 'The prices you are offering are ridiculous. Your list prices are okay; you should stick with them. We have ways of dealing with people like you. We can and will crush you if you keep this up. You know what you have to do. I will be watching you in the market'.

Company B does not want to enter into or abide by such an arrangement, but is fearful of the threats of Company A. Company B reluctantly agrees to stop discounting and notifies Company A.

Company A and its director have coerced Company B into the arrangement for the purposes of the immunity policy. Company A is also the clear leader in the conduct. The immunity policy will not apply to Company A or its director.

3.5 Revocation of immunity and conditional immunity

90. If the ACCC believes that a person granted immunity or conditional immunity has failed to comply with any of the requirements for immunity, it will advise that person of its belief in writing. The ACCC will also advise the CDPP of its concerns at that time. The ACCC may then, after giving that person a reasonable opportunity to address its concerns, advise that person in writing that they no longer qualify for immunity. The ACCC will recommend that immunity from prosecution be revoked. This may be referred to as revocation of immunity or conditional immunity as the case may be.

4. Other

4.1 Cease involvement

91. If an applicant advises the ACCC of its intention to cease involvement in an ongoing cartel, the ACCC will ordinarily direct the immunity applicant to immediately cease all involvement. However, in appropriate circumstances the ACCC may request the applicant to act in a manner which does not disclose ACCC awareness of the cartel. This might allow the ACCC an opportunity to obtain important evidence against other cartel participants.

4.2 What if the immunity policy does not apply?

92. If a person who is not eligible for immunity wishes to cooperate with the ACCC, they may still receive credit under the cooperation policy.
93. Nothing in the immunity policy is intended to alter the application of the general principle, recognised by the Federal Court of Australia and the ACCC, that more lenient treatment will be afforded to those persons who cooperate with the ACCC in its investigations and court proceedings. The ACCC recognises this through its cooperation policy.
94. The ACCC's use of the cooperation policy will directly affect the applicant's perceived benefit of the immunity policy—using the cooperation policy to achieve the same outcome as the immunity policy, in circumstances where the conditions for immunity are not met, has the potential to reduce the immunity policy's efficacy in destabilising cartels and creating a 'race to the ACCC's door'. Conversely, restricting the use of the cooperation policy would reduce the avenues by which cartel members can seek lenient treatment from the ACCC in exchange for cooperation and assisting the ACCC obtain appropriate redress.
95. The cooperation policy provides valuable flexibility and can be used to enhance the ACCC's enforcement effort without reducing the efficiency of the immunity policy. In particular, the cooperation policy allows the ACCC to obtain further cooperation and assistance (not limited to that which the immunity applicant can provide). This will both assist the ACCC to gather additional evidence that may help in the prosecution of cartel participants and allow the ACCC to negotiate an agreed penalty for recommendation to the court and thus avoid the need for contested litigation.
96. In general, a person will not be given full immunity under the cooperation policy. However, there are circumstances in which the ACCC may use its discretion under the cooperation policy to grant full immunity from ACCC initiated civil proceedings. Cartel participants who cooperate with the ACCC pursuant to the cooperation policy rather than the immunity policy will have their request for immunity from criminal prosecution determined in accordance with the *Prosecution Policy of the Commonwealth* per se, rather than pursuant to the annexure to that policy.

97. For instance, if an individual qualifies for conditional immunity, the ACCC may, in its absolute discretion, offer the first subsequent corporate immunity applicant full immunity under the cooperation policy from ACCC initiated civil proceedings. Whether or not full immunity is granted in these circumstances will depend on whether the corporate application is timely and provides information and evidence additional to that available from the individual immunity applicant.
98. Similarly, the ACCC may wish to immunise individuals not eligible for derivative immunity. For instance, where an employee, or former employee, who could normally be expected to qualify for derivative immunity, is specifically excluded from their employer's application because of the existence of an employment related dispute. In these circumstances, the ACCC may, under the cooperation policy, grant protection from civil proceedings and penalty in a form similar to that available under the immunity policy.

4.3 Amnesty plus

99. If a person cooperates with the ACCC investigation into a cartel despite being ineligible for immunity, because another person has been granted conditional immunity in relation to that cartel, the ACCC may recommend to the court a reduced penalty in civil proceedings and recommend to the CDPP a reduced fine or sentence in criminal matters. If, in addition to cooperating with investigations into the first cartel, such a person reports a second cartel, and is granted conditional immunity in relation to the second cartel, the ACCC will recommend to the court a reduced penalty in civil proceedings and recommend to the CDPP a reduced fine or sentence in criminal matters be further reduced in relation to the first cartel.
100. In some jurisdictions, this is referred to as amnesty plus.

4.4 How does the policy apply to international cartels?

101. The immunity policy will apply to international cartels that affect Australia in the same way as it will apply to purely domestic cartels.
102. Potential immunity applicants involved in an international cartel affecting Australia should have regard to the following matters:
 - An immunity application made to a foreign competition enforcement agency will not be considered an application in Australia under the immunity policy. This means an immunity applicant should contact the ACCC at the same time it contacts other jurisdictions
 - The ACCC will actively investigate and take enforcement action against international cartels affecting Australia.

4.5 What happens if the ACCC closes an investigation?

103. If after the ACCC has undertaken investigations into alleged cartel conduct, the ACCC decides not to pursue the matter any further it will advise the immunity applicant of its decision. If the applicant has been granted conditional immunity they may elect to withdraw their application or leave it in place. If they elect to leave it in place their obligations will also remain in place—for instance, they would be required to cooperate if the ACCC decided at a later date to re-open the investigation. Subject to the terms of the policy, they will also retain their first-in status.

ACCC contact details

The only valid way to make an immunity application or request a marker is by facsimile (02) 6243 1156 (dedicated line) or to contact:

Marcus Bezzi
Executive General Manager
Enforcement and Compliance Division
Telephone: (02) 9230 3894 (business hours)

It will not be adequate to leave a voicemail or other message or send an email.

Any hypothetical discussions regarding the availability of a marker should also be held with the Executive General Manager.

If the Executive General Manager is unavailable, arrangements will be in place to enable approaches to be made.

If the Executive General Manager is unavailable, you may contact Scott Gregson, Group General Manager, Enforcement Operations, as set out below.

General inquiries regarding the immunity policy should be directed to:

Scott Gregson
Group General Manager
Enforcement Operations
Telephone: (02) 6243 1350 (business hours)