

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Roundtable on challenges and co-ordination of leniency programmes - Note by
Australia****5 June 2018**

This document reproduces a written contribution from Australia submitted for Item 3 at the 127th Meeting of the Working Party No 3 on Co-operation and Enforcement on 5 June 2018.

More documentation related to this discussion can be found at

www.oecd.org/daf/competition/challenges-and-coordination-of-leniency-programmes.htm

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Australia

1. ACCC immunity and cooperation policy for cartel conduct

1. Cartels are often systematic, deliberate and covert. Our experience is that an effective cartel immunity and cooperation policy (often termed a “leniency” policy or programme) is a vital tool in the detection of cartels.
2. The *ACCC immunity and cooperation policy for cartel conduct* (the Policy) offers conditional immunity to the first eligible party to disclose cartel conduct. Second and subsequent applicants, who choose to cooperate under the Policy, may have their cooperation recognised in a variety of ways, including a reduction in the penalty or fine.
3. The ACCC conducts regular reviews of the Policy to address issues that arise in the administration of the Policy and to ensure that it remains an effective tool to deter and detect cartels operating in Australia or effecting Australian businesses and consumers.

1.1. Recent challenges in administering the Policy

4. In recent times, the main challenge that has arisen in the administration of the Policy is a concern about the level and timeliness of cooperation provided by immunity applicants.
5. Whilst the Policy clearly articulates the requirement for full and expeditious cooperation as a condition of the grant of immunity, the experience of the ACCC in recent times is that the imperative to cooperate diminishes after conditional immunity is granted to an applicant. Moreover, applicants can be slow to provide information and access to witnesses, particularly in the context of international cartels where multiple jurisdictions are investigating.
6. Mitigating this challenge is the main focus of the current review of the Policy.

1.2. The Policy review

7. The current review of the Policy proposes to address the challenge outlined above by clarifying the obligations on immunity applicants and securing key evidence prior to the grant of conditional immunity.
8. The following key changes to the Policy are under consideration:
 - Requiring clearer corporate and individual admissions as a condition of immunity;
 - Requiring immunity and derivative immunity parties to sign a cooperation agreement with the ACCC at the time that conditional immunity is granted to clearly articulate the applicants’ obligations and, in appropriate cases, set a timetable for providing documents, witnesses and information to the ACCC;
 - Requiring that individual immunity applicants participate in interviews and provide witness statements prior to a grant of conditional immunity, so that the ACCC has a clear understanding of what their evidence will be; and

- Further clarifying the information required in a proffer.

2. Cooperation/coordination with international regulators

9. The ACCC regularly engages with its international counterparts to cooperate and coordinate on immunity/leniency matters and subsequent investigations.

10. As part of the Policy review outlined in paragraph 7-8 above, the ACCC consulted with a number of international counterparts to identify key developments or issues that needed to be considered. This consultation has the benefit of enhancing the consistency of the immunity programmes operated across multiple jurisdictions. This consistency is important to prospective immunity applicants in international cartel matters, because it enables them to efficiently cooperate across multiple jurisdictions, and may inform their assessment of whether to apply to the ACCC for immunity. In particular, the ACCC discussed the above Policy changes with the New Zealand Commerce Commission (NZCC) which is also currently undertaking a review of its immunity policy. This cooperation with the NZCC is particularly significant for the ACCC given the close similarities between Australian and New Zealand competition laws and the volume of trans-Tasman trade.

11. The ACCC also regularly engages closely with its international counterparts such as the NZCC in assessing immunity applications and investigating international cartel investigations.

12. The most common and perhaps most significant form of cooperation between the ACCC and the NZCC is informal cooperation. Informal cooperation can take place on any investigation regardless of whether the agencies are able to exchange confidential information provided by the parties. There are a number of international cartel matters where the ACCC has benefitted significantly from informally discussing case theories and investigative strategies with the NZCC and other international agencies. These discussions provide critical context for our investigations, and enable us to ensure that any enforcement action taken by the ACCC in relation to an international cartel is targeted at addressing harm suffered by Australian businesses and consumers.

13. If the ACCC receives an application for immunity under the Policy in relation to an international cartel matter, the ACCC will request that the applicant provides a confidentiality waiver for each jurisdiction in which it has sought, or intends to seek, immunity or leniency. The ACCC will not share confidential information provided by an immunity applicant, or the identity of the applicant, with other regulators without the applicant's consent (or except as required by law). Immunity applicants who refuse to provide waivers without a valid reason may be considered to be failing to provide full cooperation. For example, it may be valid for an immunity applicant to refuse to provide a waiver in relation to another jurisdiction where it is not entitled to immunity.

14. The ACCC has recently worked closely with the NZCC on several international cartel investigations which involve conduct in Australia and New Zealand (as well as other jurisdictions around the world). In many of these investigations, the ACCC and NZCC had a common immunity applicant and obtained a waiver from the immunity applicant allowing them to discuss the confidential information submitted by the applicant with each other. Where the two agencies had a common immunity applicant, the ACCC and NZCC maintained regular contact during their assessments of the applicant's immunity application. Given the similarities in the Australian and New

Zealand competition legislation, it has been particularly beneficial for the ACCC and NZCC to discuss in general terms how the materials provided by the immunity applicant may give rise to contraventions and to identify potential gaps and possible further enquiries. This form of cooperation is not just efficient for both the ACCC and NZCC but is also beneficial for the immunity applicant, as both agencies can take a coordinated and focussed approach in their requests for information from the immunity applicant.

15. On a practical level, the ACCC's relationship with the NZCC has also assisted the ACCC to coordinate the timing of interviews with international witnesses. In a recent multi-jurisdictional cartel investigation, the ACCC and NZCC coordinated their requests to interview immunity applicant witnesses who were located in London. The two agencies jointly developed a plan to conduct the interviews consecutively, which facilitated timely access to the witnesses in the context of demands on those witnesses from multiple jurisdictions. Cooperation between the two agencies continued once the witness interviews commenced, with the ACCC and the NZCC discussing the key issues that arose in the course of the interviews. This enabled both agencies to conduct targeted, efficient interview processes and to clarify significant points with witnesses during the limited timeframes available.

16. Further, the ACCC's relationship with the NZCC has also allowed for both agencies to coordinate their approaches to outcomes on cartel investigations through the sharing of case theories, investigation plans or proposed remedies. Such information is 'agency confidential information' and does not require a waiver to be granted by an immunity applicant. It is beneficial to both agencies in terms of ensuring that, where possible, a consistent approach is taken. For example on a number of major international cartel investigations, both agencies have benefited from being able to discuss their approach to prioritising certain classes of conduct and possible ways to assess that conduct.

17. In appropriate cases, there are also circumstances in which the ACCC or the NZCC can utilise specific provisions in their respective legislation to exercise compulsory powers to assist in progressing the other agency's investigation. This has recently been extremely useful in a number of investigations, one involving trans-Tasman trade and another involving conduct which took place in Australia, but involved a witness that was located in New Zealand.