



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

ACCC immunity and cooperation policy: frequently asked questions

October 2019

This document supplements the *ACCC immunity and cooperation policy for cartel conduct* (the Policy). The Frequently Asked Questions (FAQs) may be amended from time to time to address issues that may arise in the application of the Policy.

ACCC contact details:

The only valid way to make an immunity application or request a marker is to contact the **ACCC Immunity Hotline:**

General Manager
Cartels Branch

Telephone: (02) 9230 3894 (business hours)

Email: cartelimmunity@accg.gov.au

If you call the telephone hotline, it will not be sufficient to leave a voicemail or other message. You must speak to the General Manager, Cartels Branch or a nominated delegate.

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ISBN 987 1 922145 32 1

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Summary

This document supplements the *ACCC immunity and cooperation policy for cartel conduct* (the Policy), which should be read in conjunction with this document. The Frequently Asked Questions (FAQs) may be amended from time to time to address issues that may arise in the application of the Policy. The latest version of the FAQs will be available on the ACCC website. Updates of substance may also be communicated by issue of a media release.

Scope of the Policy

Q1. What type of conduct does the Policy apply to?

The Policy applies to cartel conduct under Division 1 of Part IV of the *Competition and Consumer Act 2010* (CCA).

For the purposes of the Policy, 'cartel conduct' means making a contract, arrangement or understanding containing a cartel provision, giving effect to such a provision or being involved in such conduct in an ancillary capacity.

A 'cartel provision' is a provision relating to:

- a. price fixing, or
- b. restricting outputs in the production and supply chain, or
- c. allocating customers, suppliers or territories, or
- d. bid rigging,

in a contract, arrangement or understanding between parties that are, or would otherwise be, in competition with each other.

Q2. Does the Policy apply to 'concerted practices' under section 45(1)(c) of the CCA?

No. A party cannot apply for immunity for engaging in an anti-competitive concerted practice under section 45(1)(c) of the CCA, regardless of when the conduct took place.

If a party applies for immunity for cartel conduct and the ACCC forms the view that the reported conduct is **not** cartel conduct, but may comprise an anti-competitive concerted practice, conditional immunity will **not** be granted.

However, parties involved in an anti-competitive concerted practice are encouraged to cooperate with the ACCC and seek lenient treatment under the [ACCC cooperation policy for enforcement matters](#) (Cooperation Policy). Under the Cooperation Policy, the ACCC can recognise cooperation in a variety of ways, for example, complete or partial immunity from action by the ACCC, submissions to the Court for a reduction in penalty, or even administrative settlement in lieu of litigation.

Q3. What protections does the Policy provide to successful applicants?

If a party is granted conditional immunity under the Policy for its involvement in cartel conduct:

- a. the applicant (and any party granted derivative immunity) will be entitled to immunity from civil proceedings and/or criminal prosecution under Division 1 of Part IV of the CCA in respect of that cartel conduct, and

- b. the ACCC will not use information (including witness evidence) provided by that party in support of its application, directly as evidence in, or indirectly in respect of, civil proceedings against the party under any other provision of the CCA, in respect of the cartel conduct for which immunity was granted.

The Policy also provides protections in respect of the equivalent provisions in various state competition codes.

Step 1. Marker

Q4. What is a marker?

A marker is the confirmation given to an immunity applicant that it is the first party to approach the ACCC requesting immunity with respect to a particular cartel. The marker guarantees the immunity applicant first place in the queue of potential applicants, subject to it satisfying the criteria for conditional immunity in the Policy.

As long as a party holds the marker for particular cartel conduct, no other party involved in the same cartel will be allowed to take the party's first place in the immunity queue, even one that is able to satisfy the criteria for conditional immunity immediately.

Once a marker is granted, the immunity applicant has a limited period of time to gather the information necessary to demonstrate that it satisfies the criteria for conditional immunity and present this information to ACCC either in oral or written format (timing is discussed further at Q19). This oral or written statement is known as a 'proffer' and is described in more detail at Q21 to Q30.

Q5. Who should I contact to apply for a marker?

The only valid way to make an immunity application or request a marker is to contact the **ACCC Immunity Hotline**:

General Manager
Cartels Branch

Telephone: **(02) 9230 3894** (business hours)
Email: **cartelimmunity@acc.gov.au**

If you call the telephone hotline, it will not be sufficient to leave a voicemail or other message. You must speak to the General Manager, Cartels Branch or a nominated delegate.

The General Manager, Cartels Branch (GM) will note the time of the phone call or email and advise the applicant whether the requested marker is available as soon as possible following the request.

For the purposes of the Policy, the time of a telephone application will be the time displayed on the receiving ACCC telephone and the time of an email application will be the time-stamp given by the ACCC's email server when the email arrives at the ACCC's email server.

Q6. Why is it important to be the first party to apply for immunity?

The ACCC will grant a marker, with respect to particular conduct, only to the first party to request immunity. Second and subsequent applicants may seek to cooperate with the ACCC's investigation through the cooperation section of the Policy (Section H), but they will not be eligible for immunity unless the first-in party is not ultimately eligible for immunity and they are next in the immunity queue.

Maintaining the first-in approach encourages parties to apply for immunity as soon as possible and not wait for other parties to the cartel before reporting cartel conduct to the ACCC. Parties should come forward as soon as they believe they are involved in cartel conduct to ensure their status as first-in to be eligible for immunity.

Q7. How will I know I am the first person to apply for immunity?

The GM will advise the applicant whether the requested marker is available as soon as possible following the request.

Q8. What if a marker is not available?

If a marker is not available the GM will advise the applicant of this as soon as possible following the marker request. The GM will note the time of the phone call or the timestamp of the email's arrival at the ACCC server and make a note of the applicant's place in the immunity queue.

Second and subsequent applicants in the immunity queue can still seek lenient treatment by cooperating with the ACCC in accordance with Section H of the Policy, but they will not be eligible for immunity unless the first-in party is not ultimately eligible for immunity, including by withdrawal of its immunity application or revocation of its immunity.

Q9. I am not sure whether I need to apply for immunity or if I wish to cooperate with the ACCC. Can I speak to someone at the ACCC prior to lodging an application?

Yes. A party considering seeking immunity or seeking to cooperate with the ACCC should contact the ACCC Immunity Hotline on the contact details listed at Q5. This contact can be on a hypothetical and/or anonymous basis.

A party not familiar with the Policy may seek clarification on issues such as whether particular conduct can be considered cartel conduct or clarification on the process of seeking immunity or seeking to cooperate with the ACCC.

Q10. I am unsure whether I have engaged in cartel conduct or the exact nature of the suspected cartel, should I request a marker anyway?

Yes. Since time is of the essence, the ACCC encourages individuals and corporations to come forward and request a marker as soon as they suspect they may be involved in a cartel, even if they are uncertain whether it is actually a cartel. If an applicant later determines that it was not involved in cartel conduct, it can notify the ACCC and withdraw its marker.

If an applicant is granted a marker and proceeds to the proffer stage of the application and the ACCC forms a view that the information provided by an applicant does not demonstrate that the applicant has engaged in cartel conduct that may contravene the CCA, the ACCC will cancel the marker. Prior to cancelling the marker the ACCC will notify the applicant of its view and invite the applicant to make a submission for the ACCC's consideration explaining how the conduct may constitute cartel conduct.

How the ACCC may use information provided to it as part of an immunity application is outlined in Q59 to Q60.

Q11. I have information about a suspected cartel, but I am not involved in the cartel conduct. Can I speak to someone at the ACCC to pass on this information?

Yes, you can contact the ACCC Immunity Hotline on the contact details listed at Q5, the ACCC Infocentre on 1300 302 502 or make an online report at <http://www.accc.gov.au/contact-us> to seek answers to any questions you may have with respect to cartel conduct or to provide information about suspected cartel conduct. You can deal with the ACCC on an anonymous basis if you do not feel comfortable providing your details.

Q12. Are joint requests for a marker, and subsequent immunity, accepted?

An application for a marker, and subsequent immunity, may only be made by or on behalf of one party to the cartel, be they a corporation or an individual.

The ACCC will not accept joint immunity applications by or on behalf of more than one party to a cartel. In circumstances where a 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 Policy. Derivative immunity is also available to cover related corporate entities, individual employees, directors and officers of a corporate immunity applicant.

Where two or more individuals attempt to apply for immunity jointly, the ACCC may, in exceptional circumstances, offer the second and subsequent individual applicants immunity through section H of the Policy.

Q13. Can I apply for a marker if I have unilaterally attempted, without success, to create a cartel?

Generally, the Policy does not apply to corporations or individuals who have unilaterally attempted, without success, to cause others to engage in cartel conduct.

However, a current or former individual employee, officer or director of a corporation that has attempted to cause others to participate in a cartel, will be eligible for immunity if that individual is able to provide material assistance in proceedings against another party and meets the criteria for conditional immunity. For example, this may cover circumstances where an individual is able to provide information about their current or former employer attempting to induce a competitor to form a cartel.

If you have been approached by an individual or corporation attempting to enter into a cartel, you are able to report that conduct to the ACCC or, if considered necessary, seek a marker.

Q14. Can an unincorporated business apply for a marker?

Yes. An unincorporated business can apply for a marker. For the purposes of the Policy, the ACCC will treat any entity with a recognised legal status as if it is a corporation, including partnerships, unincorporated businesses, government business enterprises and government departments or agencies carrying on a business.

Q15. When has an applicant 'engaged in cartel conduct'?

For the purposes of the Policy, the ACCC will consider an applicant to have engaged in cartel conduct if the applicant has provided sufficient information or evidence to suggest that it has been involved, whether as a principal or in an ancillary capacity, in cartel conduct.

'Cartel conduct' means making a contract, arrangement or understanding containing a cartel provision, giving effect to such a provision or being involved in such conduct in an ancillary capacity. A cartel provision is a provision relating to:

- a. price fixing, or
- b. restricting outputs in the production and supply chain, or
- c. allocating customers, suppliers or territories, or
- d. bid rigging,

in a contract, arrangement or understanding between parties that are, or would otherwise be, in competition with each other.

Q16. What is meant by the phrase ‘in an ancillary capacity’?

In the Policy, to engage in cartel conduct in an ancillary capacity means:

- a. attempting to engage in cartel conduct,
- b. aiding, abetting, counselling or procuring a person to engage in cartel conduct,
- c. inducing, or attempting to induce, a person to engage in cartel conduct,
- d. being directly or indirectly knowingly concerned in, or party to, cartel conduct, or
- e. conspiring with others to engage in cartel conduct.

However, the Policy generally does not apply to corporations or individuals that have unilaterally attempted, without success, to cause others to engage in cartel conduct. Individuals involved in unsuccessful unilateral attempts to engage in cartel conduct may be eligible for immunity in the circumstances outlined in Q13.

Q17. Can the information provided to secure a marker be hypothetical?

Yes. An applicant may provide information on a hypothetical basis at the marker request stage. The applicant is not required to reveal its identity to obtain a marker. At this stage, information is often provided by the applicant’s legal representative. However, once a marker is granted, the applicant will need to identify itself to allow the ACCC to properly prepare for the proffer stage and subsequent investigation.

Q18. What kind of information do I need to provide to the ACCC to be granted a marker?

To obtain a marker, an applicant must provide a description of the cartel conduct in sufficient detail to allow the ACCC to confirm that:

- a. no other corporation or individual has applied for immunity or obtained a marker in respect of the cartel, and
- b. the ACCC is not already in possession of evidence that is likely to establish at least one contravention of the CCA (whether civil or criminal), arising from the cartel conduct.

For this reason, it is imperative that an applicant provide a precise definition of the product or service involved as well as the duration of the conduct in question. In some circumstances, the ACCC may require more detailed information regarding the conduct, the product or geographic markets or the other parties involved to determine whether the requested marker is available.

Q19. How long will the marker be valid?

In general, a marker will be valid for a 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 usually need to conduct significant investigations and document review.

The ACCC will discuss timing requirements with the applicant during the marker call.

The ACCC may, at its discretion, extend the period of the marker for a further specified period(s). For example, the ACCC may extend a marker to enable an applicant to provide additional information to support an application for immunity. It is the applicant’s responsibility to seek a marker extension from the ACCC on the contact details listed at Q5.

Q20. Can a marker lapse or be cancelled by the ACCC?

A marker will lapse at the expiry of the time period specified by the ACCC when the marker is granted. However, the ACCC may, at its discretion, extend the time period for a further specified period. It is the applicant's responsibility to seek a marker extension from the ACCC Immunity Hotline on the contact details listed at Q5.

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.

If the applicant has not provided sufficient information to enable the ACCC to determine whether it satisfies the criteria for conditional immunity in the time given (including any marker extension/s granted), the marker will lapse. As noted at Q26, the ACCC will always communicate with a marker holder regarding any gaps in the information provided to the ACCC as part of its proffer.

Where a marker lapses, the same or another party is free to apply for immunity or request a marker in respect of the relevant cartel conduct.

If a second party has already requested a marker and the first-in marker lapses or is withdrawn, the second-in party will be given an opportunity to satisfy the criteria for conditional immunity.

During the marker period, the ACCC may follow up with the marker holder on the progress of their investigations. The ACCC expects that a marker holder will promptly notify the ACCC in circumstances where, following its investigation, the marker holder considers that it will not satisfy the criteria for conditional immunity. Upon the marker holder so notifying the ACCC, the marker will lapse.

The ACCC may cancel a marker after consulting with the marker holder if the ACCC considers that the applicant will be unable to satisfy the requirements of conditional immunity.

Step 2. Proffer stage

Q21. What is a proffer?

After receiving a marker, the applicant must provide the ACCC with a proffer. A proffer is an oral or written statement providing a detailed description of the cartel and may also require the provision of supporting information, documents and witness evidence.

The proffer needs to include the information and evidence that the applicant is able to provide regarding the nature and extent of the cartel conduct.

During the proffer stage, the ACCC may request further information and may ask the party to enable it to interview witnesses in order to have sufficient information upon which to grant conditional immunity. The ACCC may not consider the proffer stage is completed until after it has taken signed statements from relevant witnesses.

Early in the proffer stage, if the ACCC considers that cartel conduct has been disclosed, the applicant will be asked to enter into a cooperation agreement to be eligible for conditional immunity under the Policy. The agreement will set out a timetable of the initial cooperative steps that the applicant agrees to undertake to satisfy its obligations under the Policy. Information regarding cooperation agreements is outlined at Q31 to Q36.

If the information provided in the proffer does not disclose cartel conduct or is otherwise not sufficient to enable the ACCC to make a decision regarding conditional immunity, the ACCC will communicate this to the applicant. If the applicant so requests, the ACCC may extend the marker to enable the applicant to undertake further enquiries and make a supplementary proffer and/or make witnesses available for interview. The additional steps that the applicant will need to take to complete its proffer will be set out in writing from the ACCC, either in the cooperation agreement or in subsequent correspondence from the ACCC.

Subject to the qualifications in Q59 about how the ACCC may use information provided in support of an immunity application, proffers are generally provided on a 'without prejudice' basis by the applicant's legal representative(s).

Q22. When should I make a proffer?

The applicant should make and complete its proffer as soon as possible after receiving a marker, typically within the time period specified by the ACCC when the marker is granted. The ACCC may, at its discretion, extend the agreed marker period for a further specified period(s). It is the applicant's responsibility to seek a marker extension from the ACCC Immunity Hotline on the contact details listed at Q5.

Q23. Can the proffer be provided orally?

Yes. 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 orally without generating any new documents.

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.

If a proffer is made orally, the ACCC may record the oral proffer. Recording an oral proffer enables an accurate record of the proffer to be submitted to the ACCC's legal advisors so that they may provide advice to the ACCC on whether the proffer sets out facts that may constitute a contravention of the CCA.

The administration of the Policy requires discussions between the ACCC and the applicant concerning the alleged conduct and that the applicant's responses to the ACCC's requests under its cooperation obligations be recorded in writing.

Further, the ACCC may decide not to grant conditional immunity until after it has interviewed, and taken signed statements from, relevant witnesses.

Q24. What kind of information should be provided in the proffer?

The proffer needs to contain information and evidence that the applicant is able to provide regarding the nature and extent of the cartel conduct.

The proffer does not need to set out the legal basis on which the conduct may contravene the CCA. That is a matter upon which the ACCC will form its own view after taking legal advice and is ultimately for a Court to decide.

At the proffer stage, the ACCC will not accept a bare outline of the cartel conduct or speculation as to the applicant's role in the cartel. The ACCC requires the details of the applicant's role in the cartel conduct and sufficient information to obtain a clear appreciation of the evidence each witness identified by the applicant can provide about the conduct. Applicants should report as completely and accurately as possible with truthfulness and in a spirit of cooperation.

While the information required will vary from case to case, the type of information generally required at the proffer stage includes:

- a. a description of the parties involved, including company structures
- b. a list of all derivative immunity applicants (including related corporate entities and individuals) that each satisfy the criteria for conditional immunity
- c. information about the relevant product or service, including who the end user is, and the industry
- d. details of the conduct, including time period, geographic scope, how agreements were made, recorded and put into effect, measures taken to conceal the conduct and whether it is ongoing
- e. a description of the impact of the conduct (for example, volume of commerce affected or relative price increase) and any data supporting that assessment

- f. details of the steps taken by the applicant to investigate the conduct, including how the conduct was discovered, a list of witnesses who could provide information about the conduct, a description of records available to the applicant including key words used in searches and the locations searched (both physical and electronic), and an explanation concerning any witnesses and records that are known to exist but are not available at that point in time.

Applicants have a positive obligation to proactively update their proffered information with new and corrected information. This must be done promptly and on an ongoing basis, regardless of whether or not the ACCC has specifically asked for the information.

Q25. What is a ‘related corporate entity’ for the purposes of derivative immunity?

Under the Policy, a ‘related corporate entity’ will be eligible for derivative conditional immunity from ACCC-initiated civil proceedings for all, or part of, the relevant period of the cartel if:

- a. the corporation that qualifies for conditional immunity had a controlling interest in the related corporate entity, or
- b. the related corporate entity was the parent company of (or held a controlling interest in) the corporation that qualifies for conditional immunity, or
- c. both the corporation that qualifies for conditional immunity and the related corporate entity had a common parent company with a controlling interest in both corporations.

Q26. What will happen if the proffer is incomplete?

The ACCC will, in all circumstances, communicate with you regarding any gaps in your proffer. If the ACCC notifies you of any gaps in your proffer, you will be provided an opportunity to complete your proffer.

Q27. Will I be asked to produce witnesses during the ACCC’s consideration of my application for immunity?

Yes. In most cases it will be necessary for the ACCC to interview individuals associated with the applicant (including, but not limited to derivative immunity applicants), who were involved in, or have knowledge of, the cartel to be satisfied that the applicant satisfies the criteria for conditional immunity. Further, the ACCC may not grant conditional immunity until after it has taken statements from relevant witnesses.

Information (including witness evidence) in support of an application for immunity is received on the basis that the ACCC and/or the Office of the Commonwealth Director of Public Prosecutions (CDPP) will not use the information directly as evidence against the applicant or nominated parties for derivative immunity in civil proceedings and/or criminal prosecutions under Division 1 of Part IV of the CCA, or civil proceedings under section 45 of the CCA in respect of the relevant cartel. However, the ACCC and CDPP may use such information against the applicant or nominated parties for derivative immunity in respect of any falsity in the information provided, or to further its investigation. Further details about how the ACCC may use information provided to it is outlined in Q59 to Q60.

Q28. Does an immunity applicant have to admit to engaging in cartel conduct to be eligible for conditional immunity?

Yes. While the immunity applicant may not be able to confirm all details of the cartel conduct when seeking and receiving a marker, before being eligible for conditional immunity, the applicant must admit to engaging in, or having engaged in cartel conduct, either as a principal or in an ancillary capacity, and that the conduct may contravene the CCA. This includes admitting that there was a contract, arrangement or understanding (CAU) (or an attempt to reach a CAU) between the parties in relation to price fixing, market sharing, bid rigging or output restriction. Whether or not this conduct does amount

to a contravention of, or an attempt to contravene, the CCA (including whether any defences apply) is a matter for the Court to decide.

Applicants that have not engaged in cartel conduct have no need for immunity from civil and criminal prosecution and will therefore receive no benefit from the Policy.

A corporation that claims that a CAU to fix prices, rig bids, restrict capacity, or allocate markets might be inferred from its conduct but cannot produce any employees who will admit that the company entered into, or gave effect to, such a CAU will not, in the absence of exceptional circumstances, be regarded as having made a sufficient admission of participation in a cartel to be eligible for immunity.

Q29. When does the ACCC consider a proffer to be complete?

The ACCC considers a proffer to be complete when it has received sufficient information to determine whether a marker holder satisfies the criteria for conditional immunity.

If the information provided is not sufficient to allow the ACCC to make a decision regarding conditional immunity, the ACCC may ask the applicant to undertake further inquiries and to make witnesses available for interview. Further, the ACCC may not consider a proffer stage is completed until after it has taken signed statements from relevant witnesses.

Q30. What happens after a proffer has been provided and found to be complete?

After an assessment of the information provided to the ACCC in the proffer, the ACCC will determine whether the marker holder satisfies the criteria for conditional immunity. If it has satisfied the criteria for conditional immunity, the marker holder will be so advised. If the marker holder wishes to continue with the application to obtain conditional civil immunity, it will be asked whether it wishes to proceed to apply for immunity.

Cooperation agreement

Q31. When will I enter into a cooperation agreement?

Early in the proffer stage, if the ACCC considers that cartel conduct has been disclosed, the applicant (and each derivative immunity applicant) will be asked to enter into a cooperation agreement to be eligible for conditional immunity.

Q32. What is a cooperation agreement?

A cooperation agreement sets out a timetable acceptable to the ACCC of the initial cooperative steps that the applicant agrees to undertake to satisfy its obligations under this Policy, such as the production of information and procurement of witnesses. It will also include agreement by the applicant to comply with additional cooperation requirements set out in writing by the ACCC from time to time.

The ACCC agrees that upon the applicant disclosing information sufficient to satisfy the ACCC that it meets the criteria for conditional immunity (as outlined in the Policy in paragraph 23 for corporations, paragraphs 29 and 32 for derivative immunity applicants, and paragraph 36 for individuals), the applicant will be granted conditional immunity.

A template of a cooperation agreement is available on the ACCC's website.

Q33. Who can sign the cooperation agreement?

The cooperation agreement must be signed by a senior executive of a corporate immunity applicant, and/or by each individual applicant (including derivative immunity applicants).

Absent exceptional circumstances, it will not be sufficient for a legal representative to sign the agreement on behalf of the company or individual. Wherever possible, the applicant should attend the ACCC's office (or another mutually convenient location) to sign the cooperation agreement.

Q34. Do applicants for derivative agreement have to enter into a cooperation agreement?

Yes. Each derivative immunity applicant will be required to enter into a separate cooperation agreement.

Q35. When does the cooperation agreement come into effect?

The cooperation agreement comes into effect once it is signed by both the applicant and the ACCC.

Q36. Is ongoing compliance with the cooperation agreement a requirement of conditional civil and criminal immunity?

Yes. In cases where the ACCC has made a recommendation to the CDPP that conditional criminal immunity be granted, and the CDPP subsequently grants criminal immunity subject to conditions, one of those conditions will be compliance with the cooperation agreement.

Failure to comply with the terms of the cooperation agreement will, absent exceptional circumstances, be considered a breach of the conditions of immunity, and the ACCC may revoke immunity and make a recommendation to the CDPP that the letter of comfort be withdrawn and/or criminal immunity subject to conditions be revoked.

Step 3. Waivers

Q37. What is a waiver?

A waiver is a written authorisation given by the immunity applicant to the ACCC to disclose particular information regarding an immunity application to one or more specified foreign competition regulator(s). The waiver usually covers disclosure of information including the identity of the immunity applicant and information provided by the immunity applicant to the ACCC in connection with the cartel conduct.

Q38. What are the consequences of an applicant refusing to give a waiver to the ACCC?

The ACCC will usually request a waiver in cartel matters involving international conduct to enable communication with regulators in other jurisdictions regarding the nature and progress of their investigations. While the granting of conditional immunity is not dependent on the provision of a waiver(s), an applicant's willingness to cooperate may be called into question if it is unable to give a valid reason for not providing a waiver(s). Below are two examples of situations in which the ACCC will consider a valid reason exists not to provide a waiver.

Example 1:

An immunity applicant in Australia may not be eligible for immunity in other jurisdictions. In those circumstances the ACCC will not require the applicant to give a waiver(s) for those particular jurisdictions. The ACCC will not share information regarding the applicant with those jurisdictions.

Example 2:

An immunity applicant may be compelled by a law enforcement agency or a court of law to maintain confidentiality. In these circumstances the ACCC will not require the applicant to give a waiver(s) for the period that it is required to maintain confidentiality, but will expect the applicant to provide a waiver(s) as soon as possible after that time.

Step 4. Confidentiality

Q39. Can an immunity applicant tell others about its marker request or subsequent immunity application?

No. It is a requirement of conditional immunity that applicants keep immunity applications confidential. Confidentiality helps to ensure that targets of the investigation do not become prematurely aware of the ACCC's investigation. Therefore confidentiality protects the integrity of the ACCC's investigation and ensures that evidence is not destroyed.

Unless consent is first obtained from the ACCC, an immunity applicant must not disclose its application for a marker and subsequent immunity, or any related information, to a third party, other than its legal representatives or regulatory agencies in foreign jurisdictions to which the applicant has made similar applications for immunity or leniency.

The only exception to the requirement to obtain consent prior to disclosure occurs if the immunity applicant is required by law to disclose the information, whether in Australia or elsewhere. An applicant that believes disclosure is required by law must give notice to the ACCC as soon as practicable after becoming aware of the disclosure requirement.

Q40. Will the information provided by me be disclosed to the public?

The ACCC will use its best endeavours to protect any confidential information provided by an immunity applicant, including the identity of the immunity applicant, from being disclosed to third parties (that is, persons who were not participants in the cartel) or published more generally, except:

- a. as required by law,
- b. as necessary in the conduct of civil or criminal proceedings, and
- c. in accordance with section 155AAA, 157B and 157C (protected cartel information provisions) of the CCA.

For more information please see Q59 to Q60.

The ACCC and/or CDPP may be required to discover or disclose information provided to the ACCC under the immunity Policy by an immunity applicant, including the identity of the immunity applicant, to the respondent/s or defendant/s during the course of civil or criminal proceedings.

The ACCC may be able to claim privilege and/or public interest immunity to protect confidential information from disclosure.

Ordinarily the ACCC will give notice to the owner of the confidential information of any Court application for disclosure of that information.

Step 5. Recommendation to CDPP

Q41. Under what circumstances will I need to seek both civil and criminal immunity for cartel conduct?

Criminal sanctions for proscribed forms of cartel conduct commenced on 24 July 2009. A civil prohibition operates in relation to the same forms of cartel conduct.

An application to the ACCC for immunity under the Policy will automatically be considered as an application for both civil and criminal immunity.

In accordance with the [Memorandum of Understanding between the CDPP and the ACCC regarding Serious Cartel Conduct \(MOU\)](#), all applications for immunity under this Policy must be made to the ACCC.

Q42. When does the ACCC make a recommendation to the CDPP to grant criminal immunity?

When the ACCC is of the view that the applicant satisfies the requirements for a grant of conditional immunity, it will, where relevant, make a recommendation to the CDPP that criminal immunity, subject to conditions, be granted to the applicant by the CDPP.

In accordance with the MOU, the ACCC will make a recommendation to the CDPP in respect of serious cartel conduct. The ACCC is more likely to consider conduct it is investigating to be serious cartel conduct if one or more of the factors set out in the MOU are satisfied.

Upon receiving the ACCC's recommendation, the CDPP will exercise independent discretion in deciding whether to grant the applicant criminal immunity subject to conditions.

Where the ACCC advises the CDPP that the applicant meets the criteria set out in Annexure B to the *Prosecution Policy of the Commonwealth*, and the CDPP is so satisfied, as a first step the CDPP will ordinarily provide a letter of comfort to the applicant. Prior to the commencement of any prosecution, the Commonwealth Director of Public Prosecutions (Director) will determine whether to grant an undertaking pursuant to section 9(6D) of the *Director of Public Prosecutions Act 1983* (DPP Act) granting criminal immunity subject to conditions.

Step 6. Conditional immunity

Q43. When will I be granted conditional immunity?

After the proffer stage, if the ACCC is satisfied that the applicant has met the criteria for conditional immunity, including compliance with the cooperation agreement, the ACCC will grant the applicant 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. For further information regarding cooperation agreements please refer to Q31 to Q36.

Generally, the ACCC's letter will include a description of the conduct in relation to which the applicant has been granted conditional immunity and the terms and conditions upon which conditional immunity is granted.

As outlined in Q45, where relevant, a letter of comfort from the CDPP regarding criminal immunity, subject to conditions, will generally be provided to the immunity applicant at the same time as the ACCC grants conditional immunity in relation to civil proceedings.

Q44. When will I be granted criminal immunity, subject to conditions?

As outlined in Q42, when the ACCC is of the view that the applicant satisfies the criteria for conditional immunity, and that the conduct is serious cartel conduct, in accordance with the MOU it will make a recommendation to the CDPP that criminal immunity, subject to conditions, be granted to the applicant by the CDPP.

The CDPP will exercise independent discretion when considering a recommendation by the ACCC. Where the ACCC advises the CDPP that the applicant meets the criteria set out in Annexure B to the *Prosecution Policy of the Commonwealth*, and the CDPP is so satisfied, as a first step the CDPP will ordinarily provide a letter of comfort regarding criminal immunity to the applicant. The letter of comfort will generally be provided to the applicant at the same time as the ACCC grants conditional civil immunity. Prior to the commencement of any prosecution, the Director will determine whether to grant an undertaking pursuant to section 9(6D) of the DPP Act granting criminal immunity subject to conditions.

Q45. What is the CDPP letter of comfort?

The letter of comfort will recognise that the applicant has a marker from the ACCC as the first to apply for immunity for the cartel conduct. The letter will also state that the Director intends to grant an undertaking pursuant to section 9(6D) of the DPP Act to the applicant prior to any prosecution being instituted against a cartel participant provided that the applicant:

- a. maintains eligibility criteria for conditional immunity (as outlined in the Policy in paragraph 23 for corporations, paragraphs 29 and 32 for derivative immunity applicants, and paragraph 36 for individuals), and
- b. enters into and complies with the terms of the cooperation agreement, including by providing full, frank and truthful disclosure, and cooperating fully and expeditiously on a continuing basis throughout the ACCC's investigation and any ensuing litigation.

The letter of comfort from the CDPP will generally be provided to the immunity applicant at the same time as the ACCC grants conditional immunity in relation to civil proceedings.

Prior to the commencement of any prosecution of a participant in the cartel who does not have immunity, the Director will determine whether to grant an undertaking pursuant to section 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.

Q46. When will the ACCC consider a party has engaged in coercion?

Paragraphs 23(c) and 36(d) of the Policy state that to be eligible for immunity a party must not have coerced others to participate in the cartel (for derivative immunity refer to paragraphs 29(c) and 32(c)).

The ACCC will consider the individual circumstances of each cartel. The ACCC will only consider a party ineligible for immunity where there is clear evidence of coercive behaviour.

The ACCC will consider the roles played by each participant and their respective positions within the cartel for the duration of the cartel. In particular, where there is evidence that the party coerced other participants and caused them to be involved in the cartel, the party will not be eligible for immunity.

The ACCC recognises that it may be difficult to decide whether a party has behaved in a coercive manner based on the imperfect information that is available at the immunity application stage. In some circumstances, the ACCC may require the applicant to demonstrate that it has not coerced others into participating in a cartel before conditional immunity is granted. Unless there is clear evidence of a party coercing another party to participate in a cartel, the ACCC is unlikely to consider a party ineligible for immunity on the basis of coercion.

The following examples may provide useful illustrations as to what the ACCC will consider to be coercion. These examples apply equally to individuals.

Example 1:

Company A is a retailer of goods and services supplied by producers B, C and D. Company A holds a near-monopoly market share in the retail market. Companies B, C and D also retail goods and services through other retail channels including ones that they own. Company A seeks an agreement with all of B, C and D that they will not offer goods and services below the price that is offered by A. A threatens to no longer acquire goods and services from any company that does not agree. A, B, C and D enter into this price fixing arrangement.

Company A is likely to be disqualified in this scenario on the basis that it has coerced others to participate in the cartel.

Example 2:

Retailers A, B and C enter into a cartel arrangement, and put it into effect over a period of two years. Retailer A, the market leader, proposed the cartel arrangement and is the most proactive participant. For example, it organises meetings and is the party that is the most aggressive and vocal in the cartel when it comes to raising prices.

The ACCC is unlikely to consider Retailer A to have engaged in coercion in this scenario for the purposes of the Policy.

Example 3:

Companies A and B are of equal size and share approximately 90 per cent of the market. Companies A and B enter into a cartel arrangement to not compete for each other's customers. This arrangement has been continuing for years and, from time to time, each of A and B has pressured the other into continuing to give effect to the cartel arrangement by threatening financial retribution.

In this scenario, given there is information to suggest that both parties have acted in a similar manner from time to time, the ACCC will likely accept an immunity application from either party.

Q47. I was granted conditional immunity but during the course of the investigation it was discovered that I coerced others into participating in the cartel, what will happen?

If there is clear evidence that you have coerced others into participating in the cartel your conditional immunity will be revoked. Depending on all of the circumstances, the ACCC may nevertheless recognise any past cooperation, and any ongoing cooperation you provide under the cooperation section of the Policy (Section H).

Q48. I have not yet ceased my involvement in the cartel conduct, am I still eligible for immunity?

As long as you cease engaging in the conduct when the ACCC requires you to do so, you will be eligible for conditional immunity.

Q49. What is a 'truly corporate act'?

Corporate immunity applicants must use their best endeavours to ensure that all relevant directors, officers, and employees cooperate with the ACCC. The corporation must ensure that its admissions and cooperation are truly corporate acts.

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.

In determining whether admissions and cooperation are a ‘truly corporate act’ the ACCC will have regard to matters such as:

- a. 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,
- b. the number and the significance of the individuals who elect not to cooperate, and
- c. any explanation for the non-cooperation.

Non-cooperating individuals will not be eligible for derivative immunity and proceedings may be brought against them.

Q50. What happens if a witness refuses to cooperate with the ACCC’s investigation?

As noted in Q49, non-cooperating individuals will not be eligible for derivative immunity and proceedings may be brought against them.

Q51. What does the ACCC expect from applicants in providing ‘full, frank and truthful disclosure’ and cooperating ‘fully and expeditiously’?

Immunity is conditional upon full, frank and truthful disclosure and not intentionally withholding any evidence or information in an applicant’s possession or available to them. For example, an applicant must not understate its role or overstate the role of any other cartel participants.

The applicant must cooperate fully and expeditiously at its own expense (unless the ACCC agrees otherwise in writing), on a continuous and proactive basis throughout the ACCC’s investigation and any ensuing Court proceedings. The ACCC will include a schedule for the production of information and documents and the provision of witnesses for interview as part of the cooperation agreement. Failure to comply with this schedule will be considered a breach of the conditions of immunity unless the ACCC agrees to a variation/s or there are extenuating circumstances.

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 full and expeditious cooperation with the ACCC’s investigation. Applicants and relevant employees, directors and officers may be asked to acknowledge their understanding of this.

Requirements of full, frank and truthful disclosure and full and expeditious 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. Preserving, and 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. This includes the preservation of, access to, and assistance with, all IT systems and equipment under the applicant's power or control. This may include conducting physical and electronic searches as directed by the ACCC, including according to particular keywords.
- d. Using its best endeavours to comply with any timetables set down by the ACCC for the provision of information and documents, including those set out in a schedule to the cooperation agreement.
- e. Responding fully, frankly and truthfully to all inquiries of the ACCC.
- f. In relation to corporate applicants, taking all reasonable steps to procure the assistance and 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), and
 - 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.
- g. In relation to individual applicants, being available, upon the request of the ACCC and in a timely fashion to respond to queries and attend interviews.

If the ACCC does not consider that the applicant has met the requirements of full, frank and truthful disclosure and full and expeditious cooperation, it may invoke the revocation procedure set out in paragraphs 74 to 78 of the Policy.

The ACCC will also require an immunity applicant, and each derivative immunity applicant, to certify in writing (in a form acceptable to the ACCC) at the end of the evidence gathering phase of an ACCC investigation that it has fully complied with its obligations under the immunity Policy, including having conducted all reasonable searches and provided all relevant witnesses, information and documents to the ACCC.

It is a serious criminal offence to knowingly provide information to the ACCC or the CDPP which is false or misleading. If an immunity applicant provides information to the ACCC or the CDPP which it knows to be false or misleading it may be prosecuted and will also be in breach of the conditions of its immunity, such that the ACCC will have a basis to revoke its immunity.

Q52. What is meant by the phrase 'cooperate...on a proactive basis'?

The ACCC expects that the applicant will conduct all reasonable searches, provide all relevant information and/or documents, and procure the assistance and cooperation of all relevant witnesses without necessarily being prompted to do so by a request from the ACCC.

Other than exceptional circumstances, this means that the applicant must continue to make records and witnesses available as soon as practicable after conditional civil immunity is granted and a letter of comfort is received regarding criminal immunity subject to conditions. This also includes a positive obligation on the applicant to proactively update proffered information with new and/or corrected information.

Step 7. Final immunity

Q53. When does conditional immunity become final immunity?

Conditional civil immunity will become final immunity at the conclusion of any ensuing proceedings, including appeals, against cartel participants who do not have conditional immunity provided the applicant does not breach any conditions of immunity and maintains eligibility under the Policy. At the conclusion of any such proceedings, the ACCC will orally notify the applicant, and each derivative immunity applicant, that it has final immunity and, if requested, confirm this in writing.

Prior to the commencement of any prosecution against a participant in the cartel who does not have immunity, the Director will determine whether to provide the immunity applicant an undertaking pursuant to section 9(6D) of the DPP Act. This undertaking grants criminal immunity subject to fulfilment of ongoing obligations and conditions. Once these conditions are fulfilled by the immunity applicant, criminal immunity becomes final.

International cartels

Q54. How does the Policy apply to international cartels?

The Policy applies to international cartels that affect Australia in the same way as it applies to purely domestic cartels.

Potential immunity applicants or cooperating parties involved in an international cartel affecting Australia should have regard to the following matters:

- a. an immunity application made, or cooperation provided, to a foreign competition enforcement agency will not be considered an application in Australia under the Policy. This means an immunity applicant or cooperating party should contact the ACCC (see contact details at Q5) at the same time it contacts other jurisdictions, and
- b. the ACCC will actively assess and, if appropriate, investigate and take enforcement action in relation to international cartels that have a connection to, or cause detriment in, Australia.

Q55. Should I request a marker even if I do not sell products or services directly or indirectly into Australia or buy products or services directly or indirectly from Australia?

In circumstances where a party has engaged in cartel conduct outside Australia and that party is:

- a. a body corporate incorporated or carrying on business within Australia, or
- b. an Australian citizen, or
- c. a person ordinarily resident in Australia,

that party should request a marker regardless of whether it sells products or services directly or indirectly into Australia. For example, a party may be found to have engaged in cartel conduct where it agrees not to sell products or services into Australia as part of a bid rigging, supply restriction or market allocation CAU.

Some examples of where the CCA or state competition codes (Codes) may apply to a foreign corporation involved in cartel conduct are as follows:

- a. an Australian entity engages in some or all of its commercial activities on behalf of the foreign corporation in Australia (section 5 of the CCA or section 8(1)(a) of the Codes),
- b. the degree of involvement of the foreign corporation in implementing the cartel agreement in Australia through an Australian entity is sufficient to constitute 'carrying on business within Australia' (section 5 of the CCA or section 8(1)(a) of the Codes),

- c. an Australian entity acts as an agent in Australia for the foreign corporation in implementing a cartel agreement reached overseas,
- d. the foreign corporation is engaging in sufficient business activity in its own right to be 'carrying on business within Australia' (section 5 of the CCA or section 8(1)(a) of the Codes),
- e. the foreign corporation engages in cartel conduct, which is in the course of, or in relation to, international trade or commerce (where section 6 of the CCA or section 8(1)(d) of the Codes extends the operation of those Acts), and/or
- f. the foreign corporation engages in conduct in Australia (for example, through a servant or agent who sends a communication from overseas which is received in Australia).

Q56. What happens if the applicant's records are in a language other than English or if a witness does not effectively communicate in English?

When requested by the ACCC, the applicant is expected to produce professionally translated records and to arrange for a professional interpreter to accompany its witnesses. Unless otherwise specifically agreed, the ACCC will not bear the cost of translation or interpretation.

Q57. Are witnesses required to travel to Australia?

Yes. Witnesses for an applicant must travel to Australia to be interviewed by the ACCC, unless special circumstances justify an alternate arrangement to which the ACCC must agree. Organisations applying for immunity are required to cover their own expenses and the expenses of any and all witnesses who are covered by the grant of immunity.

Request to expand immunity

Q58. What happens if I discover that the cartel conduct is broader than first reported and outside the scope of conditional immunity granted?

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:

- a. request that conditional immunity be expanded, or
- b. make an additional application for immunity.

As outlined in Q5 and Q6, time is of the essence in coming forward and requesting a marker. This also applies in circumstances where an applicant has already been granted immunity, but discovers that the cartel conduct is broader than the scope of the immunity grant, or the applicant discovers an additional, separate cartel. The applicant should immediately notify the ACCC and request a marker for the extended scope or the separate cartel.

Any such request or application will be assessed according to the Policy.

Use of information provided to the ACCC

Q59. How will the ACCC use the information I provide in support of my immunity application?

The ACCC generally uses information provided in support of an immunity application to progress the application and take initial steps in its investigation against other cartel participants.

However in some circumstances, such as when immunity is not granted or is revoked, information provided to the ACCC in support of an immunity application can be used as set out below:

Status	Information use
Conditional immunity granted	<p>The applicant (and any party granted derivative immunity) will be entitled to immunity from civil proceedings and/or criminal prosecution under Division 1 of Part IV of the CCA in respect of the cartel conduct.</p> <p>The ACCC will not use information (including witness evidence) provided by the applicant, directly as evidence in, or indirectly in respect of, civil proceedings against the party under any other provision of the CCA, in respect of the cartel conduct for which immunity was granted.</p>
Conditional immunity not granted (including marker lapse or withdrawal)	<p>The ACCC and/or the CDPP will not use information (including witness evidence) provided by immunity applicants (or applicants for derivative immunity) directly as evidence against the relevant party in civil proceedings and/or criminal prosecutions under Division 1 of Part IV of the CCA, or civil proceedings under section 45 of the CCA.</p> <p>The ACCC may use such information indirectly to further the ACCC's investigation, including to gather evidence that could be used against the applicant, any applicants for derivative immunity, or any other party, in civil proceedings and/or criminal prosecutions under the CCA.</p>
Conditional immunity revoked	<p>The ACCC and/or CDPP may use information (including witness evidence) provided by immunity applicants (or applicants for derivative immunity) against the revoked immunity applicant or derivative immunity applicant in any civil proceedings and/or criminal prosecution for a substantive contravention of the CCA.</p>

In appropriate circumstances, the ACCC and/or CDPP may also use information provided in support of an immunity application against the applicant or nominated parties for derivative immunity in any proceedings in respect of s. 155(5) of the CCA and/or proceedings relating to ss. 137.1, 137.2 or 149.1 of the Criminal Code.

To avoid any doubt, information provided by a marker holder to satisfy the requirements for an application for conditional immunity will be considered by the ACCC to be information provided 'in support of an application for immunity.'

Witness evidence provided in support of an immunity application may be used in litigation against other cartel participants.

Information provided in support of an immunity application may be disclosable to the defence in criminal proceedings against other cartel participants.

Subject to the qualifications above about how the ACCC may use information provided in support of an immunity application, proffers are generally provided on a 'without prejudice' basis by the applicant's legal representative(s).

Q60. How will the ACCC use the information I provide after conditional immunity is granted?

The information provided by immunity applicants and nominated parties for derivative immunity after conditional immunity is granted may be used in civil proceedings and/or criminal prosecutions against other persons. Information provided by applicants and nominated parties for derivative immunity may be shared with the CDPP.

Subject to the exceptions outlined in response to Q59, where conditional immunity is granted such information is received on the basis that the ACCC and/or CDPP will not use the information as evidence in civil proceedings and/or criminal prosecutions against the applicant or nominated parties for derivative immunity in respect of the relevant cartel.

Revocation of immunity

Q61. Can conditional immunity be revoked?

Yes. In some circumstances the ACCC may have reason to believe the applicant has breached conditions of immunity, including by failing to comply with the terms of the cooperation agreement. Often this will be resolved by dialogue between the ACCC and the applicant.

In circumstances where the ACCC's concerns have not been resolved informally, a written caution will be issued to the applicant. The caution will require the applicant to address the ACCC's concerns or explain why the applicant cannot remedy the failure to comply with the conditions of immunity.

Should the ACCC not be satisfied with the applicant's response to the written caution, a further letter will be sent to the applicant requiring an explanation as to why the ACCC should not revoke conditional immunity.

Should the ACCC not be satisfied with the applicant's response to the second letter, the ACCC may then advise that applicant in writing that they are no longer eligible for conditional immunity and that conditional immunity is revoked. The ACCC will also make a recommendation to the CDPP that the letter of comfort be withdrawn and/or criminal immunity subject to conditions be revoked.

Q62. If a corporate applicant has its immunity revoked, and has related corporate entities, directors, officers, and/or employees covered by derivative immunity, will those parties also have their derivative immunity revoked?

Revocation of immunity will affect only the individual or corporation that is not cooperating or that otherwise fails to comply with the requirements for conditional immunity. A party's conditional immunity can be revoked while its cooperating related corporate entities, directors, officers, employees or agents retain their derivative immunity. Likewise, it is possible for a party's derivative immunity to be revoked while the corporation retains its conditional immunity.

Closing an investigation/withdrawing immunity

Q63. What happens if I am granted conditional immunity and the ACCC decides not to pursue the investigation further?

If the ACCC decides not to pursue the matter any further after the applicant has been granted conditional immunity and the ACCC has undertaken investigations into alleged cartel conduct, the ACCC will advise the immunity applicant of its decision. The applicant may then elect to withdraw its application or leave it in place.

Should the immunity application be withdrawn and the ACCC reopens its investigation at a later date, it will then be open to any party to apply for conditional immunity for the relevant conduct.

Should the immunity applicant choose to leave the application in place, the obligations under the Policy will also remain in place—for instance, the party would be required to cooperate if the ACCC decided at a later date to re-open the investigation.

Unless specified, a grant of conditional immunity is ongoing until final immunity is granted or the application is withdrawn or revoked.

How the ACCC may use information provided to it in these circumstances is outlined in Q59 to Q60.

Cooperation under Section H of the Policy

Q64. How does cooperation under Section H of the Policy work?

The ACCC can recognise cooperation under Section H of the Policy in a variety of ways. Parties seeking to cooperate should approach the GM, Cartels Branch directly making reference to section H of this Policy.

Q65. Do I have to meet all of the factors listed in paragraph 93 of the Policy to be a cooperating party?

It is not necessary that all of the factors be met in order for the ACCC to recognise a party's cooperation. The ACCC assesses each case on its merits.

The cooperation section of the Policy (Section H) is flexible and the factors are intended only as an indication of what the ACCC considers relevant when assessing the extent and value of cooperation provided by a party.

Q66. If I cooperate with the ACCC under Section H of the Policy, how is this recognised if criminal proceedings are brought by the CDPP?

The ACCC will, where relevant, make a recommendation to the CDPP as to the extent and value of a party's cooperation and assistance. Generally, any cooperation by the offender with the ACCC or other law enforcement agencies is identified to the Court by evidence from the ACCC (or other relevant agencies) setting out the nature and description of the assistance provided by the offender and the overall value of that cooperation to the ACCC's investigation.

Ultimately, it is a matter for the Court to determine the appropriate sentence to be imposed on a party convicted of engaging in cartel conduct, including the extent of any discount for cooperation.

Q67. If I have coerced any other person/corporation to take part in the cartel conduct will the ACCC recognise the cooperation I provide?

Yes. The cooperation section of the Policy is flexible and the ACCC will assess each case on its merits. Whether a party has coerced others to participate in the cartel will be one factor that the ACCC considers when assessing the value of the cooperation provided.

Amnesty plus

Q68. What is 'amnesty plus'?

If a party is cooperating with the ACCC in relation to one cartel (as it is not eligible for conditional immunity) and discovers a second cartel that is independent of, and unrelated to, the first cartel, and receives conditional immunity for the second cartel, that applicant may seek 'amnesty plus' in respect of the first cartel conduct.

Amnesty plus is a recommendation by the ACCC to the Court for a further reduction in the civil sanctions (including penalty) in relation to the first cartel. If the first cartel is being dealt with as a criminal matter, any cooperation by the offender with the ACCC or other law enforcement agencies is identified to the Court by evidence from the ACCC (or other relevant agencies) setting out the nature and description of the assistance provided by the offender and the overall value of that cooperation to the ACCC's investigation.

A party will be eligible for amnesty plus if it:

- a. is a cooperating party in the first cartel investigation, and
- b. is granted conditional immunity for the second cartel.

The criteria for conditional immunity and the process for recognising cooperation by that party with the ACCC or CDPP contained in the Policy will apply to a party seeking amnesty plus.

Example:

Company A is not the first to disclose an apples cartel to the ACCC and therefore is not eligible for immunity in relation to the apples cartel. However Company A is fully cooperating with the ACCC in relation to the apples cartel.

Company A discovers and is the first party to disclose to the ACCC a different cartel previously unknown to the ACCC. The newly discovered cartel involves oranges.

Company A will receive conditional immunity for the oranges cartel, subject to compliance with the requirements set out in the Policy.

In civil proceedings relating to the apples cartel:

The ACCC will make a recommendation to the Court to reduce the penalty imposed on Company A for its participation in the apples cartel in recognition for its cooperation in the apples cartel. In addition, the ACCC will also make a recommendation to the Court to further reduce the penalty imposed on Company A in the apples cartel in recognition for disclosing and assisting the ACCC in relation to the oranges cartel.

In criminal proceedings relating to the apples cartel:

Company A's assistance to the ACCC's investigations in both the apple and orange cartels will be brought to the attention of the Court.

Other

Q69. I am required to cease involvement in the cartel to be eligible for conditional immunity from the ACCC, but I am concerned that doing so may inadvertently signal to the other cartel participants that I have approached the ACCC. What should I do?

In these circumstances the applicant should immediately notify the ACCC of its concerns.

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.

Q70. I am concerned that securing the cooperation of directors, officers and employees may alert other cartel participants that I have approached the ACCC. What should I do?

In these circumstances the applicant should immediately notify the ACCC of its concerns before taking specific steps to secure the cooperation of relevant individuals. The disclosure of the ACCC's investigation could raise issues regarding confidentiality and have an impact on the ACCC's investigation.

The applicant should only conduct an internal investigation of the cartel conduct and secure the cooperation of potential witnesses in a manner that is consistent with confidentiality obligations under the Policy.



AUSTRALIAN COMPETITION
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