



ACCC immunity and cooperation policy: frequently asked questions

September 2014



This document supplements the ACCC immunity and cooperation policy August 2014 (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:

Marcus Bezzi
Executive General Manager
Competition Enforcement

Telephone: **(02) 9230 3894** (business hours)

Email: **cartelimmunity@accg.gov.au**

If you call the telephone hotline, it will not be adequate to leave a voicemail or other message.

Note:

Amendments to section 45 of the *Competition and Consumer Act 2010* (the CCA) commenced on 6 November 2017, repealing section 45(2).

The ACCC is currently reviewing the *ACCC immunity & cooperation policy for cartel conduct and ACCC immunity & cooperation policy for cartel conduct: frequently asked questions* in light of these amendments.

While these publications are under review, references to **section 45(2)** of the CCA should be read as references to **section 45(1)(a), (b) and (c)** of the CCA.

This position may change once the review of the Immunity Policy and FAQs is finalised. We expect to release revised documents in early 2019.

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Important notice

Please note that this guideline is a summary designed to give you the basic information you need. It does not cover all relevant legislation and general law principles, nor is it a substitute for professional advice.

Moreover, because this guideline avoids legal language wherever possible, it contains generalisations about the application of legislation. Some provisions referred to have exceptions or important qualifications. In most cases the particular circumstances of the conduct need to be taken into account when determining the application of the law to that conduct.

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Summary

This document supplements the ACCC immunity and cooperation policy August 2014 (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. The latest version of the FAQs will be available on the ACCC website. Updates of substance will also be communicated by issue of a media release.

Step 1. Marker

Q1. What is a marker?

A marker is the confirmation given to an immunity applicant that they are 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 them meeting all of the immunity conditions of 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 who is able to satisfy all immunity conditions immediately.

Once a marker is granted, the immunity applicant has a limited amount of time to gather the information necessary to demonstrate that they satisfy the requirements for conditional immunity and present this information to ACCC either in oral or written format (timing is discussed further at Q16). This oral or written statement is known as a "proffer" and is described in more detail in the responses to Q18 to Q26 below.

Q2. 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:**

Marcus Bezzi
Executive General Manager
Competition Enforcement

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

If you call the telephone hotline, it will not be adequate to leave a voicemail or other message.

The Executive General Manager (EGM) 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.

Q3. What if a marker is not available?

If a marker is not available the EGM will advise the applicant as soon as possible following the marker request. The EGM 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 leniency by cooperating in accordance with Section H of the Policy, but they will not be eligible for immunity unless the first-in party ultimately does not qualify for immunity, including by withdrawal of its immunity application or revocation of its immunity.

There may be other circumstances in which a second or subsequent party may qualify for immunity through the cooperation section of the Policy, but these will be rare and exceptional cases. See Q41.

Q4. 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 Q2 above. 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.

Q5. 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 proffer provides insufficient information that a breach of the cartel provisions has occurred, the ACCC will notify the applicant and request withdrawal of the marker.

Q6. 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 Q2 above, the ACCC Infocentre on 1300 302 502 or make an online complaint or enquiry 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 speak to the ACCC on an anonymous basis if you do not feel comfortable providing your details.

Q7. 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. 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 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 rare and exceptional circumstances, offer the second and subsequent individual applicants immunity through section H of the Policy.

Q8. Can I apply for a marker if I have unilaterally attempted, without success, to create a cartel?

No. The Policy does not apply to corporations or individuals who have unilaterally attempted, without success, to get others to engage in cartel conduct. However, if you have been approached by an individual or corporation attempting to create a cartel, you are able to report that conduct to, or if considered necessary seek a marker by contacting, the ACCC Immunity Hotline on the contact details listed at Q2 above.

Q9. 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 the following as if they were corporations: partnerships, unincorporated businesses, government business enterprises and government departments or agencies carrying on a business.

Q10. In what circumstances does the Policy apply?

The Policy applies to 'cartel conduct' in contravention of:

- (a) Division 1 of Part IV of the CCA which prohibits a corporation from making or giving effect to contracts, arrangements or understandings that contain a cartel provision, and/or

(b) section 45(2) of the CCA.

The Policy applies equally to the equivalent provisions in the various state competition codes as it does to the CCA.

For the purposes of the Policy, cartel conduct comprises any of the following forms of conduct 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.

Q11. When is an applicant ‘a party to a cartel’?

The Policy applies to corporations and individuals who have been a party to a cartel (see paragraph 16(a)(i) of the Policy). The ACCC will consider an applicant to be a party to a cartel if the applicant has engaged in cartel conduct, whether as a primary contravener or in an ancillary capacity.

Under Division 1 of Part IV of the CCA, section 44ZZRC extends the meaning of the term “party” by stating that if a body corporate is a party to a contract, arrangement or understanding (otherwise than because of section 44ZZRC), each body corporate related to that body corporate is taken to be a party to that contract, arrangement or understanding. However, a related body corporate being taken to be a party to a contract, arrangement or understanding as a result of the application of this section does not, of itself, mean that the related body corporate has contravened the CCA. The related body corporate must itself have engaged in cartel conduct (whether as a primary contravener or in an ancillary capacity) to be liable under the CCA and thus eligible for immunity under the Policy.

Accordingly, for the purposes of the Policy, the ACCC will consider an applicant to be a party to a cartel if the applicant has provided sufficient information or evidence to suggest that they have been involved in cartel conduct in contravention of the CCA, whether as a primary contravener or in an ancillary capacity.

Q12. Why is it important to be the first person 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, but they will not be eligible for immunity unless the first-in party ultimately does not qualify for immunity.

Maintaining the first-in approach encourages parties to apply for immunity as soon as possible and not wait for their co-offenders 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 qualify for immunity.

Q13. How will I know I am the first person to apply for immunity?

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

Q14. 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.

Q15. 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 no other corporation or individual 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 reasonable grounds to institute proceedings in relation to conduct arising from the cartel.

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.

Q16. How long will the marker be valid for?

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.

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. 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 Q2 above.

Q17. Can a marker lapse or be cancelled by the ACCC?

The marker will lapse at the expiry of the time period advised to the applicant during the marker call. 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 Q2 above.

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.

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.

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.

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, following their investigation, the marker holder considers that it will not satisfy the conditions for conditional immunity. Upon the marker holder so notifying the ACCC, the marker will lapse.

The ACCC will cancel a marker if the applicant fails to meet the requirements of conditional immunity.

Step 2. Proffer

Q18. What is a proffer?

After receiving a marker, the applicant must provide the ACCC with a statement known as a proffer.

The proffer needs to contain the information and evidence that the applicant is able to provide from their internal investigation regarding the nature and extent of the cartel conduct. Proffers are generally provided on a "without prejudice" basis by the applicant's legal representative(s).

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 constitute a contravention of the CCA.

On the basis of the information provided to the ACCC in the proffer, the ACCC will determine whether the marker holder satisfies the criteria for a grant of conditional immunity. If they have satisfied the

criteria for conditional immunity, a marker holder will be so advised and will be asked whether they wish to apply for immunity.

If the information provided is not sufficient to allow the ACCC to make a decision regarding conditional immunity, the ACCC may extend the marker to enable the applicant to undertake further enquiries and make a supplementary proffer.

If a marker holder, having been advised that they have provided sufficient information and evidence to satisfy the criteria for a grant of conditional immunity, applies for immunity, they will be advised in writing that they have been granted conditional immunity.

Q19. 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 agreed during the marker call. However, the ACCC may, at its discretion, extend the agreed marker 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 Q2 above.

Q20. Does the proffer have to be provided in writing?

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.

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 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 their cooperation obligations be recorded in writing.

Q21. What kind of information should be provided in the proffer?

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

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.

Applicants have a positive obligation to update their proffered information as they become aware of either new or corrected information. This must be done promptly and on an on-going basis, regardless of whether or not the ACCC has specifically asked for the information.

Q22. 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.

Q23. Will I be asked to produce witnesses during the ACCC's consideration of my application for immunity?

Yes. It may be necessary for the ACCC to speak with individuals involved in the cartel to be satisfied that the applicant meets the requirements for conditional immunity. Information in support of an application for immunity is received on the basis that the ACCC or the 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. However, the ACCC will be

entitled to use such information against the applicant or nominated parties for derivative immunity for falsity. For more information please see Q50–52.

Q24. Does an immunity applicant have to admit to being a party to a cartel to be eligible for conditional immunity?

Yes. While the immunity applicant may not be able to confirm that it contravened the law at the point in time of seeking and receiving a marker, before being eligible for conditional immunity, the applicant should be in a position to admit to being a party to a cartel, either as a principal or in an ancillary capacity. Whether or not this conduct amounts to a contravention of the CCA is a matter for the Court to decide.

Applicants that were not a party to a cartel have no need to receive immunity from civil and criminal prosecution and will therefore receive no benefit from the Policy.

The ACCC may also insist on interviews with key employees of a corporate applicant who were involved in the cartel conduct before issuing the conditional immunity letter.

Information in support of an application for immunity is received on the basis that the ACCC or the Office of the Commonwealth Director of Public Prosecutions (CDPP) will not use the information as evidence in proceedings against the applicant in respect of any civil proceedings or prosecution relating to the cartel. However, the ACCC will be entitled to use such information against the applicant for falsity. For more information please see Q50-Q52.

A corporation that claims that an agreement 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 contract, arrangement or understanding 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.

Q25. 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 requirements for a grant of 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.

Q26. 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 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.

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.

Step 3. Waivers

Q27. What is a waiver?

A waiver is a written authorisation given by the immunity applicant to the ACCC to disclose particular information regarding the immunity application to a 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.

Q28. 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).

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 they are required to maintain confidentiality, but will expect the applicant to provide a waiver(s) as soon as possible after that time.

Step 4. Confidentiality

Q29. Can an immunity applicant tell others about its marker request or subsequent immunity application?

As set out in paragraph 52 of the Policy, the ACCC requires that applicants keep immunity applications confidential. Confidentiality helps to ensure that the other targets of the investigation do not become prematurely aware of the ACCC's investigation. Hence 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 shall not disclose its application for a marker and subsequent immunity, or any related information, to a third party, other than its counsel or regulatory agencies in foreign jurisdictions to which the applicant has made similar applications for immunity or leniency those jurisdictions.

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 that disclosure is required by law must give notice to the ACCC as soon as practicable after becoming aware of the disclosure requirement.

Q30. 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, except as required by law and in accordance with section 155AAA, 157B and 157C (protected cartel information provisions) of the CCA. For more information please see Q50-Q52.

In relation to criminal matters disclosure obligations may require the ACCC and/or the CDPP to disclose such information.

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

Q31. Under what circumstances will I need to seek both civil and criminal immunity for cartel conduct?

In 2009 Parliament passed the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009*, which amended the CCA to provide criminal sanctions for cartel conduct. The majority of these amendments commenced on 24 July 2009, including criminal sanctions for proscribed forms of cartel conduct. A civil prohibition operates in relation to the same forms of cartel conduct.

If an application to the ACCC for immunity includes cartel conduct that occurred on or after 24 July 2009, then this application will automatically be considered as an application for both civil and criminal immunity.

Immunity applications for cartel conduct that only occurred prior to 24 July 2009 and did not continue on or after this date will not require consideration regarding criminal immunity as criminal sanctions for cartel conduct were not in operation prior to this date.

Q32. 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.

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 CDPP considers that the applicant meets the criteria set out in Annexure B to the Prosecution Policy of the Commonwealth, as a first step it will ordinarily provide a letter of comfort to the applicant. Prior to the commencement of any prosecution, the Director of Public Prosecutions (Director) will 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

Q33. When will I be granted conditional immunity?

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.

Generally speaking, 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 Q35 below, 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.

Q34. When will I be granted criminal immunity, subject to conditions?

As outlined in Q32 above, 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.

The CDPP will exercise an independent discretion when considering a recommendation by the ACCC. Where the CDPP considers that the applicant meets the criteria set out in Annexure B to the Prosecution Policy of the Commonwealth, as a first step it will ordinarily provide a letter of comfort regarding criminal immunity to the applicant. Prior to the commencement of any prosecution, the Director will grant an undertaking pursuant to section 9(6D) of the DPP Act granting criminal immunity subject to conditions.

Q35. 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) maintain eligibility criteria for conditional immunity (as outlined in the Policy in paragraph 16 for corporations and paragraph 28 for individuals)
- (b) provide full, frank and truthful disclosure, and cooperate fully and expeditiously on a continuing basis throughout the ACCC's investigation and any ensuing litigation, and
- (c) maintain confidentiality regarding its status as an immunity applicant and details of the investigation and any ensuing litigation unless otherwise required by law or with the written consent of the ACCC.

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, the Director will grant an undertaking pursuant to section 9(6D) of the DPP Act that, subject to fulfilment of on-going obligations and conditions, the applicant will not be prosecuted for the cartel offence for which immunity is sought.

Q36. When will the ACCC consider a party has engaged in coercion?

Paragraphs 16(a)(iv) and 28(a)(iv) of the Policy state that to qualify for immunity a party must not have coerced others to participate in the cartel (for derivative immunity refer to paragraphs 21(e) and 24(c)).

The ACCC will consider the individual circumstances of each cartel. The ACCC will disqualify a party only 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 qualify 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 disqualify the applicant from conditional 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 negotiates agreements between itself, 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 the 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. 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.

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 cartel arrangements 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 arrangements 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 application from either party.

Q37. 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 on-going cooperation you provide.

Q38. I have not yet ceased my involvement in the cartel conduct, am I still eligible for immunity?

As long as an applicant ceases engaging in the conduct when the ACCC requires it to do so, the applicant will be eligible for conditional immunity.

Q39. What is a 'truly corporate act'?

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.

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.

Q40. What happens if a witness refuses to cooperate with the ACCC's investigation?

As noted in Q39 above, non-cooperating individuals will not be eligible for derivative immunity and proceedings may be brought against them.

Q41. How does civil immunity under the cooperation section of the Policy work?

In rare and exceptional circumstances, the ACCC may ensure a cooperating party's civil immunity by not commencing civil suit against the individual.

Applications for criminal immunity will be determined by the Director in accordance with Chapter 6 of the Prosecution Policy of the Commonwealth, and not in accordance with Annexure B. Paragraph 6.6 of the *Prosecution Policy of the Commonwealth* provides that a party will only be given an undertaking under the DPP Act if the evidence that the party can give "is considered necessary to secure the conviction of the defendant or is essential to fully disclose the nature and scope of the offending and that evidence is not available from other sources" and the party "can reasonably be regarded as significantly less culpable than the defendant". The CDPP will have regard to any recommendation made by the ACCC relating to a party's application for such immunity.

Q42. 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 their own expense (unless the ACCC agrees otherwise in writing), on a continuous basis throughout the ACCC's investigation and any ensuing court proceedings.

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) 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 on-going, 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.

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 60 to 63 of the Policy.

Q43. How soon do witnesses and records need to be made available after immunity is granted?

In addition to the material provided for the purposes of its/his/her immunity application, the immunity applicant is required to provide complete, timely and on-going cooperation to the ACCC, at its own expense, throughout the ACCC's investigation and any subsequent court proceedings. Other than exceptional circumstances, this means that the applicant must 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.

Step 7. Final immunity

Q44. When does conditional immunity become final immunity?

Conditional civil immunity will become final immunity at the conclusion of any ensuing proceedings provided the applicant does not breach any conditions of immunity and maintains eligibility under the Policy.

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

International cartels

Q45. 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 Q2 above) at the same time it contacts other jurisdictions, and
- (b) the ACCC will actively assess and, if appropriate, investigate and take enforcement action against international cartels that have a connection to, or cause detriment in, Australia.

Q46. 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 or market allocation contract, arrangement or understanding.

Some examples of where the CCA or Competition Codes may apply to foreign corporations involved in cartel conduct are as follows:

- (a) An Australian entity engages in some or all of its commercial activities on behalf of a foreign corporation in Australia (section 5 of the CCA or section 8(1)(a) of the Codes)
- (b) The degree of involvement of a foreign corporation in implementing the cartel agreement in Australia through an Australia 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 a foreign corporation in implementing a cartel agreement reached overseas;
- (d) A 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) A 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) A 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).

Q47. 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 where necessary. The ACCC will not bear the cost of translation or interpretation.

Q48. 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

Q49. 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 their conditional immunity be expanded, or
- (b) make an additional application for immunity.

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

Use of information provided to the ACCC

Q50. How will the ACCC use the information I provide in support of my immunity application?

The ACCC uses information provided in support of an immunity application to progress the application and take initial steps in its investigation against other cartel participants. Information in support of an application for immunity is received on the basis that the ACCC or CDPP will not use the information as evidence in proceedings against the applicant or nominated parties for derivative immunity in respect of any civil proceedings or prosecution relating to the cartel. However, the ACCC will be entitled to use such information 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.'

Q51. 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 Q52 below, 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.

Q52. Under what circumstances can the ACCC use the information I provide (after conditional immunity is granted) in civil or criminal proceedings against me?

If an applicant fails to comply with the conditions set out in its grant of conditional immunity and conditional immunity is subsequently revoked, the ACCC and/or CDPP may use such information against the immunity applicant (and any related corporate entities and any directors, officers or employees of the applicant whose immunity has also been revoked) in any:

- (a) civil and/or criminal proceedings for a substantive contravention of the CCA, and/or
- (b) 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.

Revocation of immunity

Q53. Can conditional immunity be revoked?

Yes. In some circumstances the ACCC may have reason to believe the applicant has breached conditions of immunity. 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 request that the applicant remedy the ACCC's concerns or explain why the applicant cannot remedy the ACCC's concerns.

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 withdraw conditional immunity.

Should the ACCC not be satisfied with the applicant's response to the second letter, the ACCC may then advise that person in writing that they no longer qualify for conditional immunity. 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.

Q54. 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

Q55. What happens if I am granted a marker and the ACCC decides not to pursue the investigation further?

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.

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 not to withdraw the immunity application the 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.

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

The use of information provided to the ACCC is outlined in Q50–52 above.

Cooperation

Q56. Do I have to meet all of the factors listed in paragraph 77 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 is flexible and that 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.

Q57. 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.

Amnesty plus

Q58. What is Amnesty plus?

If a party is cooperating with the ACCC in relation to one cartel and discovers a second cartel that is independent 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, the CDPP will advise the court of the full extent of the party’s cooperation so that it will be taken into account for sentencing purposes.

A party will be eligible for amnesty plus if it:

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

The criteria for 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 does not qualify for immunity for the apples cartel. However Company A is fully cooperating with the ACCC in relation to the apples cartel.

Company A discovers and discloses 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:

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

In criminal proceedings:

The CDPP will bring Company A’s assistance to the ACCC’s investigations in both the apple and orange cartels to the attention of the Court.

Other

Q59. 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 on-going 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.

Q60. 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?

The applicant should 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. At the earliest opportunity, and before taking specific steps, the applicant should raise any concerns with the ACCC regarding confidentiality and the possible impact this could have on the ACCC's investigation.