



International
Competition
Network

**ANTI-CARTEL
ENFORCEMENT
TEMPLATE**

**CARTELS WORKING GROUP
Subgroup 2: Enforcement Techniques**

**Australia
15 December 2015**

ICN anti-cartel enforcement template

IMPORTANT NOTES:

This template is intended to provide information for the ICN member competition agencies about each other's legislation concerning (hardcore) cartels. At the same time the template supplies information for businesses participating in cartel activities about the rules applicable to them; moreover, it enables businesses which suffer from cartel activity to get information about the possibilities of lodging a complaint in one or more jurisdictions.

Reading the template is not a substitute for consulting the referenced statutes and regulations. This template should be a starting point only.

1. Information on the law relating to cartels

A. Law(s) covering cartels:

Australia is a federation with three tiers of government (national, state/territory and local), all of which have the capacity to regulate.

The principal law covering cartels in Australia is the *Competition and Consumer Act 2010 (CCA)*. The CCA prohibits certain anti-competitive contracts, arrangements and understandings (**CAU**) between competitors who can be corporations or individuals.

Cartel conduct is prohibited by Part IV of the CCA and includes these four forms of activity:

- price fixing, when competitors agree on a pricing structure rather than competing against each other
- sharing markets, when competitors agree to divide a market so participants are sheltered from competition
- rigging bids, when participants communicate before lodging their bids and agree among themselves who will win and at what price
- controlling the output or limiting the amount of goods and services available to buyers.

Division 1 of Part IV of the CCA sets out parallel offences and civil penalty provisions relating to cartel conduct.

Sections 44ZZRF, 44ZZRG – Criminal offences of ‘Making’, ‘Giving effect’ to a CAU with a cartel provision.

Sections 44ZZRJ, 44ZZRK – Civil prohibition of ‘Making’, ‘Giving effect’ to a CAU with a cartel provision.

Division 1A of Part IV of the CCA prohibits certain forms of price signalling (since June 2012). At present these laws only apply to the banking sector in relation to taking deposits and making loans, but they may be extended by regulation in the future to other sectors of the economy.

Division 2 of Part IV contains other prohibitions, including section 45 which prohibits a CAU that contains an ‘exclusionary provision’ as defined in section 4D of the CCA, or provisions that have the purpose, effect or likely effect of substantially lessening competition.

The abovementioned provisions are available at:

http://www.comlaw.gov.au/Details/C2012C00490/Html/Volume_1#_Toc327279083

This information is in English.

In addition to the CCA (which is a national law) each state/territory in Australia has enacted a Competition Code. The Competition Codes have the same provisions covering cartel as those in the CCA. The Competition Codes apply to cartel conduct in circumstances where Australia’s national government does not have jurisdiction on account of constitutional limitations. They were implemented in 1995 as part of Australia’s National Competition Policy.

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| | <p>For an example of a state Competition Code, that of New South Wales can be viewed in English at:</p> <p>http://www5.austlii.edu.au/au/legis/nsw/consol_act/cprswa1995464/</p> |
| <p>B. Implementing regulation(s):</p> | <p>With respect to the price signalling provisions in Part IV Division 1A of the CCA, implementing regulations can be found here:</p> <p>http://www.austlii.edu.au/au/legis/cth/num_reg/cacar20121n90o2012546/sch1.html</p> <p>With respect to the Competition Codes referred to in question 1A above, implementing regulations for the New South Wales Competition Code can be found in English here:</p> <p>http://www5.austlii.edu.au/au/legis/nsw/consol_act/cprswa1995464/</p> |
| <p>C. Interpretative guideline(s):</p> | <p>General information about cartels is available at:</p> <p>http://www.accc.gov.au/business/anti-competitive-behaviour/cartels</p> <p>General information about anti-competitive agreements is available at:</p> <p>https://www.accc.gov.au/business/anti-competitive-behaviour/anti-competitive-agreements</p> <p>The ACCC's Immunity and Cooperation Policy for cartel conduct (updated in 2014) is available at:</p> <p>http://www.accc.gov.au/publications/accc-immunity-cooperation-policy-for-cartel-conduct</p> |

D. Other relevant materials:

General information about cartels is available at:<http://www.accc.gov.au/business/anti-competitive-behaviour/cartels>

A range of general information about cartels is publicly available on the ACCC's website: <http://www.accc.gov.au>. Relevant materials released at the time of the introduction of criminal sanctions for cartel conduct include:

Cartels: Deterrence and Detection – A guide for government procurement officers
<http://www.accc.gov.au/publications/cartels-deterrence-detection-a-guide-for-government-procurement-officers>

Cartels: What you need to know – A guide for business
<http://www.accc.gov.au/publications/cartels-what-you-need-to-know-a-guide-for-business>

Cartel conduct – How it affects you and your business
<http://www.accc.gov.au/publications/cartel-conduct-how-it-affects-you-and-your-business>

The Marker – the ACCC's short fiction film designed to engage people at all levels of business about what cartel conduct involves and the devastating impact that cartels can have on participants
<http://www.accc.gov.au/publications/cartel-the-marker-dvd>

In July 2009, the ACCC entered a memorandum of understanding (**MOU**) with the Commonwealth Director of Public Prosecutions (**CDPP**) outlining the respective roles and responsibilities of each agency in relation to serious cartel conduct. A copy of the MOU (renewed in 2014) is available at: <https://www.cdpp.gov.au/sites/g/files/net391/f/MR-20140910-MOU-Serious-Cartel-Conduct.pdf>

In December 2011, the ACCC entered a MOU with the South Australian State Government detailing strategies to combat cartel conduct in the State. A copy of the media release is available at: <http://www.accc.gov.au/media-release/accc-and-sa-government-to-combat-cartels>

This material is available in English.

2. Scope and nature of prohibition on cartels

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| <p>A. Does your law or case law define the term “cartel”?</p> <p>If not, please indicate the term you use instead.</p> | <p>The term ‘cartel’ is not defined by the legislation.</p> <p>The term ‘cartel provision’ is defined in s44ZZRD of the CCA as a provision in a CAU that either has:</p> <ul style="list-style-type: none"> • the purpose or effect of directly or indirectly: <ul style="list-style-type: none"> ○ Fixing, controlling or maintaining prices (price fixing) ○ Preventing, restricting or limiting production, capacity or supply (output restrictions) ○ Allocating customers, supplier or geographical areas (market sharing), or ○ Rigging bids by parties that are, or would otherwise be, in competition with each other (bid rigging). <p>The CCA also prohibits CAUs that are likely to substantially lessen competition in a market, even if that conduct does not meet the stricter definitions set out above (see section 45 of the CCA).</p> |
| <p>B. Does your legislation or case law distinguish between very serious cartel behaviour (“hardcore cartels” – e.g.: price fixing, market sharing, bid rigging or production or sales quotas) and other types of “cartels”?</p> | <p>Yes. In 2009 the Parliament of Australia revised the <i>Trade Practices Act 1974 (TPA)</i> (now known as the CCA) to target cartels based on the OECD’s 1998 recommendation regarding hard core cartels. Both the criminal cartel offence and civil prohibition are centered upon the existence of a “cartel provision”; a provision relating to price fixing, output restrictions, market sharing or bid rigging between competitors.</p> <p>Some provisions that had traditionally addressed cartel conduct, such as the prohibition of exclusionary provisions by agreements affecting competition, were retained as a backstop for the new cartel regime primarily because the cartel provisions do not capture the same breadth of conduct. Exclusionary provisions prohibited by section 45 and price signalling prohibited by Part IV Division 1A (applies to the banking sector only) are civil contraventions. Price signalling conducted in private is prohibited on a <i>per se</i> basis; whereas public price signalling is subjected to a competition test.</p> |
| <p>C. Scope of the prohibition of hardcore cartels:</p> | <p>Certain exceptions exist to the new cartel regime (these are contained in Subdivision D of Division 1 of the CCA). Broadly, these exceptions relate to:</p> <ul style="list-style-type: none"> • conduct subject to a collective bargaining notice • conduct subject to authorisation (that is, where the public benefit of the cartel conduct outweighs any public detriment) • joint ventures • agreements between related bodies corporate, and • collective acquisition of goods or services. <p>More information is available on the ACCC website at: http://www.accc.gov.au/business/anti-competitive-behaviour</p> |

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| <p>D. Is participation in a hardcore cartel illegal per se?</p> | <p>Yes, under the CCA it is per se illegal to make or give effect to a CAU containing a cartel provision. Breach of these per se provisions attracts criminal and/or civil liability.</p> |
| <p>E. Is participation in a hardcore cartel a civil or administrative or criminal offence, or a combination of these?</p> | <p>The CCA has both civil and criminal prohibitions against cartel conduct. The civil cartel prohibition and the criminal cartel offence are centered upon the existence of a cartel provision within a CAU.</p> <p>The law provides a number of additional requirements in prosecuting the criminal cartel offence, including the need to:</p> <ol style="list-style-type: none"> 1. Establish certain fault elements under the Criminal Code (in the <i>Criminal Code Act 1995</i>, a copy of which is available at: http://www.comlaw.gov.au) <p>In relation to the offence of making a CAU containing a cartel provision, it will be necessary to establish that a corporation intended to enter into a CAU and that it knew or believed the CAU contained a cartel provision.</p> <ol style="list-style-type: none"> 2. Prove the offence beyond reasonable doubt. 3. Obtain a unanimous verdict of the jury. <p>The definition of 'cartel provision' establishes four forms of cartel conduct:</p> <ul style="list-style-type: none"> • price fixing, when competitors agree on a pricing structure rather than competing against each other • sharing markets, when competitors agree to divide a market so participants are sheltered from competition • rigging bids, when participants communicate before lodging their bids and agree among themselves who will win and at what price • controlling the output or limiting the amount of goods and services available to buyers. <p>The definition of cartel provision also requires at least two of the parties to the cartel agreement to be businesses that are, or would be but for the CAU, in competition with each other for the supply of goods or services.</p> <p>A company will have contravened the civil prohibition if it makes, or attempts to make, a CAU containing a cartel provision with its competitor, or if it gives effect to a CAU containing a cartel provision. Proceedings may also be taken against an individual where he or she is involved in the cartel conduct.</p> <p>The element that distinguishes the criminal cartel offence from the civil prohibition is the need to establish certain fault elements under the Criminal Code. It is necessary to establish that an individual or corporation intended to enter into a CAU and that she/he or it knew or believed the CAU contained a cartel provision.</p> <p>It is necessary to establish that an individual or corporation knew or believed a CAU contained a cartel provision and that she, he or it intended to give effect to that cartel provision.</p> |

Suspected serious cartels are investigated by a specialist team at the ACCC and may be pursued either through civil or criminal means. The ACCC has developed factors concerning what amounts to a serious cartel, with a view to ensuring that serious cartel conduct is pursued criminally. The factors are:

- whether the conduct was longstanding or had, or could have had, a significant impact on the market in which it occurred
- whether the conduct caused, or could have caused, significant detriment to the public or a class of the public, or significant loss or damage to one or more customers of the alleged participants
- whether one or more of the alleged participants has previously been found by a court to have participated in, or has admitted to participating in, civil or criminal cartel conduct
- whether the value of the affected commerce exceeded or would have exceeded \$1 million within a 12-month period (that is, the combined value for all cartel participants of the specific line of commerce affected by the cartel would exceed \$1 million within a 12-month period)
- whether in the case of bid rigging, the value of the bid or series of bids exceeded \$1 million within a 12-month period.

Further information can be found in English at <http://www.accc.gov.au/system/files/Cartels%20What%20you%20need%20to%20know%20-%20a%20guide%20for%20business.pdf> (page 14).

3. Investigating institution(s)

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| <p>A. Name of the agency, which investigates cartels:</p> | <p>The Australian Competition and Consumer Commission (ACCC) is the federal agency responsible for investigating allegations of cartel conduct in Australia.</p> |
| <p>B. Contact details of the agency:</p> | <p>Australian Competition and Consumer Commission PO Box 3131 CANBERRA ACT AUSTRALIA 2601 Ph: +61 2 6243 1111; Fax: +61 2 6243 1199 http://www.accc.gov.au/contact-us/contact-the-accc</p> <p>This information is in English. Some materials on the ACCC's website are available in other languages including: Arabic, Chinese, Dari, Dinka, Farsi, Greek, Italian, Khmer, Korean, Serbian, Thai, Turkish, and Vietnamese.</p> |
| <p>C. Information point for potential complainants:</p> | <p>Information about how to make a complaint, including reporting a cartel or applying for immunity, is available on the ACCC's website at: http://www.accc.gov.au/content/index.phtml/itemId/54217</p> |
| <p>D. Contact point where complaints can be lodged:</p> | <p>Complaints may be lodged by telephone, online, in writing or in person via the contact details at http://www.accc.gov.au/contact-us/contact-the-accc</p> <p>Cartel immunity applicants can apply for immunity by contacting: Marcus Bezzi Executive General Manager, Competition Enforcement Phone: +61 2 9230 3894; cartelimmunity@accc.gov.au</p> |
| <p>E. Are there other authorities which may assist the investigating agency? If yes, please name the authorities and the type of assistance they provide.</p> | <p>The Australian Federal Police (AFP) and the CDPP may work with the ACCC during a cartel investigation.</p> <p>The AFP may provide assistance to the ACCC in both civil and criminal investigations. The AFP and ACCC may conduct a joint investigation into potential criminal cartel conduct. Any real time telecommunications interceptions used during a cartel investigation are conducted by the AFP on the ACCC's behalf.</p> <p>The CDPP is responsible for prosecuting offenses against Commonwealth law, including the cartel offences, in accordance with the Prosecution Policy of the Commonwealth.</p> <p>The ACCC's MOU with the CDPP regarding serious cartel conduct (referred to above) is available at: https://www.cdpp.gov.au/sites/g/files/net391/f/MR-20140910-MOU-Serious-Cartel-Conduct.pdf</p> |

4. Decision-making institution(s) [to be filled in only if this is different from the investigating agency]

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| <p>A. Name of the agency making decisions in cartel cases:</p> | <p>The ACCC does not have the power to make a decision as to whether cartel conduct contravenes the CCA. The ACCC must commence proceedings in the Federal Court of Australia alleging that a business or individual has contravened the law. The Federal Court of Australia is responsible for hearing these proceedings, determining whether the law has been contravened and the remedy that should be imposed. Court settlements, judgments and the court's associated reasoning are mostly made publicly available.</p> <p>In a criminal prosecution, a case is taken by the CDPP. It can be taken either in the Federal Court or another Court with jurisdiction such as state Supreme Courts.</p> |
| <p>B. Contact details of the agency:</p> | <p>The Federal Court of Australia's website including contact details is: http://www.fedcourt.gov.au/.</p> <p>This website is in English; however, translation services are available.</p> |
| <p>C. Contact point for questions and consultations:</p> | <p>The ACCC should be the first contact point for questions about the decision-making in process cartel cases: http://acc.gov.au/ and http://www.acc.gov.au/contact-us/contact-the-acc</p> |
| <p>D. Describe the role of the investigating agency in the process leading to the sanctioning of the cartel conduct.</p> | <p>As described above, the ACCC investigates and litigates anti-competitive conduct under the civil contraventions of the CCA.</p> <p>While the ACCC is responsible for investigating criminal cartel matters and referring such matters to the CDPP for prosecution, it is the CDPP that is responsible for prosecuting cartel offences.</p> <p>The respective roles and responsibilities of the ACCC and CDPP in relation to possible criminal prosecution of cartel matters are outlined in the memorandum of understanding between the ACCC and CDPP. This MOU can be found via the following link: https://www.cdpp.gov.au/sites/g/files/net391/f/MR-20140910-MOU-Serious-Cartel-Conduct.pdf</p> <p>The CDPP's website is: http://www.cdpp.gov.au/. This website is in English.</p> |
| <p>E. What is the role of the investigating agency if cartel cases belong under criminal proceedings?</p> | <p>The ACCC is responsible for investigating cartel conduct and referral of criminal cartel conduct to the CDPP for consideration for prosecution. The CDPP is responsible for prosecuting the criminal cartel offence before the courts.</p> |

5. Handling complaints and initiation of proceedings

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| <p>A. Basis for initiating investigations in cartel cases:</p> | <p>Information received from market participants, market intelligence, information exchange between regulators and applications for immunity may trigger a cartel investigation by the ACCC.</p> |
| <p>B. Are complaints required to be made in a specific form (e.g. by phone, in writing, on a form, etc.)?</p> | <p>Information may be provided or complaints made to the ACCC by telephone, online, in writing, by email, by facsimile or in person. There is no specific form. However, there are specific procedures for making an application for leniency (see section 6 below).</p> |
| <p>C. Legal requirements for lodging a complaint against a cartel:</p> | <p>There is no requirement for a complainant to have any particular standing. Anyone can make a complaint about an alleged cartel.</p> <p>There is no requirement for a cartel investigation to be instigated through a complaint.</p> |
| <p>D. Is the investigating agency obliged to take action on each complaint that it receives or does it have discretion in this respect?</p> | <p>The ACCC exercises its discretion to direct resources to the investigation and resolution of matters that provide the greatest overall benefit for competition and consumers.</p> <p>The ACCC publication <i>Compliance and Enforcement Policy</i> sets out the principles it has adopted to achieve compliance with the CCA, including a statement of priorities. Under this policy cartel conduct is identified as being so detrimental to consumer welfare and the competitive process that the ACCC will always regard it as a priority.</p> <p>When dealing with international cartels, the ACCC will focus on pursuing cartels that have a connection to, or cause detriment in, Australia; that is, cartels that involve Australians, Australian businesses or entities carrying on business in Australia.</p> <p>The Compliance and Enforcement Policy (reviewed annually) can be viewed here: http://www.accc.gov.au/publications/compliance-and-enforcement-policy</p> <p>This information is in English.</p> |
| <p>E. If the agency intends not to pursue a complaint, is it required to adopt a decision addressed to the complainant explaining its reasons?</p> | <p>The ACCC is not required to provide a formal or informal reason when it chooses not to pursue a complaint or an investigation. The ACCC Service Charter sets out what the Australian public can expect of the ACCC in the performance of its regulatory function http://www.accc.gov.au/about-us/australian-competition-consumer-commission/service-charter.</p> |

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| F. Is there a time limit counted from the date of receipt of a complaint by the competition agency for taking the decision on whether to investigate or reject it? | <p>There is no time limit on the ACCC acting on complaints or completing investigations.</p> <p>There are legislative time limits on the ACCC seeking civil pecuniary penalties for breaches of the CCA (within six years after the contravention, per section 77 of the CCA).</p> |
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6. Leniency policy

A. What is the official name of your leniency policy)?

The official name of the ACCC's leniency policy is the "ACCC *Immunity and Cooperation Policy for Cartel Conduct*". The ACCC will grant civil immunity in accordance with this policy.

The ACCC uses the term "immunity" instead of leniency to describe upfront immunity from prosecution. Leniency refers to the credit that may be given for cooperating parties who do not qualify for immunity.

The Immunity and Cooperation Policy for Cartel Conduct is publically available on the ACCC website at:

<http://www.accc.gov.au/publications/accc-immunity-cooperation-policy-for-cartel-conduct>

The CDPP will grant immunity from criminal prosecution for cartel conduct on the basis set out in Annexure B to the Prosecution Policy of the Commonwealth. The Prosecution Policy of the Commonwealth is available on the CDPP website at:

<http://www.cdpp.gov.au/publications/prosecution-policy-of-the-commonwealth/>

The ACCC receives and manages requests for immunity for both criminal and civil proceedings and makes recommendations to the CDPP as to whether the applicant for immunity meets the criteria set out in the ACCC's Immunity and Cooperation Policy for Cartel Conduct. By applying to the ACCC, an eligible immunity applicant may be able to obtain upfront civil immunity from the ACCC and criminal immunity from the CDPP. The key issue for the ACCC and CDPP in making their respective decisions is whether the applicant satisfies the ACCC's Immunity and Cooperation Policy.

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| <p>B. Does your jurisdiction offer full leniency as well as partial leniency (i.e. reduction in the sanction / fine), depending on the case?</p> | <p>Under the ACCC's Immunity and Cooperation Policy for Cartel Conduct, only the first eligible applicant will be granted immunity.</p> <p>If immunity has already been granted to a party under the Immunity and Cooperation Policy for Cartel Conduct, any subsequent parties will have their circumstances considered in accordance with the ACCC's <i>Cooperation policy for cartel conduct</i> (section H of the Immunity and Cooperation Policy for Cartel Conduct) and with the general provisions of the Prosecution Policy of the Commonwealth rather than the immunity specific clauses in Annexure B to the Prosecution Policy. Subsequent applicants may be eligible for lenient treatment in return for their cooperation in the prosecution of another. The degree of leniency that may be granted depends on the particular circumstances of the case and the level of cooperation provided by the subsequent applicant(s).</p> <p>The Immunity and Cooperation policy is available on the ACCC website at http://www.accc.gov.au/publications/accc-immunity-cooperation-policy-for-cartel-conduct.</p> <p>Frequently Asked Questions pertaining to this policy are also available on the ACCC website at http://www.accc.gov.au/system/files/885_ACCC%20immunity%20and%20cooperation%20policy%20FAQ_FA2.pdf</p> |
| <p>C. Who is eligible for full leniency</p> | <p>Immunity is available only for the first eligible party to disclose the cartel conduct. Parties not eligible for immunity may seek to cooperate with the ACCC under the ACCC's Cooperation policy for cartel conduct (section H of the Immunity and Cooperation Policy for Cartel Conduct). See also Frequently Asked Questions pertaining to the ACCC Immunity and Cooperation policy: http://www.accc.gov.au/system/files/885_ACCC%20immunity%20and%20cooperation%20policy%20FAQ_FA2.pdf</p> |
| <p>D. Is eligibility for leniency dependent on the enforcing agency having either no knowledge of the cartel or insufficient knowledge of the cartel to initiate an investigation?</p> <p>In this context, is the date (the moment) at which participants in the cartel come forward with information (before or after the opening of an investigation) of any relevance for the outcome of leniency applications?</p> | <p>No. Subject to satisfying requirements for immunity, immunity is available up until the point where the ACCC has received legal advice that it has sufficient evidence to commence proceedings in relation to at least one contravention of the CCA arising from the conduct in respect of the cartel.</p> <p>No, immunity is available after the opening of an investigation if the ACCC has not yet received the legal advice referred to above.</p> |

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| <p>E. Who can be a beneficiary of the leniency program (individual / businesses)?</p> | <p>Australian law prohibits natural persons and corporations from engaging in cartel conduct, or being involved in cartel conduct.</p> <p>The ACCC Immunity and Cooperation Policy is available to both corporate entities and natural persons, subject to satisfying the requirements under the Policy.</p> |
| <p>F. What are the conditions of availability of full leniency:</p> | <p>The ACCC Immunity and Cooperation Policy states:</p> <p><i>Corporate Immunity</i></p> <p>Immunity is only available to corporate entities that meet the following requirements:</p> <ul style="list-style-type: none"> • the corporation is or was a party to a cartel, whether as a primary contravener or in an ancillary capacity • the corporation admits that its conduct in respect of the cartel may constitute a contravention or contraventions of the CCA • the corporation is the first person to apply for immunity in respect of the cartel under this policy • the corporation has not coerced others to participate in the cartel • the corporation has either ceased its involvement in the cartel or indicates to the ACCC that it will cease its involvement in the cartel • the corporation's admissions are a truly corporate act (as opposed to isolated confessions of individual representatives) • the corporation has provided full, frank and truthful disclosure, and has cooperated fully and expeditiously while making the application, and undertakes to continue to do so, throughout the ACCC's investigation and any ensuing court proceedings. <p>In order to maintain conditional immunity once granted, the corporation must provide full, frank and truthful disclosure and cooperate fully and expeditiously on a continuing basis throughout the ACCC's investigation and any ensuing court proceedings.</p> <p>Subject to the applicant meeting the conditions for final immunity under this policy (see answer to question 6J), conditional civil immunity will become final immunity after the resolution of any ensuing proceedings against cartel participants who do not have conditional immunity. The applicant may request the ACCC to confirm that it has final immunity status after the resolution of such proceedings.</p> <p><i>Derivative immunity for related corporate entities, directors, officers and employees</i></p> <p>Derivative immunity for related corporate entities and/or for current and former directors, officers and employees of the corporation may be granted for all, or part of, the relevant period of the cartel conduct and will be in the same form as the</p> |

conditional immunity granted to the corporation.

A related corporate entity will be eligible for derivative immunity if:

- (a) for all or part of the relevant period of the cartel conduct the corporation that qualifies for conditional immunity had a controlling interest in the related corporate entity, or
- (b) for all or part of the relevant period of the cartel conduct the related corporate entity was the parent company of (or held a controlling interest in) the corporation that qualifies for conditional immunity,
and
- (c) the related corporate entity is or was a party to a cartel, whether as a primary contravener or in an ancillary capacity
- (d) it admits that its conduct in respect of the cartel may constitute a contravention or contraventions of the CCA
- (e) it has not coerced others to participate in the cartel
- (f) it has either ceased its involvement in the cartel or undertakes to the ACCC that it will cease its involvement in the cartel
- (g) its admissions are a truly corporate act (as opposed to isolated confessions of individual representatives), and
- (h) it has provided full, frank and truthful disclosure, and has cooperated fully and expeditiously while the application was being made, and undertakes to continue to do so, throughout the ACCC's investigation and any ensuing court proceedings.

In order to maintain conditional immunity once granted, the related corporate entity must provide full, frank and truthful disclosure and cooperate fully and expeditiously on a continuing basis throughout the ACCC's investigation and any ensuing court proceedings.

Subject to the related corporate entities covered by derivative immunity meeting the conditions for final immunity under this policy (see answer to question J), conditional civil immunity will become final immunity after the resolution of any ensuing proceedings against cartel participants who do not have conditional immunity.

Individual Immunity

An individual will be eligible for derivative immunity if the same conditions as those detailed above for related corporate entities are satisfied by the individual (refer to <http://www.accc.gov.au/publications/accc-immunity-cooperation-policy-for-cartel-conduct> for details).

Immunity is only available to individuals who meet the following requirements:

- (i) the individual is or was a director, officer or employee of a corporation that is or was party to a cartel, whether as a primary contravener or in an ancillary capacity
- (ii) the individual admits that he or she has participated, or is

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| | <p>participating, in conduct in respect of the cartel that may constitute a contravention or contraventions of the CCA</p> <ul style="list-style-type: none"> (iii) the individual is the first party to apply for immunity in respect of the cartel under this policy (iv) the individual has not coerced others to participate in the cartel (v) the individual has either ceased his or her involvement in the cartel or indicates to the ACCC that he or she will cease their involvement in the cartel (vi) the individual has provided full, frank and truthful disclosure, and has cooperated fully and expeditiously while making the application, and undertakes to continue to do so, throughout the ACCC's investigation and any ensuing court proceedings. <p>In order to maintain conditional immunity once granted, the individual must provide full, frank and truthful disclosure and cooperate fully and expeditiously on a continuing basis throughout the ACCC's investigation and any ensuing court proceedings.</p> <p>Subject to the individual meeting the conditions for final immunity under this policy (see answer to question J), conditional civil immunity will become final immunity after the resolution of any ensuing proceedings against cartel participants who do not have conditional immunity.</p> <p><i>Criminal Immunity</i></p> <p>In the circumstances described above, the ACCC will grant a corporation conditional immunity from ACCC-initiated civil proceedings and the ACCC will make a recommendation to the CDPP that immunity from prosecution be granted to the applicant. The CDPP will exercise an independent discretion when considering a recommendation by the ACCC.</p> |
| <p>G. What are the conditions of availability of partial leniency (such as reduction of sanction / fine / imprisonment):</p> | <p>Parties not eligible for 'first-in' immunity may wish to cooperate with the ACCC in its investigations. As a matter of general principle the courts afford more lenient treatment to persons who cooperate with the ACCC in its investigations and provide assistance in court proceedings. The size of the civil penalty and/or other sanctions is ultimately determined by the Federal Court. Cooperation can be provided by corporate or individual parties.</p> <p>The following factors will be considered in assessing the extent and value of the cooperation provided by a party who has engaged in cartel conduct, whether as a primary contravener or in an ancillary capacity:</p> <ul style="list-style-type: none"> (a) did the party approach the ACCC in a timely manner seeking to cooperate? (b) has the party provided significant evidence regarding the cartel conduct? (c) has the party provided full, frank and truthful disclosure, and cooperated fully and expeditiously on a continuing basis throughout the ACCC's investigation and any ensuing court proceedings? |

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| | <p>(d) has the party ceased their involvement in the cartel or indicated to the ACCC that they will cease their involvement in the cartel?</p> <p>(e) did the party coerce any other person/corporation to participate in the cartel?</p> <p>(f) has the party acted in good faith in dealings with the ACCC? and</p> <p>(g) (for individual cooperating parties only) has the party agreed not to use the same legal representation as the corporation by which they are or were employed?</p> <p>In determining whether to reach an agreement on civil penalties, banning orders and/or other relief and the terms of any such agreement, the ACCC takes into consideration factors including:</p> <p>(a) the extent and value of the party's cooperation with the ACCC by reference to the factors set out above</p> <p>(b) (for corporate cooperating party) whether the contravention arose out of the conduct of senior management, or at a lower level</p> <p>(c) (for corporate cooperating party) whether the corporation has a corporate culture conducive to compliance with the law</p> <p>(d) the nature and extent of the party's contravening conduct</p> <p>(e) whether the conduct has ceased</p> <p>(f) the amount of loss or damage caused</p> <p>(g) the circumstances in which the conduct took place</p> <p>(h) (for corporate cooperating party) the size and power of the corporation, and</p> <p>(i) whether the contravention was deliberate and the period over which it extended.</p> |
| <p>H. Obligations for the beneficiary after the leniency application has been accepted:</p> | <p>In order to maintain conditional immunity once granted, the beneficiary must provide full, frank and truthful disclosure and cooperate fully and expeditiously on a continuing basis throughout the ACCC's investigation and any ensuing court proceedings.</p> |
| <p>I. Are there formal requirements to make a leniency application?</p> | <p>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</p> <p>Telephone: (02) 9230 3894 (business hours) Email: cartelimmunity@acc.gov.au</p> <p>There are no other formal requirements or processes however please also refer to answers to question 6F above and question 6J below.</p> |

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| <p>J. Are there distinct procedural steps within the leniency program?</p> | <p>Step 1: Marker - Where a corporation or individual intends to apply for immunity, that corporation or individual or their legal representative may approach the ACCC and request the placement of a marker. If a marker is placed, it will have the effect of preserving, for a limited period, the marker recipient's status as the first party to apply to the ACCC for immunity in respect of the cartel. A marker allows that corporation or individual a limited period of time to gather the information necessary to demonstrate that they satisfy the requirements for conditional immunity.</p> <p>Step 2: Proffer – After obtaining a marker from the ACCC, if a party decides to proceed with an immunity application, it will need to provide a detailed description of the cartel conduct. This is known as a 'proffer' and can be made orally or in writing.</p> <p>Step 3: Waivers - Except as required by law, the ACCC will not share confidential information provided by the immunity applicant, or the identity of the applicant, with other regulators without the consent of the applicant, but will seek consent as a matter of course, particularly for international matters. In relation to international matters, the ACCC will request that the applicant provide a confidentiality waiver for each jurisdiction in which it has or intends to seek immunity for the cartel conduct or leniency related to its cooperation in those jurisdictions.</p> <p>Step 4: Confidentiality – 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. The applicant and its legal representatives are required to keep confidential both the fact that the party has applied for immunity and any information they have obtained through cooperating with the ACCC, except as required by law or with the consent of the ACCC.</p> <p>Step 5: Recommendation to CDPP – When the ACCC is satisfied that an applicant is eligible for conditional immunity, the ACCC will, where relevant, make a recommendation to the CDPP to grant criminal immunity subject to conditions. The CDPP will exercise an independent discretion when considering a recommendation by the ACCC.</p> <p>Step 6: Conditional immunity – If the ACCC is satisfied that the applicant has met the eligibility criteria 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. The 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's letter granting conditional civil immunity.</p> <p>Step 7: Final immunity - In order to receive final immunity the applicant is required to satisfy the following conditions:</p> <ul style="list-style-type: none"> (a) maintain eligibility criteria for conditional immunity (b) provide full, frank and truthful disclosure, and cooperate fully and expeditiously on a continuing basis throughout the ACCC's investigation and any ensuing civil or criminal proceedings, and |
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| | <p>(c) maintain confidentiality regarding its status as an immunity applicant and details of the investigation and any ensuing civil or criminal proceedings unless otherwise required by law or with the written consent of the ACCC.</p> <p>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 this policy.</p> <p>For further details on each of these steps please refer to http://www.accc.gov.au/publications/accc-immunity-cooperation-policy-for-cartel-conduct</p> |
| <p>K. At which time during the application process is the applicant given certainty with respect to its eligibility for leniency, and how is this done?</p> | <p>The applicant may be advised at a number of stages during the immunity process that:</p> <ul style="list-style-type: none"> (a) Hypothetically, a marker is available (b) They are the first or subsequent applicant (c) They have been granted conditional immunity (d) They have been granted final immunity after proceedings are finalised. <p>A letter of comfort from the CDPP that the applicant satisfies the conditions for criminal immunity is generally provided to the applicant at the same time as the ACCC's decision whether to grant conditional immunity.</p> |
| <p>L. What is the legal basis for the power to agree to grant leniency? Is leniency granted on the basis of an agreement or is it laid down in a (formal) decision? Who within the agency decides about leniency applications?</p> | <p>Civil</p> <p>There is no legislative provision underpinning the granting of immunity. Immunity is granted according to the terms of the ACCC's Immunity and Cooperation Policy, which is an administrative process.</p> <p>Criminal</p> <p>Pursuant to section 9 (6D) of the <i>Director of Public Prosecutions Act 1982</i> (Cth) the CDPP may, if the CDPP considers it appropriate to do so, give a person an undertaking that the person will not be prosecuted.</p> |
| <p>M. Do you have a marker system? If yes, please describe it.</p> | <p>Yes, the ACCC Immunity and Cooperation Policy provides for a marker system whereby a marker, if placed, will have the effect of preserving, for a limited period, the marker recipient's status as the first party to apply to the ACCC for immunity in respect of the cartel. A marker allows that corporation or individual a limited period of time to gather the information necessary to demonstrate that they satisfy the requirements for conditional immunity.</p> |

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| <p>N. Does the system provide for any extra credit for disclosing additional violations?</p> | <p>Yes the ACCC Immunity and Cooperation Policy recognises “amnesty plus”. A party who is cooperating with the ACCC in relation to one cartel may discover a second cartel that is independent and unrelated to the first cartel. In these circumstances, the party may apply for conditional immunity for the second cartel and also seek ‘amnesty plus’ for the original cartel conduct.</p> <p>“Amnesty plus” is a recommendation by the ACCC to the Federal Court for a further reduction in the civil penalty in relation to the first cartel.</p> <p>A party will be eligible for “amnesty plus” if it:</p> <p>(a) is cooperating with the ACCC under section H of the Immunity and Cooperation Policy in respect of the first cartel investigation, and</p> <p>(b) receives conditional immunity for the second cartel.</p> |
| <p>O. Is the agency required to keep the identity of the beneficiary confidential? If yes, please elaborate.</p> | <p>The ACCC does its best to protect the identity of an immunity applicant, consistent with the ACCC conducting its investigations. If the applicant is required to give evidence at trial, then their identity will be disclosed. In criminal matters the identity of the immunity applicant and the terms of the undertaking between the CDPP and the applicant will be disclosed to the defendant and the court.</p> |
| <p>P. Is there a possibility of appealing an agency’s decision rejecting a leniency application?</p> | <p>The merits of the ACCC’s decision to reject an immunity applicant is, generally speaking, not an appealable decision.</p> |
| <p>Q. Contact point where a leniency application can be lodged</p> | <p>The only valid way to make an immunity application or request a marker is to contact the ACCC Immunity Hotline:</p> <p>Marcus Bezzi Executive General Manager Competition Enforcement</p> <p>Telephone: (02) 9230 3894 (business hours) Email: cartelimmunity@acc.gov.au</p> |

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| <p>R. Does the policy address the possibility of leniency being revoked? If yes, describe the circumstances where revocation would occur. Can an appeal be made against a decision to revoke leniency?</p> | <p>In some circumstances the ACCC may consider that the applicant has breached conditions of immunity. Often this will be resolved by dialogue between the ACCC and the applicant.</p> <p>If the ACCC's concerns are not resolved informally between the ACCC and the applicant a written caution will be issued to the applicant and this may be followed by a further letter requiring an explanation as to why the ACCC should not revoke conditional immunity.</p> <p>Should the ACCC not be satisfied with the applicant's response, the ACCC may then advise that person in writing that they no longer qualify for immunity. The ACCC will make a recommendation to the CDPP that criminal immunity subject to conditions also be revoked.</p> <p>The merits of the ACCC's decision to revoke immunity is, generally speaking, not an appealable decision.</p> |
| <p>S. Does your policy allow for "affirmative leniency", that is the possibility of the agency approaching potential leniency applicants?</p> | <p>No.</p> |
| <p>T. Does your authority have rules to protect leniency material from disclosure? If yes, please elaborate.</p> | <p>Please refer to answer to question 6J above.</p> |

7. Settlement

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| <p>A. Does your competition regime allow settlement?</p> <p>If yes, please indicate its public availability.</p> | <p>The ACCC has a range of enforcement remedies available to it, including court-based outcomes and court enforceable undertakings.</p> <p>For the purposes of responding to questions in this section the ACCC has interpreted settlement to mean where parties agree to conclude court action and 'settle' a matter in advance of determination by the Federal Court. It can include an agreement to end the proceedings with or without commitments as well as agreed consent orders.</p> <p>In cases where the ACCC pursues enforcement through litigation, the ACCC must adhere to Australia's <i>Legal Services Directions 2005</i> (https://www.comlaw.gov.au/Details/F2006L00320) (the Directions) - legally binding directions from the Attorney-General's Department that set out the framework and requirements for performing Commonwealth legal services including conduct of litigation.</p> <p>The Directions require the ACCC to continually monitor the progress of litigation and use any methods it considers appropriate to resolve litigation. This encompasses continual review of the prospects of success and whether there is sufficient justification to continue the proceedings as opposed to negotiating a settlement.</p> |
| <p>B. Which types of restrictive agreements are eligible for settlement?</p> | <p>Subject to the matters noted in 7A above, all restrictive agreements are eligible for settlement.</p> |
| <p>C. What is the reward of the settlement for the parties?</p> | <p>Settlement is likely to facilitate a more expeditious and low cost resolution of the dispute, and possibly a lower penalty discount for those who settle at an early stage during proceedings.</p> |
| <p>D. May a reduction for settling be cumulated with a leniency reward?</p> | <p>Yes – a jointly agreed settlement would take into account cooperation.</p> |
| <p>E. List the criteria (if there is any) determining the cases which are suitable for settlement.</p> | <p>In determining which enforcement measures are appropriate in any given matter, including which cases are suitable for settlement, the ACCC takes into account considerations such as the nature and seriousness of the conduct, and how cooperative and effective the trader is in taking action to resolve the ACCC's concerns about the conduct.</p> |

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| <p>F. Describe briefly the system.</p> | <p>Either party may initiate settlement and settlement may occur at any stage before a court determination.</p> <p>Generally, there is no obligation to settle in response to an offer to settle. See also 7A above regarding the ACCC's obligations pursuant to the Directions.</p> |
| <p>G. Describe the procedural efficiencies of your settlement system.</p> | <p>Settlement is likely to facilitate a more expeditious and lower cost resolution of the dispute.</p> |
| <p>H. Does a settlement necessitate that the parties acknowledge their liability for the violation?</p> | <p>No, however if a party refuses to acknowledge their liability this will be relevant to the ACCC's determination of whether to accept a settlement offer.</p> |
| <p>I. Is there a possibility for settled parties to appeal a settlement decision at court?</p> | <p>Settlement is an agreed outcome between parties and would not generally be appealed.</p> |

8. Commitment

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| <p>A. Does your competition regime allow the possibility of commitment?</p> <p>If yes, please indicate its public availability.</p> | <p>Section 87B of the CCA allows the ACCC to accept court enforceable undertakings in order to resolve alleged contraventions of the CCA. In these undertakings, which are on the public record, companies or individuals generally agree to:</p> <ul style="list-style-type: none"> • remedy the harm caused by the conduct • accept responsibility for their actions • establish or review and improve their trade practices compliance programs and culture. <p>Guidelines are available at http://www.accc.gov.au/publications/section-87b-of-the-competition-consumer-act</p> <p>The ACCC maintains a public register of section 87B enforceable undertakings at http://registers.accc.gov.au/content/index.phtml/itemId/815599</p> |
| <p>B. Which types of restrictive agreements are eligible for commitment?</p> <p>Are there commitments which are excluded from the commitment possibility?</p> | <p>The ACCC may accept a section 87B undertaking given by a person in connection with any matter in relation to which the Commission has a power or function under the CCA, with the exception of Part X (pertaining to international liner cargo shipping).</p> |
| <p>C. List the criteria determining the cases which are suitable for commitment.</p> | <p>The ACCC will resolve matters under section 87B only when it considers that a breach has occurred, or was likely to have occurred, and that a resolution based on enforceable undertakings offers the appropriate solution.</p> <p>The ACCC will be influenced by factors such as:</p> <ul style="list-style-type: none"> • the nature of the alleged breach in terms of: <ul style="list-style-type: none"> ○ the seriousness of the conduct involved ○ the impact of the conduct on third parties and the community at large ○ the product or service involved ○ the size of the company/business involved • the ability of a section 87B undertaking to offer redress to affected consumers and businesses • the history of complaints and/or ACCC action against the company, business or individuals involved • the history of complaints and/or ACCC action involving the practice, the product or the industry generally • prospects for rapid resolution of the matter • the apparent good faith of the company/business. <p>This list is not exhaustive. Often other considerations arise that</p> |

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| | <p>reflect the particular circumstances of the alleged breach.</p> |
| <p>D. Describe which types of commitments are available under your competition law.</p> | <p>In these undertakings, which are on the public record, companies or individuals generally agree to:</p> <ul style="list-style-type: none"> • remedy the harm caused by the conduct • accept responsibility for their actions • establish or review and improve their trade practices compliance programs and culture. <p>Examples of the type of redress sought by the ACCC in previous matters include:</p> <ul style="list-style-type: none"> • corrective advertising in the print and electronic media • refunds to affected consumers • community service remedies • industry-wide education programs funded by the company/business providing the undertaking. <p>In negotiating such resolutions, the ACCC's broad objectives are:</p> <ul style="list-style-type: none"> • cessation of the conduct leading to the alleged breach • redress for parties adversely affected by the conduct • implementation of compliance measures to help prevent future breaches by the company/business concerned • general education and deterrence, particularly in the industry concerned, by way of public awareness. <p>The ACCC maintains a public register of section 87B Enforceable Undertakings at http://registers.accc.gov.au/content/index.phtml/itemId/815599</p> |
| <p>E. Describe briefly the system.</p> | <p>The ACCC does not have the power to demand or require a section 87B undertaking, but may raise it as an option, leaving the other party to decide whether to pursue it. Undertakings can be offered at any stage during an investigation and have also been offered and accepted in resolving litigated matters.</p> |

F. Does a commitment decision necessitate that the parties acknowledge their liability for the violation?

While the content of each undertaking is subject to negotiation between the ACCC and the party concerned an undertaking usually includes the following elements:

- an acknowledgment or admission from the company or business that the conduct of concern constitutes or was likely to constitute a breach of the CCA
- a positive commitment to cease the conduct and not recommence it
- specific details of the corrective action that will be taken by the company or business to remedy the harm caused by the conduct
- details of redress (such as payment of compensation or reimbursement to consumers) where appropriate— including a mechanism to determine and audit the outcome
- positive reporting requirements from the company or business to the ACCC that may include:
 - a report as to when the company has satisfied its undertaking obligations
 - the provision of supporting information and documentation by the company to the ACCC to verify that it has in fact satisfied its undertaking obligations
- future actions aimed at preventing a recurrence or any other breach of the CCA (such as an internal compliance and/or training program), including timeframes and other details
- an acknowledgment that:
 - the ACCC will make the undertaking publicly available including by placing it on the ACCC's public register of section 87B undertakings on its website
 - the ACCC will make public reference to the undertaking, from time to time, including in news media statements and in ACCC publications
 - the undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

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| <p>G. Describe how your authority monitors the parties' compliance to the commitments.</p> | <p>Following acceptance of an undertaking, the ACCC requires that its implementation and effectiveness be monitored. Monitoring will generally be the responsibility of the company/business concerned.</p> <p>To assist in monitoring compliance, the ACCC has, as a standard practice, sought the inclusion of provisions requiring relevant information to be made available to it:</p> <ul style="list-style-type: none"> • periodically—for example, a periodic audit of compliance with the undertaking • in specified circumstances—for example, where there is an event of default, information relating to that default (such as the reasons for it), or • upon the ACCC's request. <p>The ACCC will also usually require a commitment to an independent audit of the compliance program elements of the undertaking at regular intervals (usually annually) for the period of the undertaking (usually three years). Where it has reason to believe that a business has not complied with an undertaking, the ACCC will usually first try to resolve the matter by consultation.</p> <p>If this approach fails, the ACCC will not hesitate to apply to the court for appropriate orders. The ACCC will make public its application to the court and will seek legal costs from the offending party where appropriate.</p> |
| <p>H. Is there a possibility for parties to appeal a commitment decision at court?</p> | <p>Section 87B undertakings are negotiated between the ACCC and the parties and therefore appeal is not relevant. However the ACCC has the discretion to not accept a section 87B undertaking and instead pursue litigation. Courts will not intervene in this decision.</p> |

9. Investigative powers of the enforcing institution(s)

A. Briefly describe the investigative measures available to the enforcing agency such as requests for information, searches/raids, electronic or computer searches, expert opinion, etc. and indicate whether such measures requires a court warrant.

Subject to threshold requirements, the ACCC has powers under the CCA to require the furnishing of information and the production documents, as-well as compulsory examinations of individuals.

Most of the ACCC's powers can be used in the investigation of both civil and criminal investigations.

Section 155 of the CCA

- Civil
 - Can seek information, documents and compel testimony.
- Criminal
 - Can seek information and documents already in existence, but can't use the testimony against an individual where they are interviewed and incriminate themselves, however, it can be used against others.

Search warrants

- An ACCC inspector may seek search warrant from a magistrate pursuant to Part XIX of the CCA.
- Any State or Territory Magistrate may issue a warrant for premises anywhere in Australia. The Magistrate must be satisfied by information on oath or affirmation that there are reasonable grounds for suspecting that there is evidential material on the premises (private or business) within the next 72 hours.
- This can be used to search for evidential material relating to civil contraventions and criminal offences.

Stored communications

- Pursuant to the *Telecommunications (Interception and Access) Act 1979* (Cth) the ACCC can seek a warrant to access emails, SMS, MMS etc. stored on equipment operated by a Telco or ISP for use in certain civil or criminal investigation.

Telephone interception

- Telephone interception (TI) warrants are available under the *Telecommunications (Interceptions and Access) Act 1979* for criminal cartel investigation.
- The AFP may seek a TI warrant from a Magistrate in a joint AFP/ ACCC criminal cartel investigation.
- This power can only be used for a criminal investigation.

Surveillance devices

- The AFP may seek a warrant from a Magistrate to place a listening device to record a conversation e.g.

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| | <p>cartel meeting. This can be used in joint AFP/ACCC investigations.</p> <ul style="list-style-type: none"> This power can only be used for a criminal investigation. <p>Australia is also able to request the extradition of individuals from countries where cartel conduct is also a criminal offence and the country has an extradition treaty with Australia, and vice versa.</p> <p>For a list of countries with which Australia has a bilateral extradition treaty, see https://www.ag.gov.au/Internationalrelations/Internationalcimecooperationarrangements/Documents/australias-bilateral-extradition-arrangements.pdf</p> |
| <p>B. Can private locations, such as residences, automobiles, briefcases and persons be searched, raided or inspected? Does this require authorisation by a court?</p> | <p>An ACCC inspector may seek search warrant from a Magistrate of the Federal Court of Australia pursuant to Part XIX of the CCA. This includes a warrant to search private residences, automobiles, briefcases, etc.</p> |
| <p>C. May evidence not falling under the scope of the authorisation allowing the inspection be seized / used as evidence in another case? If yes, under which circumstances (e.g. is a post-search court warrant needed)?</p> | <p>Information falling outside the scope of the search warrant may be seized if it affords evidence of an indictable offence and it is necessary to seize the thing to prevent its concealment, loss or destruction.</p> |
| <p>D. Have there been significant legal challenges to your use of investigative measures authorized by the courts? If yes, please briefly describe them.</p> | <p>There have been challenges to the ACCC's powers to seek information, documents and compulsory examinations.</p> <p>In 2009 the Full Court of the Australian Federal Court upheld the validity of compulsory investigation notices under the TPA (now CCA) where the ACCC sought information in relation to air routes wholly outside Australia. The breadth of the compulsory investigation notices was considered - they may be issued by the ACCC to ascertain facts which merely indicate a further line of enquiry through to determining whether to institute proceedings.</p> <p><i>Australian Competition and Consumer Commission v Singapore Airlines Cargo Pte Ltd (corrigendum 27 May 2009)</i> [2009] FCA 510 (20 May 2009): http://www.austlii.edu.au/au/cases/cth/FCA/2009/510.html</p> <p>Also see:</p> <p><i>Obeid v Australian Competition and Consumer Commission</i> [2014] FCAFC 155 (20 November 2014) http://www.austlii.edu.au/au/cases/cth/FCAFC/2014/155.ht</p> |

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Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission [2002] HCA 49; 213 CLR 543; (7 November 2002):

<http://www.austlii.edu.au/au/cases/cth/HCA/2002/49.html>

Seven Network Limited v Australian Competition and Consumer Commission [2004] FCAFC 267 (6 October 2004):

<http://www.austlii.edu.au/au/cases/cth/FCAFC/2004/267.html>

10. Procedural rights of businesses / individuals

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| <p>A. Key rights of defence in cartel cases: Please indicate the relevant legal provisions.</p> | <p>As stated in response to question 4A above, legal proceedings are conducted in the Federal Court of Australia.</p> <ul style="list-style-type: none"> • In both civil proceedings and in a criminal prosecution, the respondent/ defendant is entitled to see the case against them. This will be set out in documentary form. • Individuals have a right against self-incrimination however corporations do not. • Confidential communications between a client and a lawyer for the purpose of obtaining legal advice are <i>prima facie</i> privileged. • Generally a criminal prosecution in relation to cartel conduct will involve <ul style="list-style-type: none"> ○ Committal proceedings before a magistrate in a state or territory court. The Magistrate decides whether the charges are sufficiently strong for the person to face trial before a jury. ○ The trial being heard by a jury. <p>Respondents defending cases brought against companies and individuals for cartel conduct are usually represented by legal advisors.</p> |
| <p>B. Protection awarded to business secrets (competitively sensitive information): is there a difference depending on whether the information is provided under a compulsory legal order or provided under informal co-operation? Please indicate the relevant legal provisions.</p> | <p>There is no specific protection for business secrets however as a general rule the ACCC strives to maintain confidentiality where appropriate, so as to protect the integrity of the investigative process.</p> <p>Section 155AAA of the CCA provides for the protection of certain information.</p> <p>The Federal Court may make orders preventing the disclosure of certain information. Such protection can be requested by the party making a claim of trade secrets.</p> |

11. Limitation periods and deadlines

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| <p>A. What is the limitation period (if any) from the date of the termination of the infringement by which the investigation / proceedings must begin or a decision on the merits of the case must be made?</p> | <p>There is no limitation period for the investigation of cartels or for the commencement of legal proceedings.</p> <p>However it is important to note that section 77 of the CCA provides that the ACCC has six years from the contravention to institute a proceeding in the Court for the recovery on behalf of the Commonwealth of a pecuniary penalty imposed under section 76 of the CCA.</p> |
| <p>B. What is the deadline, statutory or otherwise for the completion of an investigation or to make a decision on the merits?</p> | <p>The CCA does not impose any statutory time limits for the conduct of investigations of possible contraventions of Part IV of the CCA.</p> <p>However, pecuniary penalties can only be recovered where proceedings have been commenced within six years after a contravention (pursuant to section 77 of the CCA).</p> |
| <p>C. What are the deadlines, statutory or otherwise to challenge the commencement or completion of an investigation or a decision regarding sanctions? (see also 15A)</p> | <p>There are a range of review mechanisms which can apply to decisions made or actions taken by the ACCC.</p> <p>These review mechanism can in some circumstances apply to the conduct of an investigation, see for example the Commonwealth Ombudsman. The Commonwealth Ombudsman considers and investigates complaints from people who believe they have been treated unfairly or unreasonably by an Australian Government department or agency, including the ACCC.</p> <p>More information about review mechanisms can be found at http://www.accc.gov.au/publications/the-acccs-accountability-framework-for-investigations</p> <p>A respondent in litigated proceedings may seek to have the matter 'struck out' by the Federal Court, thereby challenging the ACCC's decision to institute proceedings. The Federal Court determines, on the basis of the evidence put before it by the ACCC (or another applicant) and the responding party, whether a contravention of the CCA has been established. If a party disagrees with the Federal Court's determination, that party has the option to lodge an appeal against the Court's judgment. Generally speaking, appeals from the final decision of the Court in civil matters must be made within 21 days and in criminal matters within 28 days.</p> <p>For further information about the Federal Court of Australia please see http://www.fedcourt.gov.au/</p> |

12. Types of decisions

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| A. List which types of decisions on the merits of the case can be made in cartel cases under the laws listed under Section 1. | <p>The Court determines whether a party's conduct contravened the CCA.</p> <p>The Court may order:</p> <ul style="list-style-type: none">• imprisonment and/or a fine (criminal matters)• pecuniary penalties (civil matters)• injunctions• declarations• adverse publicity orders• implementation of a compliance program• orders disqualifying a person from managing a company. |
| B. List any other types of decisions on the merits of the case relevant particularly in hardcore cartel cases under the laws listed under Section 1 (if different from those listed under 12/A). | N/A |
| C. Can interim measures be ordered during the proceedings in cartel cases? (if different measures for hardcore cartels please describe both.) Which institution (the investigatory / the decision-making one) is authorised to take such decisions? What are the conditions for taking such a decision? | <p>An interim injunction may be sought by the ACCC or CDPP from the court pending the outcome of the substantive case. The Court must be convinced that on the balance of convenience, the orders should be made.</p> |

13. Sanctions for procedural breaches (non-compliance with procedural obligations) in the course of investigations

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| <p>A. Grounds for the imposition of procedural sanctions / fines.</p> | <p>Section 9A above sets out the ACCC’s investigative powers. Relevantly the ACCC may seek sanctions for non-compliance with a formal request for information and documents made under section 155 of the CCA.</p> <p>Sanctions may also be sought where false or misleading information is provided to the ACCC pursuant to a notice issued under section 155 of the CCA. Sanctions for non-compliance with a notice validly issued under section 155 of the CCA are sought by the CDPP following referral by the ACCC.</p> |
| <p>B. Type and nature of the sanction (civil, administrative, criminal, combined; pecuniary or other):</p> | <p>Refusal or failure to comply with a section 155 notice is an offence punishable on conviction by a fine or imprisonment under section 155(6A), and also under the Commonwealth Criminal Code.</p> |
| <p>C. On whom can procedural sanctions be imposed?</p> | <p>Sanctions can be imposed on natural persons and corporate entities.</p> |
| <p>D. Criteria for determining the sanction / fine:</p> | <p>Civil Contravention: When determining an appropriate penalty the Court takes into account the following factors:</p> <ul style="list-style-type: none"> • the nature and extent of the contravening conduct • the nature and extent of any loss or damage suffered as a result of the contravening conduct • the circumstances in which the act or omission took place, and • whether the contravener has previously been found by the Court to have engaged in similar conduct. <p>Criminal Offence: The <i>Crimes Act 1914</i> (Cth) provides that the court must impose a sentence that is ‘of a severity appropriate in all the circumstances of the offence’. A checklist of factors is set out in section 16A of the <i>Crimes Act 1914</i> (Cth) (available at: http://www.comlaw.gov.au/Details/C2012C00720/Html/Volume_1#_Toc338150288).</p> |
| <p>E. Are there maximum and / or minimum sanctions / fines?</p> | <p>Yes, in the case of a natural person, the maximum penalty is a fine of up to 20 penalty units (currently a penalty unit is equivalent to \$180 AUD) or imprisonment for up to 12 months. In the case of a body corporate, the maximum penalty is a fine not exceeding \$18,000.</p> |

14. Sanctions on the merits of the case

A. Type and nature of sanctions in cartel cases (civil, administrative, criminal, combined):
On whom can sanctions be imposed?

The prohibitions under the CCA for cartel conduct are criminal and civil in nature.

Subject to judicial discretion, sanctions can be imposed by the Court on any party found to have engaged in a contravention or involved in a contravention of the CCA.

Corporate entities and natural persons can be sanctioned by the Court for being involved in the conduct.

B. Criteria for determining the sanction / fine:

Criminal Offence: The *Crimes Act 1914* (Cth) provides that the court must impose a sentence that is 'of a severity appropriate in all the circumstances of the offence'. A checklist of factors is set out in section 16A of the *Crimes Act 1914* (Cth).

Available at:

http://www.comlaw.gov.au/Details/C2012C00720/Html/Volume_1#_Toc338150288

Civil Contravention: When determining an appropriate penalty the Court takes into account the following factors:

- the nature and extent of the contravening conduct
- the nature and extent of any loss or damage suffered as a result of the contravening conduct
- the circumstances in which the act or omission took place, and
- whether the contravener has previously been found by the Court to have engaged in similar conduct.

Additional factors, based on case law include:

- the size of the contravening company
- the degree of power it has, as evidenced by its market share and ease of entry into the market
- the deliberateness of the contravention and the period over which it extended
- whether the contravention arose out of the conduct of senior management or at a lower level
- whether the company has a corporate culture conducive to compliance with the CCA
- whether the company has shown a willingness to cooperate with the authorities responsible for the enforcement of the CCA
- effect on the functioning of the market and other

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| | <p>economic effects of the conduct</p> <ul style="list-style-type: none"> • the financial position of the contravening company, and • whether the conduct was systematic, deliberate or covert. |
| <p>C. Are there maximum and / or minimum sanctions / fines?</p> | <p><i>Penalties for corporations</i></p> <p>The maximum fine or pecuniary penalty for each criminal cartel offence or civil contravention (whichever applies) will be the greater of:</p> <ul style="list-style-type: none"> • \$10 000 000 • three times the total value of the benefits obtained by one or more persons and that are reasonably attributable to the offence or contravention • where benefits cannot be fully determined, 10 per cent of the annual turnover of the company (including related corporate bodies) in the preceding 12 months. • other corporate penalties for cartel civil contraventions or criminal offences include: <ul style="list-style-type: none"> ○ injunctions ○ orders disqualifying a person from managing corporations ○ community service orders. <p><i>Penalties for individuals</i></p> <ul style="list-style-type: none"> • Imprisonment of up to 10 years and/or fines of up to \$340 000 per criminal cartel offence. • A pecuniary penalty of up to \$500 000 per civil contravention. • It is illegal for a corporation to indemnify its officers against legal costs and any financial penalty. |
| <p>D. Guideline(s) on calculation of fines:</p> | <p><i>Civil</i></p> <p>There are no formal guidelines on the calculation of fines (referred to in Australia in the civil context as “pecuniary penalties”). However, common law precedent has developed a number of factors, commonly referred to as “French” and “Heerey” factors, after the judges who developed them, which the Court will take into account when imposing penalties.</p> <p>For more information on penalty and sentencing <i>factors</i> please see: Trade Practices Commission v CSR Limited (1991) ATPR 41-0176; NW Frozen Foods v ACCC [1996] FCA 1134.</p> <p>Where a penalty is calculated for a number of offences, the Court takes into account whether the aggregate penalty is just and appropriate. This is known as the “Totality Principle.”</p> <p><i>Criminal</i></p> |

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| | <p>Part 16A of the <i>Crimes Act 1914</i> (Cth) provides guidance on the sentencing of federal offenders; in particular, the court must take into account the following matters as are relevant and known to the court:</p> <ul style="list-style-type: none"> • the nature and circumstances of the offence • other offences (if any) that are required or permitted to be taken into account • if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character--that course of conduct • the personal circumstances of any victim of the offence • any injury, loss or damage resulting from the offence • the degree to which the person has shown contrition for the offence by taking action to make reparation for any injury, loss or damage resulting from the offence, or in any other manner • the extent to which the person has failed to comply with: <ul style="list-style-type: none"> ○ any order under subsection 23CD(1) of the <i>Federal Court of Australia Act 1976</i> ○ any obligation under a law of the Commonwealth ○ any obligation under a law of the State or Territory applying under subsection 68(1) of the <i>Judiciary Act 1903</i>; about pre-trial disclosure, or ongoing disclosure, in proceedings relating to the offence • if the person has pleaded guilty to the charge in respect of the offence--that fact • the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences • the deterrent effect that any sentence or order under consideration may have on the person • the need to ensure that the person is adequately punished for the offence • the character, antecedents, age, means and physical or mental condition of the person • the prospect of rehabilitation of the person • the probable effect that any sentence or order under consideration would have on any of the person's family or dependents. <p>Please also refer above to answer to 14B.</p> |
| <p>E. Does a challenge to a decision imposing a sanction / fine have an automatic suspensory effect on that sanction / fine? If it is necessary to apply for suspension, what are the criteria?</p> | <p>There is no automatic suspension of a fine if an appeal is lodged, however, fines and other orders are usually, as a matter of course, suspended pending the outcome of the appeal process. This is a matter for the Federal Court and not the ACCC.</p> |

15. Possibilities of appeal

A. Does your law provide for an appeal against a decision that there has been a violation of a prohibition of cartels? If yes, what are the grounds of appeal, such as questions of law or fact or breaches of procedural requirements?

Any party to the court proceedings may appeal a decision of the Federal Court. This can either be during an interlocutory stage (before substantive judgment on the merits of the case) or if appealing the judgment itself, after it is handed down.

For an appeal to succeed the party must convince the appeal court that the Judge who heard the original case made an error of such significance that the decision should be varied.

Some examples of significant errors are that the Judge who heard the original case:

- applied an incorrect principle of law, or
- made a finding of fact or facts on an important issue which could not be supported by the evidence.

Generally speaking, the Court hearing the appeal:

- does not consider any new evidence or information that was not presented in the original case (except in special circumstances),
- does not call witnesses to give evidence,
- does consider all the relevant documents filed by the parties for the original case,
- does consider the relevant parts of the transcript of the original case, if available,
- does listen to legal arguments from all parties to the appeal.

Section 30AJ of the *Federal Court of Australia Act (1976)* (Cth) sets out when the Federal Court of Australia will allow appeals in relation to a cartel offence. The most significant consideration in relation to a conviction is whether there has been a substantial miscarriage of justice. In an appeal against a sentence, it is whether the some other sentence is warranted in law.

B. Before which court or agency should such a challenge be made?

A challenge to a decision of a single judge of the Federal Court is heard by the Full Court of the Federal Court, which comprises of two or more Federal Court Judges.

To challenge a decision of the Full Court of the Federal Court, the appellant must first seek leave to appeal to the High Court of Australia. This preliminary hearing is usually heard by a full court of more than 2 justices. Some matters can be heard and determined by a single justice. If leave to appeal is granted, allowing the appeal to proceed to the High Court, then the final hearing is also before two or more judges of the High Court.

The High Court of Australia is the highest court in Australia and it is not possible to appeal from a judgment of the High Court of Australia.