

ACCC immunity and cooperation policy
for cartel conduct

April 2014

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This publication replaces the following ACCC publications:

ACCC immunity policy for cartel conduct July 2009

ACCC immunity policy interpretation guidelines July 2009

The ACCC also publishes Frequently Asked Questions (**FAQs**) regarding this policy. These FAQs can be found on the ACCC website [\[insert hyperlink\]](#).

ACCC contact details:

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

Marcus Bezzi
Executive General Manager
Enforcement and Compliance Division

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

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

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

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 Australian Competition and Consumer Commission (**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 and ultimately result in reduced employment opportunities for Australians. 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 and 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, the discovery of and the proof of the existence of cartels can be more difficult than other forms of corporate misconduct. An immunity and cooperation policy in relation to cartels encourages insiders to provide information and enables the ACCC to penetrate the cloak of secrecy. When the extent of the immunity or leniency to be provided 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 identifying, stopping and taking action against harmful and illegal behaviour.

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A. Introduction

The *ACCC immunity and cooperation policy for cartel conduct* (**policy**) sets out the policy of the ACCC in relation to applications for immunity or for leniency from ACCC-initiated civil proceedings by those involved in cartel conduct. 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 case of ambiguities in the policy.

B. Scope of the policy

1. This policy applies to conduct in contravention of Division 1 of Part IV of the CCA. Under Division 1 a corporation must not make, or give effect to, a contract, arrangement or understanding that contains a cartel provision. This policy also applies to cartel conduct in contravention of section 45(2) of the CCA where the conduct is not also caught by Division 1 of Part IV of the CCA.
2. This policy applies equally to the equivalent provisions in various state competition codes as it does to the CCA.
3. For the purposes of this policy, cartel conduct comprises any of the following forms of conduct engaged in by parties that are, or would otherwise be, in competition with each other:
 - (a) price fixing; or
 - (b) restricting outputs in the production and supply chain; or
 - (c) allocating customers, suppliers or territories; or
 - (d) bid rigging.
4. 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.
5. The ACCC is responsible for granting civil immunity. The Office of the Commonwealth Director of Public Prosecutions (**CDPP**) is responsible for granting criminal immunity.
6. 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. Should the ACCC consider that the applicant is eligible for conditional civil immunity, it will, where relevant, make a recommendation to the CDPP to grant criminal immunity subject to conditions.

7. The CDPP will exercise an independent discretion when considering a recommendation by the ACCC. Where the CDPP considers that the applicant meets the criteria set out in Annexure B to the Prosecution Policy of the Commonwealth, as a first step it will ordinarily provide a letter of comfort to the applicant. Prior to the commencement of any criminal prosecution, the CDPP will grant an undertaking pursuant to section 9(6D) of the *Director of Public Prosecutions Act 1983 (DPP Act)* granting criminal immunity subject to conditions.
8. Parties not eligible for immunity may wish to apply for leniency in relation to their participation in cartel conduct. The ACCC's position on leniency in relation to cartel conduct is set out in section H of this policy. The ACCC's position on leniency in relation to conduct in contravention of the CCA, other than cartel conduct, is set out in the *ACCC cooperation policy for enforcement matters July 2002*.
9. This policy applies to corporations and individuals who have engaged in cartel conduct, whether as a primary contravener or in an ancillary capacity, in contravention of the CCA. For the purposes of this policy, the ACCC will treat the following as if they were corporations: partnerships, unincorporated businesses, government business enterprises and government departments or agencies carrying on a business.
10. Corporations or individuals who have unilaterally attempted, without success, to get others to engage in cartel conduct will not be eligible for immunity under this policy.
11. This policy commenced on **[date]** and applies to applications for immunity and leniency for cartel conduct received by the ACCC after this time. Applications for immunity or leniency made under former policies will be subject to those policies under which they were made.

C. Civil immunity

12. A party will be granted conditional civil immunity if the criteria outlined below are satisfied.
13. 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 apply for leniency under this policy.
14. 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

15. A corporation may apply for immunity under this section of the policy.
16. A corporation will be eligible for conditional immunity from ACCC-initiated civil proceedings where:
 - (a) it applies for immunity under this policy and satisfies the following criteria:
 - (i) the corporation is or was a party to a cartel, whether as a primary contravener or in an ancillary capacity;

- (ii) the corporation admits that its conduct in respect of the cartel may constitute a contravention or contraventions of the CCA;
 - (iii) the corporation is the first person to apply for immunity in respect of the cartel under this policy;
 - (iv) the corporation has not coerced others to participate in the cartel;
 - (v) the corporation has either ceased its involvement in the cartel or indicates to the ACCC that it will cease its involvement in the cartel;
 - (vi) the corporation's admissions are a truly corporate act (as opposed to isolated confessions of individual representatives);
 - (vii) the corporation has provided full, frank and truthful disclosure, and has cooperated fully and expeditiously up to the time of making the application, and undertakes to continue to do so, throughout the ACCC's investigation and any ensuing court proceedings; and
- (b) at the time the ACCC receives the application, the ACCC has not received written legal advice that it has reasonable grounds to institute proceedings in relation to at least one contravention of the CCA arising from the conduct in respect of the cartel.
17. 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.
18. Subject to the applicant meeting the conditions for final immunity under this policy (see paragraph 57), 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.

Derivative immunity from proceedings

19. Subject to this policy, if a corporation qualifies for conditional immunity (see paragraph 16), 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.
20. At the time of making an application for immunity under this policy, the corporation must list all related corporate entities and/or current and former directors, officers and employees of the corporation 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.
21. 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 up to the time of the application being made, and undertakes to continue to do so, throughout the ACCC's investigation and any ensuing court proceedings.
22. 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.
23. Subject to the related corporate entities covered by derivative immunity meeting the conditions for final immunity under this policy (see paragraph 57), 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.
24. An individual will be eligible for derivative immunity if the individual:
- (a) is a current director, officer or employee of the corporation that qualifies for conditional immunity or was a director, officer or employee of that corporation during the relevant period of the cartel conduct;
 - (b) admits his or her involvement in the conduct of the corporation in respect of the cartel;
 - (c) has not coerced other persons to participate in the cartel;
 - (d) has either ceased his or her involvement in the cartel or undertakes to the ACCC that he or she will cease their involvement in the cartel; and

- (e) has provided full, frank and truthful disclosure, and has cooperated fully and expeditiously up to the time of the application being made, and undertakes to continue to do so, throughout the ACCC's investigation and any ensuing court proceedings.
25. 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.
26. Subject to the current and former directors, officers and employees covered by derivative immunity meeting the conditions for final immunity under this policy (see paragraph 57), 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.

Individual immunity from proceedings

27. An individual may apply for immunity under this section of the policy.
28. An individual will be eligible for conditional immunity from ACCC-initiated civil proceedings where:
- (a) he or she applies for immunity under this policy and satisfies the following criteria:
 - (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 participating, in conduct in respect of the cartel that may constitute a contravention or contraventions of the CCA;
 - (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 up to the time of making the application, and undertakes to continue to do so, throughout the ACCC's investigation and any ensuing court proceedings; and
 - (b) at the time the ACCC receives the application, the ACCC has not received written legal advice that it has reasonable grounds to institute proceedings in relation to at least one contravention of the CCA arising from the conduct in respect of the cartel.
29. 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.

30. Subject to the individual meeting the conditions for final immunity under this policy (see paragraph 57), 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.

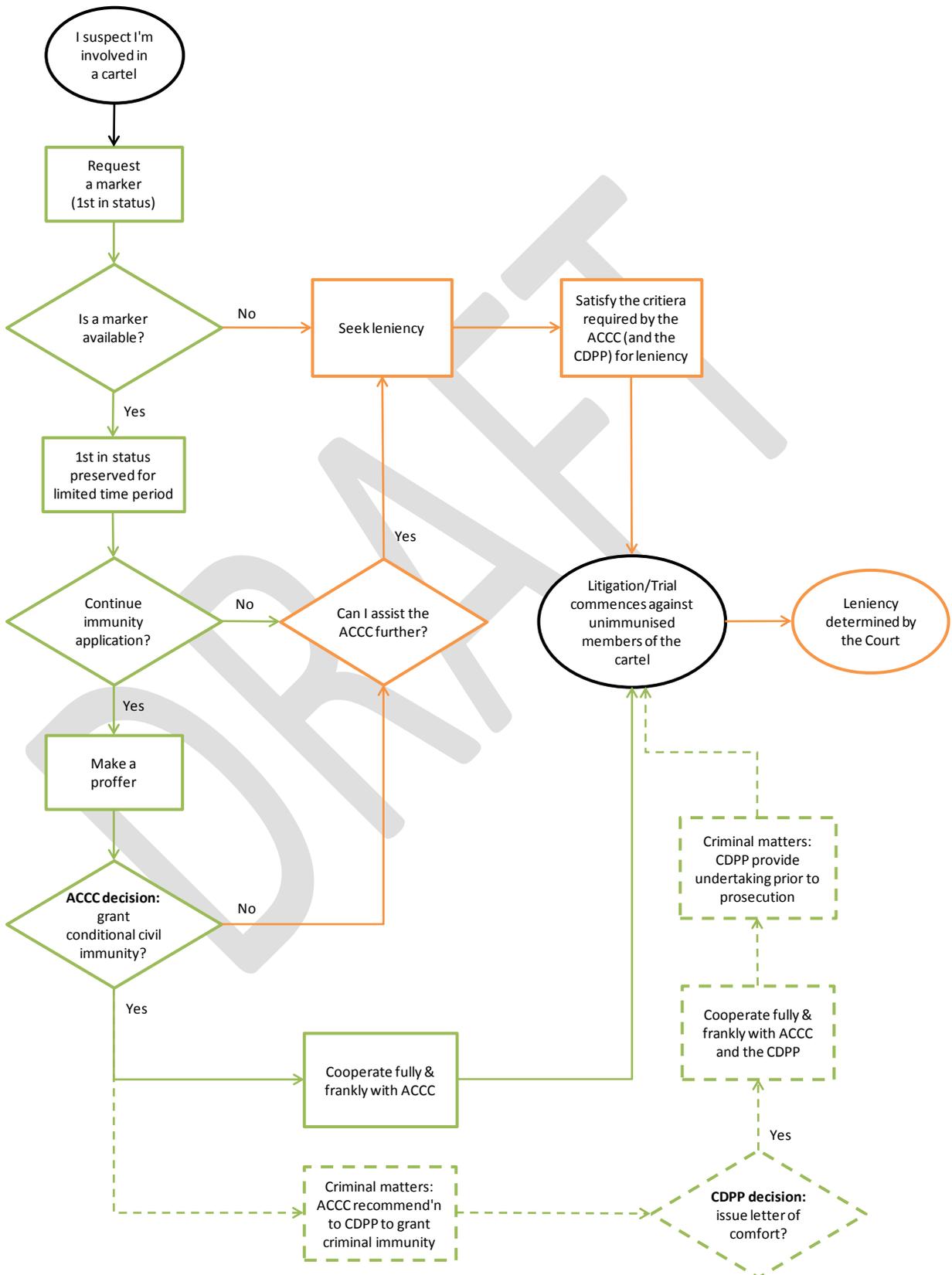
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D. Criminal immunity

31. The CDPP is responsible for the prosecution of offences relating to cartel conduct.
32. 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.
33. Where the ACCC is of the view that the applicant satisfies the conditions for immunity under the policy, it will make a recommendation to the CDPP that immunity from prosecution be granted to the applicant.
34. The CDPP will exercise an independent discretion when considering a recommendation by the ACCC. Where the CDPP considers that the applicant meets the criteria set out in Annexure B to the Prosecution Policy of the Commonwealth, as a first step it will ordinarily provide a letter of comfort to the applicant.
35. The letter of comfort recognises that the applicant has “first-in-status” under section C of this policy. The letter also states that the CDPP intends to grant an undertaking pursuant to section 9(6D) of the DPP Act to the applicant prior to any prosecution being instituted against a participant in the cartel who does not have immunity provided that the applicant:
 - (a) continues to remain eligible as assessed against the ACCC’s criteria for immunity;
 - (b) undertakes to and does maintain confidentiality; and
 - (c) fully cooperates with the ACCC’s investigation and any subsequent prosecution by the CDPP and/or proceedings brought by the ACCC.
36. 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.
37. Prior to instituting a prosecution against a participant in the cartel who does not have immunity, the CDPP will provide to the applicant a written undertaking pursuant to s. 9(6D) of the DPP Act. This undertaking grants criminal immunity subject to fulfilment of on-going obligations and conditions. Once these conditions are fulfilled by the immunity applicant, the immunity becomes final.

E. The immunity process

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



Step 1. Marker

38. 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.
39. 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.
40. 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.
41. 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.
42. 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.
43. An applicant can make a request for a marker on a hypothetical, anonymous basis, but the applicant must disclose sufficient information to satisfy the matters outlined in paragraph 42 above. This may include specifying the particular industry, product(s) and/or time period in which the cartel conduct took place.

Step 2. Proffer

44. 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. 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.
45. 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.
46. The proffer will need to disclose sufficient information to determine whether the applicant satisfies the criteria for immunity (as outlined in paragraph 16 for corporations and paragraph 28 for individuals).
47. 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 documents to determine whether the applicant meets the conditions for immunity.

Step 3. Waivers

48. 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 or leniency for the cartel conduct.
49. 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

50. The ACCC will use its best endeavours to protect any confidential information provided by an immunity applicant, including the identity of the immunity applicant, except as required by law and in accordance with sections 155AAA, 157B and 157C (protected cartel information provisions) of the CCA. In relation to criminal matters disclosure obligations may require the ACCC and the CDPP to disclose such information.
51. The ACCC may be able to claim privilege and/or public interest immunity to protect confidential information from disclosure.
52. 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

53. 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.
54. The CDPP will exercise an independent discretion when considering a recommendation by the ACCC. Where the CDPP considers that the applicant meets the criteria set out in Annexure B to the Prosecution Policy of the Commonwealth, as a first step it will ordinarily provide a letter of comfort to the applicant. Prior to the commencement of any criminal prosecution, the CDPP will grant an undertaking pursuant to section 9(6D) of the DPP Act granting criminal immunity subject to conditions.

Step 6. Conditional immunity

55. If the ACCC is satisfied that the applicant has met the eligibility criteria for conditional immunity (as outlined in paragraph 16 for corporations and paragraph 28 for individuals), 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.

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

Step 7. Final immunity

57. In order to receive final immunity the applicant is required to satisfy the following conditions:
- (a) maintain eligibility criteria for conditional immunity (as outlined in paragraph 16 for corporations and paragraph 28 for individuals);
 - (b) provide full, frank and truthful disclosure, and cooperate fully and expeditiously on a continuing basis throughout the ACCC's investigation and any ensuing litigation; and
 - (c) maintain confidentiality regarding its status as an immunity applicant and details of the investigation and any ensuing litigation unless otherwise required by law or with the written consent of the ACCC.
58. 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.
59. 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

60. 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.
61. In circumstances where the ACCC's concerns have not been resolved informally a written caution will be issued to the applicant. The caution will request that the applicant remedy the ACCC's concerns or explain why the applicant cannot remedy the ACCC's concerns within a specified period.
62. 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.
63. Should the ACCC not be satisfied with the applicant's response to the second letter, the ACCC may then advise that person in writing that they no longer qualify for immunity. The ACCC will make a recommendation to the CDPP that criminal immunity subject to conditions also be revoked. This may be referred to as revocation of immunity or conditional immunity as the case may be.

G. Closing an investigation/withdrawal of an immunity application

64. 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.
65. Should the immunity application be withdrawn, the applicant loses their first-in status. If the ACCC reopens its investigation at a later date, it will then be open to any party to apply for conditional immunity for the relevant conduct.
66. 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 cooperate if the ACCC decides at a later date to re-open the investigation. Subject to the terms of the policy, they will also retain their first-in status.
67. Unless specified, a grant of conditional immunity is on-going until full immunity is granted or the application is withdrawn or revoked.

H. Cooperation policy

68. Parties not eligible for immunity may wish to apply for leniency in relation to their participation in cartel conduct.
69. The ACCC's position on leniency in relation to cartel conduct, including cartel conduct in contravention of section 45(2) of the CCA (as outlined in paragraph 1), is set out below. The ACCC's position on leniency in relation to conduct in contravention of the CCA, other than cartel conduct, is set out in the *ACCC cooperation policy for enforcement matters July 2002*.
70. The ACCC and the CDPP accept that as matter of general principle the courts should afford more lenient treatment to persons who co-operate with the ACCC in its investigations and provide assistance in court proceedings. Recognition of such co-operation and assistance may take a variety forms, including for example submissions to the court acknowledging that the co-operation and assistance should be taken into account by the court when determining penalty or sentence.
71. Whilst the ACCC and the CDPP can recognise the co-operation and assistance that a person has provided and make appropriate submissions to the court that the co-operation and assistance should be taken into account, it will ultimately be for the court to determine the appropriate penalty or sentence to be imposed on a person who has engaged in cartel conduct.
72. If a criminal cartel prosecution is instituted and the ACCC considers that a co-operating party meets the criteria for a recommendation to the Court for lenient treatment (as outlined in paragraph 81), the ACCC will, where relevant, make a recommendation to the CDPP as to the form in which and/or extent to which the co-operating party's co-operation and assistance ought to be recognised by the CDPP.
73. Civil and/or criminal leniency can be sought by corporate or individual applicants.

Civil leniency

74. Parties seeking leniency should approach the ACCC making reference to section H of the policy. Applications can be made by directly engaging with the Executive General Manager, Enforcement and Compliance Division.
75. Each request for leniency will be considered on a case-by-case basis, having regard to the criteria listed in paragraph 81, to determine if civil leniency is available.
76. Unlike the immunity section of this policy, the ACCC will not commit upfront to the nature or the scope of civil leniency it will support. The nature and scope of civil leniency that the ACCC supports will be at the discretion of the ACCC and will generally be assessed at the end of an investigation having regard to the factors listed in paragraph 83.
77. As a condition of leniency, the ACCC may also require the applicant to make admissions, agree to a statement of facts, and/or provide evidence in proceedings in respect of the cartel conduct.
78. Where appropriate, the ACCC will invite the cooperating party to make submissions and provide evidence as to the appropriate nature and scope of leniency that the ACCC should support. However, the degree of penalty discount and other sanctions ultimately supported are solely at the discretion of the ACCC.

79. In general, second and subsequent applicants eligible for lenient treatment under the section H of this policy will not be given full immunity. However, in rare and exceptional circumstances, the ACCC may use its discretion under this policy to grant full immunity from ACCC initiated civil proceedings.
80. For instance, if an individual qualifies for conditional immunity under section C of this policy, the ACCC may, in its absolute discretion, offer the first subsequent corporate applicant full immunity from ACCC initiated civil proceedings under the cooperation section of this policy. Whether or not full immunity is granted in these circumstances will depend on the quality and extent of cooperation.

Criteria for considering leniency in civil matters

81. Civil leniency will be considered for those second and subsequent applicants under this policy that:
 - (a) have been a party to cartel conduct, whether as a primary contravener or in an ancillary capacity;
 - (b) approach the ACCC in a timely manner seeking leniency;
 - (c) have either ceased their involvement in the cartel or indicate to the ACCC that they will cease their involvement in the cartel;
 - (d) have not coerced any other person/corporation to participate in the cartel;
 - (e) act in good faith in dealings with the ACCC;
 - (f) provide significant evidence regarding the cartel conduct;
 - (g) 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; and/or
 - (h) (for individual leniency applicants only) agree not to use the same legal representation as the corporation by which they are employed.
82. It is not necessary that all the criteria be met in order for civil leniency to be supported by the ACCC. Each case is assessed on its merits.

Factors taken into consideration for recommended reduction in civil sanctions

83. 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) whether the corporation or individual has cooperated with the ACCC;
 - (b) whether the contravention arose out of the conduct of senior management, or at a lower level;
 - (c) whether the corporation has a corporate culture conducive to compliance with the law;
 - (d) the nature and extent of the contravening conduct;

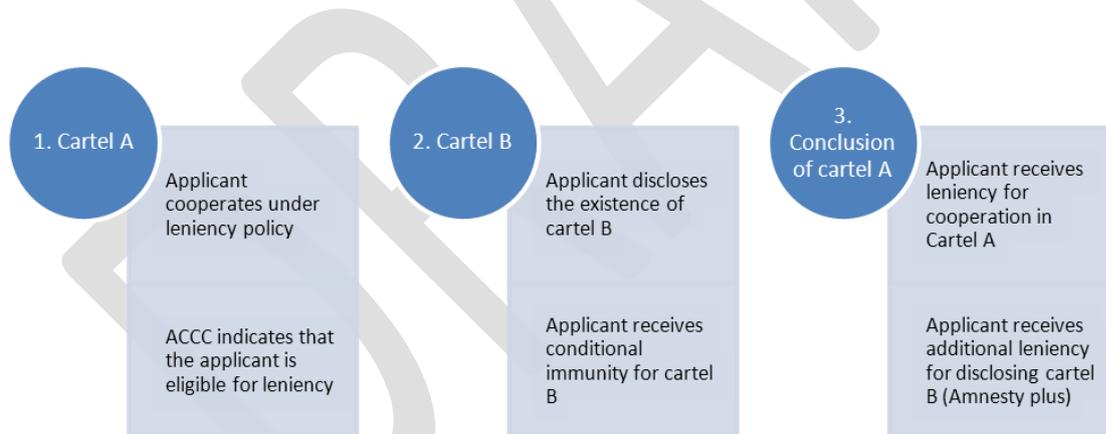
- (e) whether the conduct has ceased;
 - (f) the amount of loss or damage caused;
 - (g) the circumstances in which the conduct took place;
 - (h) the size and power of the corporation; and
 - (i) whether the contravention was deliberate and the period over which it extended.
84. For the avoidance of any doubt, the ACCC will make a recommendation to the Court regarding the leniency discount it supports for the applicant in a civil cartel case. However, the size of the civil penalty and/or other sanctions imposed on parties who engage in cartel conduct is ultimately determined by the Court.

Criminal leniency

85. A person who has engaged in cartel conduct but who is not the first person to apply for immunity in respect of the cartel will have their application for lenient treatment, or criminal immunity determined by the CDPP in accordance with the Prosecution Policy of the Commonwealth, rather than pursuant to Annexure B of that Prosecution Policy. The CDPP will have regard to any recommendation made by the ACCC relating to a person's application for leniency.
86. The CDPP may require direct engagement with the applicant in making decisions regarding leniency.
87. As a condition of leniency, the CDPP may also require the applicant to make admissions, agree to a statement of facts, and/or provide evidence in proceedings in respect of the cartel conduct.
88. Although the CDPP will acknowledge the cooperation of a defendant, the sanctions imposed on a party who engages in cartel conduct is ultimately determined by the Court.

I. Amnesty plus

89. A leniency applicant 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.
90. Amnesty plus is a recommendation to the Court for a further reduction in the civil penalty in relation to the first cartel and/or an acknowledgement by the ACCC of further cooperation for a further reduced fine or sentence in criminal matters in relation to the first cartel.
91. A party will be eligible for amnesty plus if it:
- (a) is a leniency applicant for the first cartel investigation, and
 - (b) receives conditional immunity for the second cartel.
92. The criteria for immunity and leniency contained in this document will apply to a party seeking amnesty plus.
93. Immunity is not available as a form of leniency for parties seeking amnesty plus.
94. A simplified illustration of arrangements supporting an amnesty plus recommendation is set out below:



95. A party seeking amnesty plus should seek a marker for the second cartel from the ACCC as soon as possible as outlined in paragraph 38 of this policy.