



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

ACCC immunity and cooperation policy for cartel conduct

A policy document

October 2019

International experience and the experience of the Australian Competition and Consumer Commission (ACCC) has demonstrated that effective immunity and cooperation policies encourage businesses and individuals to disclose cartel behaviour. This in turn assists the ACCC to stop the harm arising from this illegal conduct and to take action against participants.

This document replaces the *ACCC immunity and cooperation policy for cartel conduct September 2014*.

The ACCC also publishes Frequently Asked Questions (FAQs) regarding this Policy. This Policy should be read in conjunction with the FAQs which can be found on the [ACCC website](#).

ACCC contact details:

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

General Manager
Cartels Branch

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

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

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Preface

The objective of Australia's competition laws, contained in the *Competition and Consumer Act 2010* (CCA), is to enhance the welfare of Australians. There is a direct link between preventing anti-competitive conduct and the significant benefits to consumers of the competitive process such as lower prices, greater choice and better service.

In performing its duties in its enforcement of the CCA, the ACCC endeavours to detect, stop and deter domestic and international cartels operating in Australia or affecting Australians. Cartel conduct involves price fixing, restricting outputs in the production and supply chain, allocating customers, suppliers or territories and/or bid rigging. This type of collusive conduct between otherwise competitive firms is often systematic, deliberate and covert.

Cartels harm consumers, businesses and the economy by increasing prices, reducing choice or distorting the ordinary processes of innovation and product development. They adversely affect domestic and international competitiveness. Due to the detrimental nature of this type of conduct, the ACCC will always assess cartels as a priority.

International experience and the experience of the ACCC has demonstrated that effective immunity and cooperation policies encourage businesses and individuals to disclose cartel behaviour. This in turn assists the ACCC to stop the harm arising from this illegal conduct and to take action against participants.

Cartels usually involve secrecy and deception. Collusion is difficult to detect—there may be little documentary evidence and parties often go to great lengths to keep their involvement secret. In these circumstances, discovery and proof of the existence of cartels can be more difficult than discovery and proof of other forms of corporate misconduct. An immunity and cooperation policy in relation to cartels encourages insiders to provide information, assisting the ACCC to detect cartel conduct. When the extent of the immunity to be provided, or the process for recognising cooperation with law enforcement authorities is certain, persons are more likely to take advantage of such a policy and disclose illegal and harmful conduct.

Just as importantly, an immunity and cooperation policy that provides incentives to businesses and individuals to disclose illegal behaviour is also a powerful disincentive to the formation of cartels, as potential participants will perceive a greater risk of ACCC detection and court proceedings. An immunity and cooperation policy does not offer a reward to 'good corporate citizens'. It is a detection tool designed to deliver benefits to all Australians by assisting the ACCC to identify, stop and take action against harmful and illegal behaviour.

A. Introduction

1. This Policy sets out the ACCC's approach to applications for immunity from proceedings initiated or authorised by the ACCC or the Office of the Commonwealth Director of Public Prosecutions (CDPP) in relation to cartel conduct, and how cooperation provided to the ACCC by cartel participants will be recognised. In its interpretation of this Policy the ACCC will seek to:
 - apply the Policy consistently and fairly,
 - be approachable and accessible, and
 - interpret the Policy in favour of an applicant in the case of ambiguities in the Policy.
2. In accordance with the [Memorandum of Understanding between the CDPP and the ACCC regarding Serious Cartel Conduct \(MOU\)](#), all applications for immunity under this Policy should be made to the ACCC.

B. Scope of the Policy

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

A cartel provision is a provision relating to:

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

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

5. If a party is granted immunity under this Policy for cartel conduct, the applicant (and any party granted derivative immunity) will be entitled to immunity from civil proceedings and/or criminal prosecution in respect of that cartel conduct under Division 1 of Part IV of the CCA, which prohibits a corporation from making or giving effect to a contract, arrangement or understanding that contains a cartel provision.
6. Where conditional immunity is granted to an applicant (and any derivative immunity applicant), the ACCC will not use information (including witness evidence) provided by that party, directly as evidence in, or indirectly in respect of, civil proceedings against the party under any other provision of the CCA, in respect of the cartel conduct for which immunity was granted.
7. This Policy also provides protections in respect of the equivalent provisions in various state competition codes.
8. The Policy does not apply to parties engaged in a concerted practice. If the ACCC forms the view that the conduct reported by an applicant seeking immunity under this Policy is not cartel conduct, but may comprise an anti-competitive concerted practice, conditional immunity will not be granted. The applicant may then seek to cooperate under the *ACCC cooperation policy for enforcement matters*. In these circumstances, the ACCC may use information provided by the applicant, but will do so only in the limited circumstances set out at paragraph 83.
9. Cartel participants may seek both civil and criminal immunity in respect of cartel conduct. The ACCC is the sole point of contact for applicants seeking civil and/or criminal immunity under this Policy. Applications are made to the ACCC in accordance with the procedures set out in this Policy.
10. The ACCC is responsible for granting civil immunity. The CDPP is responsible for granting criminal immunity.
11. When the ACCC receives an application for immunity, it will be assessed against the criteria contained within this Policy to determine whether the applicant is eligible for conditional civil immunity. Early in the proffer stage, the applicant (and each derivative immunity applicant) will be asked to enter into a cooperation agreement which will outline the initial cooperative steps that the applicant agrees to undertake pursuant to its application.

12. Should the ACCC consider that the applicant is eligible for conditional civil immunity, it will grant such immunity and, 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. Where the ACCC advises the CDPP that the applicant meets the criteria set out in Annexure B to the *Prosecution Policy of the Commonwealth*, and the CDPP is so satisfied, as a first step the CDPP will ordinarily provide a letter of comfort to the applicant. Prior to the commencement of any criminal prosecution, the Commonwealth Director of Public Prosecutions (the Director) will determine whether to grant a written undertaking pursuant to section 9(6D) of the *Director of Public Prosecutions Act 1983* (DPP Act) granting criminal immunity subject to conditions.
13. The ACCC will require an immunity applicant, and each derivative immunity applicant, to certify in writing (in a form acceptable to the ACCC) at the end of the evidence gathering phase of an ACCC investigation that it has fully complied with its obligations under the immunity Policy, including having conducted all reasonable searches and provided all relevant witnesses, information and documents to the ACCC within its power, custody or control. The onus is on the applicant to ensure that it has fully complied with its disclosure obligations under this Policy (as outlined in paragraph 23(f) for corporations, paragraphs 29(f) and 32(e) for derivative immunity applicants, and paragraph 36(f) for individuals).
14. It is a serious criminal offence to knowingly provide information to the ACCC or the CDPP which is false or misleading. If an immunity applicant (or derivative immunity applicant) provides information to the ACCC or the CDPP which it knows to be false or misleading, it may be prosecuted and will also be in breach of the conditions of its immunity such that the ACCC will have a basis to revoke its immunity.
15. Parties involved in cartel conduct who are not eligible for immunity, or parties involved in other conduct in contravention of the CCA (such as a concerted practice), are encouraged to cooperate with the ACCC's investigation. The ACCC's position on cooperation in relation to cartel conduct is set out in section H of this Policy. The ACCC's position on cooperation in relation to conduct in contravention of the CCA, other than cartel conduct, is set out in the *ACCC cooperation policy for enforcement matters*.
16. This Policy applies to corporations and individuals who have engaged in cartel conduct, whether as a principal or in an ancillary capacity, in contravention of the CCA. For the purposes of this Policy, the ACCC will treat any entity with a recognised legal status as if it is a corporation including partnerships, unincorporated businesses, government business enterprises and government departments or agencies carrying on a business.
17. Corporations or individuals who have unilaterally attempted to cause others to engage in cartel conduct will not be eligible for immunity under this Policy. However, a current or former individual employee, officer or director of a corporation that has attempted to cause others to participate in a cartel will be eligible for immunity under this Policy if the individual meets all of the conditions of immunity and is able to provide material assistance in proceedings against another party.
18. This Policy commenced on 1 October 2019 and applies to parties seeking immunity and parties seeking to cooperate with the ACCC from that date. Applications made under former policies will be subject to those policies under which they were made.

C. Civil immunity

19. A party will be granted conditional civil immunity if the criteria outlined below are satisfied.
20. Immunity is available only for the first eligible party to disclose the cartel conduct. Parties not eligible for immunity (because they are not the first to disclose the conduct or because they do not meet the criteria) may seek to cooperate with the ACCC under section H of this Policy.
21. The ACCC encourages parties seeking immunity to come forward as soon as possible if they believe they may have been involved in cartel conduct. It is not necessary for a party to have gathered all of the required information when first contact is made with the ACCC.

Corporate immunity from proceedings

22. A corporation may apply for immunity under this section of the Policy.
23. Subject to the matters set out in paragraphs 24 and 25, a corporation will be eligible for conditional immunity from ACCC-initiated civil proceedings where it applies for immunity under this Policy and satisfies the following criteria:
 - (a) the corporation admits it is engaging in, or has engaged in, cartel conduct, whether as a principal or in an ancillary capacity, and that the conduct may contravene the CCA
 - (b) the corporation is the first party to apply for immunity in respect of the cartel under this Policy
 - (c) the corporation has not coerced others to participate in the cartel
 - (d) the corporation has either ceased its involvement in the cartel or undertakes to the ACCC that it will cease its involvement in the cartel
 - (e) the corporation's admissions are a truly corporate act (as opposed to isolated confessions of individual representatives)
 - (f) the corporation has provided full, frank and truthful disclosure, and has cooperated fully and expeditiously while making the application, including taking all reasonable steps to procure the assistance and cooperation of witnesses and to provide sufficient evidence to substantiate its admissions in paragraph 23(a), and agrees to continue to do so on a proactive basis throughout the ACCC's investigation and any ensuing court proceedings
 - (g) the corporation has entered into a cooperation agreement, and
 - (h) the corporation has maintained, and agrees to continue to maintain, confidentiality regarding its status as an immunity applicant, details of the investigation and any ensuing civil or criminal proceedings unless otherwise required by law or with the written consent of the ACCC.
24. Generally, the ACCC will not grant conditional immunity if, at the time an application is received, the ACCC is already in possession of evidence that is likely to establish at least one contravention of the CCA (whether civil or criminal), arising from the cartel conduct.
25. In order to maintain conditional immunity once granted, the corporation must comply with the cooperation agreement, including by providing full, frank and truthful disclosure and cooperating fully and expeditiously on a continuing basis throughout the ACCC's investigation and any ensuing court proceedings.
26. Subject to the applicant meeting the conditions for final immunity under this Policy (see paragraph 71), conditional civil immunity will become final immunity after the resolution of any ensuing proceedings, including appeals, against cartel participants who do not have conditional immunity.

Derivative immunity from proceedings

27. Subject to this Policy, if a corporation qualifies for conditional immunity (see paragraph 23), it may seek derivative immunity for related corporate entities and/or for current and former directors, officers and employees of the corporation who were involved in the cartel conduct. Derivative immunity may be granted for all, or part of, the relevant period of the cartel conduct and will be in the same form as the conditional immunity granted to the corporation. Derivative immunity may also extend to current and former directors, officers or employees of related corporate entities.
28. At the time of making an application for immunity under this Policy, the corporation must list all related corporate entities and/or individuals seeking derivative immunity who are known to have been involved in the alleged conduct at that point in time. Where requested to do so by the ACCC, the immunity applicant must demonstrate the relationship, at all relevant times, between itself and the related corporate entities and/or individuals for which it is seeking derivative immunity. Where the corporate applicant becomes aware, after the initial grant of conditional immunity, of related corporate entities and/or individuals that require derivative immunity, it may apply to the ACCC to extend conditional derivative immunity to the additional related corporate entities and/or individuals.
29. Subject to the matters set out in paragraph 30, a related corporate entity will be eligible for derivative conditional immunity from ACCC-initiated civil proceedings if:
- (a) for all or part of the relevant period of the cartel:
 - (i) the corporation that qualifies for conditional immunity had a controlling interest in the related corporate entity, or
 - (ii) the related corporate entity was the parent company of (or held a controlling interest in) the corporation that qualifies for conditional immunity, or
 - (iii) both the corporation that qualifies for conditional immunity and the related corporate entity had a common parent company with a controlling interest in both corporations,
- and satisfies the following criteria:
- (b) the related corporate entity admits it is engaging in, or has engaged in, cartel conduct, whether as a principal or in an ancillary capacity, and that the conduct may contravene the CCA
 - (c) the related corporate entity has not coerced others to participate in the cartel
 - (d) the related corporate entity has either ceased its involvement in the cartel or undertakes to the ACCC that it will cease its involvement in the cartel
 - (e) the related corporate entity's admissions are a truly corporate act (as opposed to isolated confessions of individual representatives)
 - (f) the related corporate entity has provided full, frank and truthful disclosure, and has cooperated fully and expeditiously while the application was being made, including taking all reasonable steps to procure the assistance and cooperation of witnesses and to provide sufficient evidence to substantiate the admissions in paragraph 29(b), and agrees to continue to do so on a proactive basis throughout the ACCC's investigation and any ensuing court proceedings
 - (g) the related corporate entity has entered into a cooperation agreement, and
 - (h) the related corporate entity has maintained, and agrees to continue to maintain, confidentiality regarding its status as a derivative 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.
30. In order to maintain conditional immunity once granted, the related corporate entity must comply with the cooperation agreement, including by providing full, frank and truthful disclosure and cooperating fully and expeditiously on a continuing basis throughout the ACCC's investigation and any ensuing court proceedings.

31. Subject to the related corporate entities covered by derivative immunity meeting the conditions for final immunity under this Policy (see paragraph 71), conditional civil immunity will become final immunity after the resolution of any ensuing proceedings, including appeals, against cartel participants who do not have conditional immunity.
32. Subject to the matters set out in paragraph 33, an individual will be eligible for derivative conditional immunity from ACCC-initiated civil proceedings if the individual applies for immunity under this Policy and satisfies the following criteria:
 - (a) the individual is a current director, officer or employee of the corporation that qualifies for conditional immunity or derivative conditional immunity, or was a director, officer or employee of that corporation during the relevant period of the cartel conduct
 - (b) the individual admits his or her involvement in the conduct of the corporation in respect of the cartel
 - (c) the individual has not coerced others to participate in the cartel
 - (d) the individual has either ceased his or her involvement in the cartel or undertakes to the ACCC that he or she will cease his or her involvement in the cartel
 - (e) the individual has provided full, frank and truthful disclosure, and has cooperated fully and expeditiously while the application was being made, including taking all reasonable steps to provide sufficient evidence to substantiate the admissions at 32(b), and agrees to continue to do so on a proactive basis throughout the ACCC's investigation and any ensuing court proceedings
 - (f) the individual has entered into a cooperation agreement, and
 - (g) the individual has maintained, and agrees to continue to maintain, confidentiality regarding his or her status as a derivative 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.
33. In order to maintain conditional immunity once granted, the individual must comply with the cooperation agreement, including by providing full, frank and truthful disclosure and cooperating fully and expeditiously on a continuing basis throughout the ACCC's investigation and any ensuing court proceedings.
34. Subject to the individual covered by derivative immunity meeting the conditions for final immunity under this Policy (see paragraph 71), conditional civil immunity will become final immunity after the resolution of any ensuing proceedings, including appeals, against cartel participants who do not have conditional immunity.

Individual immunity from proceedings

35. An individual may apply for immunity under this section of the Policy.
36. Subject to the matters set out in paragraphs 37 and 38, an individual will be eligible for conditional immunity from ACCC-initiated civil proceedings where he or she applies for immunity under this Policy and satisfies the following criteria:
 - (a) the individual is or was a director, officer or employee of a corporation that is engaging in or has engaged in cartel conduct, or they are engaging in or have engaged in cartel conduct, whether as a principal or in an ancillary capacity
 - (b) the individual admits that he or she has participated, or is participating, in conduct in respect of the cartel that may contravene the CCA
 - (c) the individual is the first party to apply for immunity in respect of the cartel under this Policy
 - (d) the individual has not coerced others to participate in the cartel
 - (e) the individual has either ceased his or her involvement in the cartel or undertakes to the ACCC that he or she will cease his or her involvement in the cartel

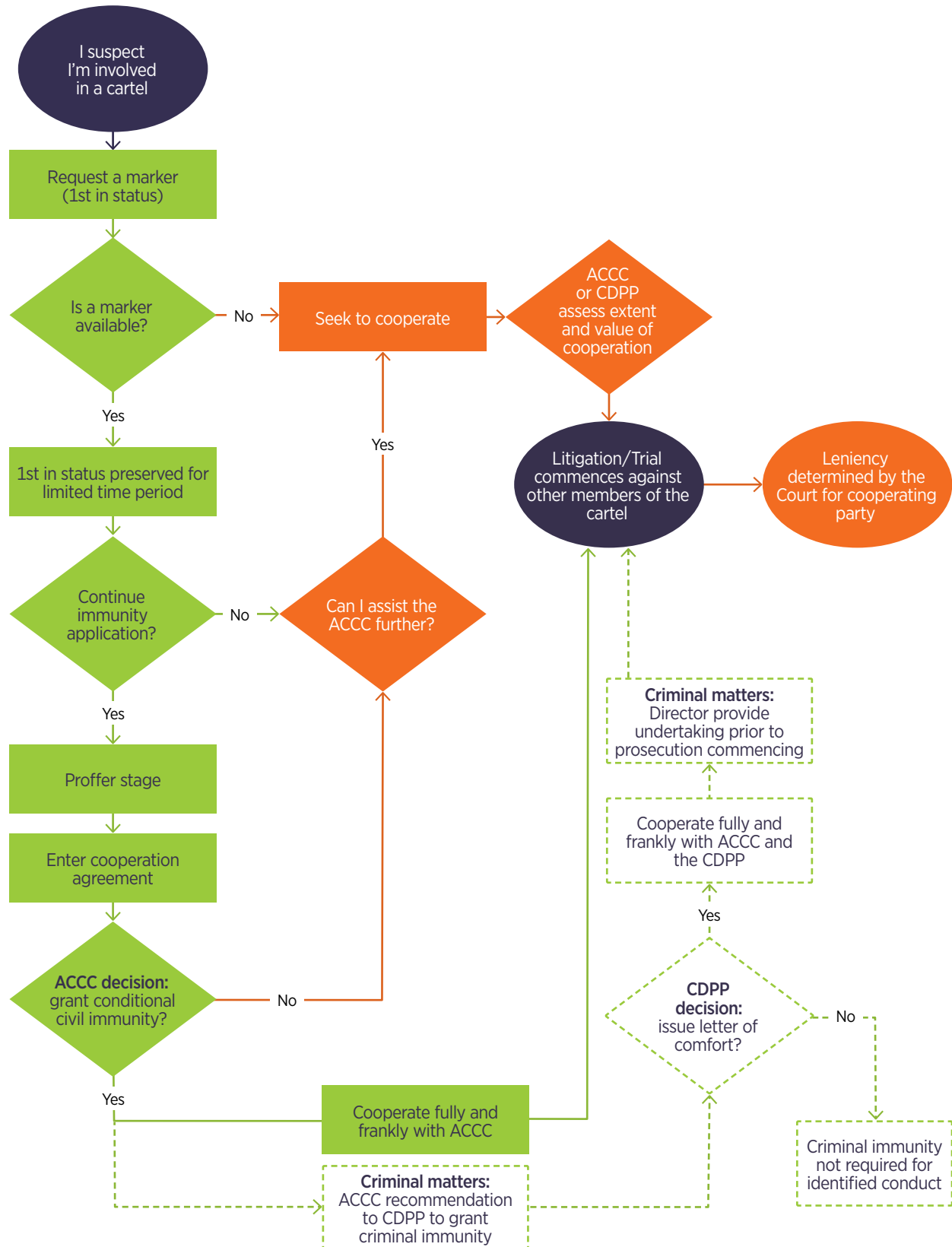
- (f) the individual has provided full, frank and truthful disclosure, and has cooperated fully and expeditiously while making the application, including taking all reasonable steps to provide sufficient evidence to substantiate the admissions in paragraph 36(b), and agrees to continue to do so on a proactive basis throughout the ACCC's investigation and any ensuing court proceedings
 - (g) the individual has entered into a cooperation agreement, and
 - (h) the individual has maintained, and agrees to continue to maintain, confidentiality regarding his or her 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.
37. Generally, the ACCC will not grant immunity if, at the time an application is received, the ACCC is already in possession of evidence that is likely to establish at least one contravention of the CCA (whether civil or criminal), arising from the cartel conduct.
38. In order to maintain conditional immunity once granted, the individual must comply with the terms of the cooperation agreement, including by providing full, frank and truthful disclosure and cooperating fully and expeditiously on a continuing basis throughout the ACCC's investigation and any ensuing court proceedings.
39. Subject to the individual meeting the conditions for final immunity under this Policy (see paragraph 71), conditional civil immunity will become final immunity after the resolution of any ensuing proceedings, including appeals, against cartel participants who do not have conditional immunity.

D. Criminal immunity

40. The CDPP is responsible for the prosecution of offences relating to cartel conduct.
41. Recognising the importance of maximising certainty in the operation of the Policy, the CDPP and the ACCC have agreed to procedures that will facilitate the granting of immunity in relation to cartel offences at the same time as immunity in relation to civil proceedings.
42. Where the ACCC is of the view that the applicant (or derivative immunity applicant) satisfies the conditions for immunity under the Policy, it will, where relevant, make a recommendation to the CDPP that immunity from prosecution be granted to the applicant.
43. The CDPP will exercise an independent discretion when considering a recommendation by the ACCC. Where the ACCC advises the CDPP that the applicant meets the criteria set out in Annexure B to the *Prosecution Policy of the Commonwealth* and the CDPP is so satisfied, as a first step the CDPP will ordinarily provide a letter of comfort to the applicant.
44. The letter of comfort recognises that the applicant has ‘first-in’ status under section C of this Policy. The letter also states that the Director intends to grant an undertaking pursuant to section 9(6D) of the DPP Act to the applicant (or derivative immunity applicant) prior to any prosecution being instituted against a participant in the cartel who does not have immunity provided that the applicant:
 - (a) maintains eligibility criteria for conditional immunity (as outlined in paragraph 23 for corporations, paragraphs 29 and 32 for derivative immunity applicants, and paragraph 36 for individuals), and
 - (b) enters into and complies with the terms of the cooperation agreement, including by providing full, frank and truthful disclosure, and cooperating fully and expeditiously on a continuing basis throughout the ACCC’s investigation and any ensuing civil or criminal proceedings.
45. The letter of comfort from the CDPP will generally be provided to the immunity applicant at the same time as the ACCC grants conditional civil immunity.
46. Prior to instituting a prosecution against a participant in the cartel who does not have immunity, the Director will determine whether to grant to the applicant (or derivative immunity applicant) a written undertaking pursuant to section 9(6D) of the DPP Act. This undertaking grants criminal immunity subject to fulfilment of ongoing obligations and conditions. Once these conditions are fulfilled by the immunity applicant (or derivative immunity applicant), the immunity becomes final.

E. The immunity process

A flowchart summarising the process of seeking immunity and leniency for cooperation is set out below:



Step 1. Marker

47. 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. The ACCC anticipates that most applications will be preceded by a request for a marker.
48. 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.
49. 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.
50. As long as a corporation or individual holds the marker for particular cartel conduct, no other corporation or individual involved in the same cartel conduct will be allowed to take that place in the immunity queue, even one that is able to satisfy all conditions immediately.
51. To obtain a marker, the 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.
52. An applicant can make a request for a marker on a hypothetical and/or anonymous basis, but the applicant must disclose sufficient information to satisfy the matters outlined in paragraph 51. This may include specifying the particular industry, product(s) and/or time period in which the cartel conduct took place.
53. If the immunity applicant has not provided sufficient information to enable the ACCC to determine whether it satisfies the requirements for a grant of conditional immunity in the time given, the marker will lapse.
54. If the ACCC forms a view that the applicant will be unable to satisfy the requirements of conditional immunity, the ACCC will cancel the marker. Prior to cancelling the marker the ACCC will notify the applicant of its view and invite the applicant to make a submission for the ACCC's consideration explaining how the applicant satisfies the requirements of conditional immunity.
55. When a marker lapses, is cancelled or is withdrawn, the same applicant or another party may apply for immunity or request a marker in respect of the relevant conduct.

Step 2. Proffer stage

56. 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 and may also need to provide supporting documents and witness evidence. This is known as a 'proffer'. The description of the cartel conduct can be made orally or in writing. However, the ACCC will create its own records in respect of all marker requests and applications, including proffers received, whether the applications are oral or written.
57. 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 applicant has been a party to a cartel.
58. The proffer will need to disclose information sufficient to satisfy the ACCC that the applicant meets the criteria for conditional immunity (as outlined in paragraph 23 for corporations, paragraphs 29 and 32 for derivative immunity applicants, and paragraph 36 for individuals).
59. The applicant will be required to provide specific detail as to the type of evidence that can be provided to the ACCC. The ACCC may require an interview with one or more witnesses, or the production of certain information and documents in order to determine whether the applicant meets the conditions for immunity. Further, the ACCC may not consider the proffer stage is completed until after the ACCC has taken signed statements from relevant witnesses.

60. Where immunity is not granted following the proffer, the ACCC may use the proffered information, but will only do so in the limited circumstances set out at paragraph 83.
61. Early in the proffer stage, if the ACCC considers that cartel conduct has been disclosed, the applicant (and each derivative immunity applicant) will be asked to enter into a cooperation agreement to be eligible for conditional immunity. A cooperation agreement sets out a timetable acceptable to the ACCC of the initial cooperative steps that the applicant agrees to undertake to satisfy its obligations under this Policy. A template of a cooperation agreement is available on the ACCC's website.
62. Conditional civil immunity will only be granted once the ACCC is satisfied that the applicant has met all the eligibility criteria for conditional immunity, including entering into and complying with the cooperation agreement. As noted at paragraph 44, one of the conditions of criminal immunity will be compliance with the cooperation agreement.

Step 3. Waivers

63. Except as required by law, the ACCC will not share confidential information provided by the immunity applicant, or the identity of the applicant, with 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.
64. Whilst the grant of conditional immunity is not dependent on a waiver(s) being provided, an applicant will be required to explain why a waiver(s) cannot be provided. A failure to provide a satisfactory explanation may be regarded as a failure to provide full cooperation as per the immunity criteria.

Step 4. Confidentiality

65. If civil proceedings and/or criminal prosecutions are commenced regarding the cartel conduct, the ACCC and/or CDPP may be required to discover or disclose information provided to the ACCC under the immunity Policy by an immunity applicant, including the identity of the immunity applicant, to the respondent/s or defendant/s.
66. The ACCC will use its best endeavours to protect any confidential information provided by an immunity applicant, including the identity of the immunity applicant, being disclosed to third parties (that is, persons who were not participants in the cartel) or published more generally, except as required by law or as necessary in the conduct of civil proceedings or criminal prosecution, and in accordance with sections 155AAA, 157B and 157C (protected cartel information provisions) of the CCA. In relation to criminal matters disclosure obligations may also require the ACCC and the CDPP to disclose such information.
67. 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.

Step 5. Recommendation to CDPP

68. 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.
69. The CDPP will exercise an independent discretion when considering a recommendation by the ACCC. Where the ACCC advises the CDPP that the applicant meets the criteria set out in Annexure B to the *Prosecution Policy of the Commonwealth* and the CDPP is so satisfied, as a first step the CDPP will ordinarily provide a letter of comfort to the applicant. Prior to the commencement of any criminal prosecution, the Director will determine whether to grant an undertaking pursuant to section 9(6D) of the DPP Act granting criminal immunity subject to conditions.

Step 6. Conditional immunity

70. If the ACCC is satisfied that the applicant has met the eligibility criteria for conditional immunity, the applicant (and any eligible derivative immunity applicants) will be granted conditional immunity in relation to civil proceedings that the ACCC might otherwise have brought against the corporation or individual in respect of the cartel conduct. 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. These letters will define the scope of the cartel conduct in relation to which conditional immunity is granted.

Step 7. Final immunity

71. In order to receive final immunity the applicant (and any derivative immunity applicant) is required to satisfy the following conditions:
 - (a) maintain eligibility criteria for conditional immunity (as outlined in paragraph 23 for corporations, paragraphs 29 and 32 for derivative immunity applicants, and paragraph 36 for individuals), and
 - (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, including by complying with the terms of its cooperation agreement.
72. Conditional civil immunity will become final immunity at the conclusion of any ensuing proceedings, including appeals, provided the applicant does not breach any conditions of immunity and maintains eligibility under this Policy. At the conclusion of any such proceedings, the ACCC will orally notify the applicant, and each derivative immunity applicant, that it has final immunity and, if requested, confirm this in writing.
73. An undertaking pursuant to section 9(6D) of the DPP Act granting criminal immunity subject to conditions will remain in place unless revoked and therefore an undertaking from the CDPP granting final criminal immunity is not required.

F. Revocation of immunity

74. In some circumstances the ACCC may consider that the applicant has breached conditions of immunity, including by failing to comply with the terms of the cooperation agreement. Often this will be resolved by dialogue between the ACCC and the applicant.
75. In circumstances where the ACCC's concerns have not been resolved informally, a written caution will be issued to the applicant. The caution will require the applicant to address the ACCC's concerns or explain why the applicant cannot remedy the failure to comply with the conditions of immunity.
76. Should the ACCC not be satisfied with the applicant's response to the written caution, a further letter will be sent to the applicant requiring an explanation as to why the ACCC should not revoke conditional immunity.
77. Should the ACCC not be satisfied with the applicant's response to the second letter, the ACCC may then advise that applicant in writing that they are no longer eligible for immunity and that their conditional immunity is revoked. The ACCC will make a recommendation to the CDPP that criminal immunity subject to conditions also be revoked.
78. In circumstances where an immunity applicant or derivative immunity 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 information (including witness evidence) provided by immunity applicants, or derivative immunity applicants, against the revoked immunity applicant or derivative immunity applicant in any:
 - (a) civil proceedings and/or criminal prosecution 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.

G. Closing an investigation/withdrawal of an immunity application/cancellation of marker

79. 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.
80. Should the immunity application be withdrawn, the applicant loses its first-in status. It will then be open to any party to apply for conditional immunity for the relevant conduct.
81. Should the immunity applicant choose not to withdraw the immunity application the obligations will also remain in place—for instance, they will be required to proactively disclose any new or corrected information to the ACCC promptly and cooperate if the ACCC decides at a later date to re-open the investigation. Subject to the party continuing to comply with the conditions of immunity (including the terms of the cooperation agreement), they will also retain their first-in status.
82. Unless specified, a grant of conditional immunity is ongoing until full immunity is granted or the application is withdrawn or revoked.
83. In circumstances where a marker lapses or is withdrawn, conditional immunity is not granted by the ACCC, or a marker is otherwise cancelled:
 - (a) the ACCC and/or the CDPP will not use information (including witness evidence) provided by immunity applicants, or derivative immunity applicants, directly as evidence against the relevant party in civil proceedings and/or criminal prosecutions under Division 1 of Part IV of the CCA, or civil proceedings under section 45 of the CCA, and
 - (b) the ACCC may use such information indirectly to further the ACCC's investigation, including to gather evidence that could be used against the applicant, any derivative immunity applicants, or any other party, in civil proceedings and/or criminal prosecutions under the CCA.

H. Cooperation Policy

84. Parties not eligible for ‘first-in’ immunity are encouraged to cooperate with the ACCC in its investigations.
85. 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. Recognition of such cooperation and assistance may take a variety of forms.
86. This section of the Policy relates to cooperation in relation to cartel conduct only. Cooperation with the ACCC in relation to conduct in contravention of the CCA, other than cartel conduct, is set out in the [ACCC cooperation policy for enforcement matters](#). To be clear, such other conduct includes a person engaging in a concerted practice.
87. Cooperation can be provided by corporate or individual parties.
88. Parties seeking to cooperate should approach the ACCC making reference to section H of this Policy. Applications can be made by directly engaging with the General Manager, Cartels Branch.

Cooperation in civil cartel matters

89. The ACCC will identify, by way of submissions to the Court, any cooperation provided by a party. The ACCC will generally assess the extent and value of the cooperation provided at the end of an investigation having regard to the factors listed in paragraph 93.
90. The ACCC may require the cooperating party to make admissions, agree to a statement of facts, and/or provide evidence in proceedings in respect of the cartel conduct.
91. Where appropriate, the ACCC will invite the cooperating party to make submissions and provide evidence as to the appropriate extent and value of the cooperation the ACCC should identify to the court. However, the penalty discount and other sanctions the ACCC ultimately recommends to the Court are solely in the discretion of the ACCC.
92. In exceptional circumstances, the ACCC may use its discretion to grant full immunity from ACCC initiated civil proceedings to a cooperating party.

Assessing cooperation in civil cartel matters

93. 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:
 - (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, which was previously unknown to the ACCC or has materially advanced the ACCC investigation
 - (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
 - (d) has the party ceased their involvement in the cartel or indicated to the ACCC that they will cease their involvement in the cartel
 - (e) did the party coerce any other person/corporation to participate in the cartel
 - (f) has the party acted in good faith in dealings with the ACCC, and
 - (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?
94. Compliance with statutory notices is a legal obligation and does not comprise cooperation for the purposes of this Policy.

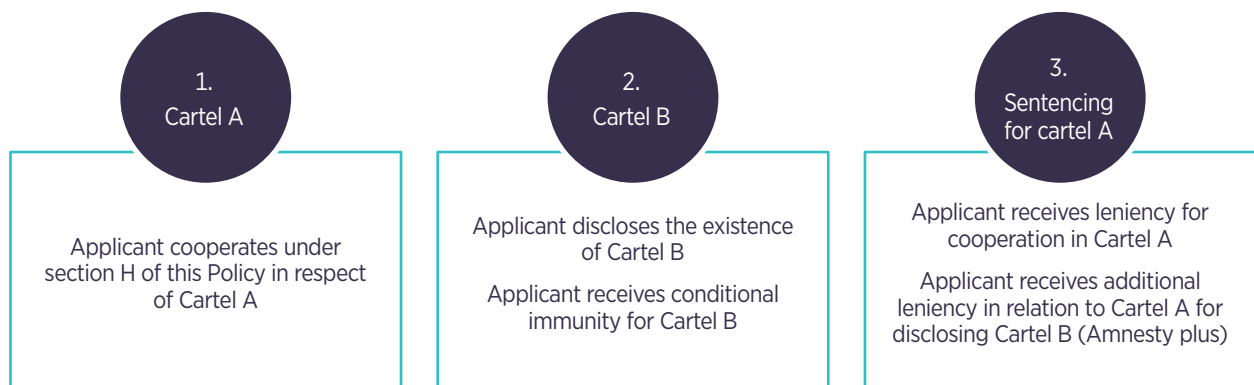
95. In determining whether to reach an agreement on civil penalties, banning orders and/or other relief and the terms of any such agreement, the ACCC takes into consideration factors including:
- (a) the extent and value of the party's cooperation with the ACCC by reference to the factors set out in paragraph 93
 - (b) (for corporate cooperating party) whether the contravention arose out of the conduct of senior management, or at a lower level
 - (c) (for corporate cooperating party) whether the corporation has a corporate culture conducive to compliance with the law
 - (d) the nature and extent of the party's contravening conduct
 - (e) whether the conduct has ceased
 - (f) the amount of loss or damage caused
 - (g) the circumstances in which the conduct took place
 - (h) (for corporate cooperating party) the size and power of the corporation, and
 - (i) whether the contravention was deliberate and the period over which it extended.
96. For the avoidance of any doubt, the ACCC will identify, by way of submissions to the Court, any cooperation provided by a party. However, the amount of any civil penalty and/or the nature and extent of any other sanctions imposed on parties who engage in cartel conduct is ultimately determined by the Court.

Cooperation in criminal matters

97. It is a matter for the Court to determine the appropriate sanction to be imposed on a party convicted of engaging in cartel conduct, including the extent of any discount for cooperation.
98. Section 16A(2) of the *Crimes Act 1914* (Cth) sets out the matters that a court must take into account when sentencing a person for a Commonwealth offence. They include whether or not a person has pleaded guilty to the offence (s16A(2)(g)), and the degree to which the person has cooperated with law enforcement agencies in the investigation of the offence or of other offences (s16A(2)(h)), and shown contrition for the offence (s16A(2)(f)).
99. Generally, any cooperation by the offender with the ACCC or other law enforcement agencies is identified to the court by evidence from the ACCC (or other relevant agencies) setting out the nature and description of the assistance provided by the offender and the overall value of that cooperation to the ACCC's investigation.
100. Compliance with statutory notices is a legal obligation and does not comprise cooperation for the purposes of this Policy.
101. It may be appropriate for the cooperating party to engage directly with the CDPP. The CDPP may require the cooperating party to make admissions, agree to a statement of facts, and/or provide evidence in proceedings in respect of the cartel conduct.
102. The ACCC will, where relevant, make a recommendation to the CDPP as to the extent and value of a party's cooperation and assistance.

I. Amnesty plus

103. A party who is cooperating with the ACCC under section H of this Policy in relation to one cartel may discover a second cartel that is independent of, 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.
104. ‘Amnesty plus’ is a recommendation by the ACCC to the Court for a further reduction in the civil 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.
105. A party will be eligible for amnesty plus if it:
- (a) is cooperating with the ACCC under section H of this Policy in respect of the first cartel investigation, and
 - (b) receives conditional immunity for the second cartel.
106. The criteria for conditional immunity and cooperation contained in this document will apply to a party seeking amnesty plus.
107. A simplified illustration of arrangements supporting an amnesty plus recommendation is set out below:



108. A party seeking amnesty plus should seek a marker for the second cartel from the ACCC as soon as possible as outlined in paragraph 47 of this Policy.