

Cartel Regulation

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in 42 jurisdictions worldwide

2010

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Overview	Kirby D Behre, Michael PA Cohen and Kristen Warden <i>Paul, Hastings, Janofsky & Walker LLP</i>	3
Argentina	Viviana Guadagni <i>Quevedo Abogados</i>	6
Australia	Michael Corrigan and Anna Modrak <i>Clayton Utz</i>	11
Austria	Astrid Ablasser-Neuhuber and Florian Neumayr <i>bvp Hügel Rechtsanwälte</i>	18
Belgium	Hans Gilliams, Jan Bocken and Koen Baekelandt <i>Eubelius</i>	23
Brazil	Mauro Grinberg, Leonor Cordovil and Carlos Amadeu Pereira de Barros <i>Barcellos Tucunduva</i>	31
Canada	D Martin Low QC, A Neil Campbell, J William Rowley QC and Mark Opashinov <i>McMillan LLP</i>	36
Chile	Claudio Lizana and Lorena Pavic <i>Carey y Cía</i>	44
China	Susan Ning, Ding Liang and Jiang Liyong <i>King & Wood</i>	50
Colombia	Jorge Jaeckel and Claudia Montoya <i>Jaeckel/Montoya Abogados</i>	55
Cyprus	Thomas Keane <i>Chrysses Demetriades & Co LLC</i>	60
Denmark	Jan-Erik Svensson <i>Gorrissen Federspiel</i>	65
European Union	Hans-Jörg Niemeyer and Dirk Hamann <i>Hengeler Mueller</i> John Boyce and Anna Lyle-Smythe <i>Slaughter and May</i>	70
France	Hugues Calvet and Ning-Ly Seng <i>Bredin Prat</i>	81
Germany	Alf-Henrik Bischke and Thorsten Mäger <i>Hengeler Mueller</i>	90
Greece	Angela Nissyrios <i>M&P Bernitsas Law Offices</i>	97
Hungary	Zoltán Marosi and Gábor Fejes <i>Oppenheim</i>	104
India	Suchitra Chitale <i>Chitale & Chitale Partners</i>	110
Ireland	Helen Kelly and Donogh Hardiman <i>Matheson Ormsby Prentice</i>	115
Israel	Eytan Epstein, Tamar Dolev Green and Michelle Morrison Trau <i>Epstein Chomsky Osnat & Co</i>	122
Italy	Rino Caiazzo, Kathleen Stagi and Francesca Costantini <i>Ughi e Nunziante</i>	130
Japan	Eriko Watanabe <i>Nagashima Ohno & Tsunematsu</i>	138
Korea	Hoil Yoon <i>Yoon & Yang LLC</i>	145
Latvia	Dace Silava-Tomsone and Ugis Zeltins <i>Raidla Lejins & Norcous</i>	150
Lithuania	Emil Radzihovsky, Henrikas Celencevičius and Giedrius Kolesnikovas <i>Motieka & Audzevičius</i>	156
Luxembourg	Patrick Santer and Léon Gloden <i>Elvinger, Hoss & Prussen</i>	164
Macedonia	Tatjana Popovski Buloski <i>Polenak Law Firm</i>	169
Netherlands	Jolling K de Pree and Simone JH Evans <i>De Brauw Blackstone Westbroek NV</i>	174
New Zealand	Sarah Keene and Nick Flanagan <i>Russell McVeagh and Meredith Connell</i>	184
Nigeria	Babatunde Irukera and Ikem Isiekwena <i>SimmonsCooper Partners</i>	194
Norway	Heddy Ludvigsen and Monica Syrdal <i>Advokatfirmaet Hjort DA</i>	198
Poland	Dorothy Hansberry-Bieguńska, Sabina Famirska and Antoni Bolecki <i>Wardyrński & Partners</i>	205
Portugal	Mário Marques Mendes and Pedro Vilarinho Pires <i>Marques Mendes & Associados</i>	212
Romania	Georgeta Harapcea <i>Nestor Nestor Diculescu Kingston Petersen</i>	219
Russia	Evgeny Maslennikov and Ilja Ratschkov <i>Noerr</i>	225
Slovenia	Nataša Pipan Nahtigal <i>Odvetniki Šelih & partnerji</i>	233
South Africa	Anthony Norton, John Oxenham and Maria Celaya <i>Nortons Incorporated</i>	239
Sweden	Tommy Pettersson, Johan Carle and Stefan Perván Lindeborg <i>Mannheimer Swartling</i>	246
Switzerland	Marcel Meinhardt and Benoît Merkt <i>Lenz & Staehelin</i>	255
Turkey	Gönenç Gürkaynak and M Hakan Özgökçen <i>ELIG Attorneys-at-Law</i>	263
Ukraine	Stanislav Gerasymenko <i>Arzinger & Partners</i>	269
United Kingdom	Sarah Cardell and Lisa Wright <i>Slaughter and May</i>	275
United States	Moses Silverman and Aidan Synnott <i>Paul, Weiss, Rifkind, Wharton & Garrison LLP</i>	286
Quick reference tables		295

Australia

Michael Corrigan and Anna Modrak

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Legislation and jurisdiction

1 Relevant legislation

What is the relevant legislation and who enforces it?

In Australia, the relevant law is the Trade Practices Act 1974 (TPA). The Australian Competition and Consumer Commission (ACCC) is the independent, national statutory authority responsible for the administration and enforcement of the TPA. Criminal cases will be prosecuted by the federal director of public prosecutions (DPP).

In enforcing the TPA, the ACCC may bring civil proceedings in the Federal Court of Australia (Court) seeking a variety of orders (including monetary penalties, damages (in a representative capacity), injunctions and, in merger cases only, divestment of acquired assets).

The DPP may commence criminal proceedings in either the Court or a State Supreme Court.

The ACCC may authorise individual exemptions to the TPA and obtain information, documents and evidence by notice or pursuant to a search warrant.

The ACCC is vigilant in enforcing the TPA. Recent penalties imposed on a cartel member as a result of ACCC action exceeded A\$35 million.

2 Proposals for change

Have there been any recent changes or proposals for change to the regime?

On 24 July 2009, the Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009 (Cartel Act) was passed by the Federal Parliament and came into force.

The Cartel Act amended the TPA by introducing criminal penalties and parallel civil sanctions for making or giving effect to a 'cartel provision' (see questions 14 and 15 for relevant penalties).

A cartel provision is broadly a provision of a contract, arrangement or understanding between competitors that:

- has the purpose or is likely to have the effect of directly or indirectly fixing, controlling or maintaining or providing for the fixing, controlling or maintaining of the price, discount, allowance, rebate or credit in relation to goods or services; or
- has the purpose of directly or indirectly:
 - preventing, restricting or limiting production or supply of goods or services by any of the parties;
 - market sharing; or
 - bid rigging.

Liability for the criminal offence is strict, with no requirement to prove dishonesty, or to show that the conduct was known to be illegal.

To establish the criminal offence, it is sufficient to prove the parties had 'knowledge or belief' that the actual cartel conduct was occurring, together with proof of the cartel's conduct beyond reasonable doubt.

The Cartel Act also expands the ACCC's existing search and seizure powers to include the power to tap phones, intercept emails and use surveillance devices in investigating cartel offences. This is in addition to the ACCC's power to conduct raids to search for and seize documents and obtain production of documents, and to examine employees on oath.

3 Substantive law

What is the substantive law on cartels in the jurisdiction?

In addition to the new civil and criminal provisions (see question 2), the TPA also prohibits, per se, on a 'civil penalty' basis, the following types of conduct and arrangements (both horizontal and vertical) that one might associate with cartels:

- entering into 'exclusionary provisions' – essentially boycotts by competitors of dealings with another person or class of persons;
- imposing a minimum resale price for goods or services; and
- supplying goods or services on the condition that the purchaser acquires other goods or services from a third party.

Under the TPA, private actions for single damages can be brought, including class actions. The TPA also allows the ACCC to initiate 'representative' Court proceedings to recover damages on behalf of persons who suffer loss or damage from cartel activity.

4 Industry-specific offences and defences

Are there any industry-specific offences and defences?

In general, the answer is no. Part X of the TPA provides limited exemptions for conference arrangements between international liner cargo carriers.

There are detailed provisions specific to the telecommunications industry in parts XIB and XIC of the TPA.

5 Application of the law

Does the law apply to individuals or corporations or both?

Both. Although the TPA as federal law is limited to some extent by the division of federal and state powers under Australia's Constitution, those limitations are of little practical significance because universal application of the TPA is supported by mirror legislation in all Australian states and territories.

6 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction?

Yes. The TPA applies to cartel conduct outside Australia, where any of the following applies:

- the corporation is ordinarily resident, or carries on business, in Australia; or
- there is an Australian subsidiary or agent that implements the corporation's conduct, such that the Australian subsidiary's or agent's conduct can be said to be the conduct of the corporation in Australia; or
- the corporation is involved in communications targeted towards Australia or the implementation of conduct in Australia, such that its relevant conduct relating to the cartel activity, can be said to occur 'in' the Australian jurisdiction.

For example, the TPA applies to global cartel arrangements if implemented in Australia by a cartel member.

Investigation

7 Steps in an investigation

What are the typical steps in an investigation?

The ACCC has extensive powers to investigate suspected breaches of the TPA and may exercise these powers at any time if it has reason to believe that a person has information relating to a breach or potential breach of the TPA by any person.

There is no statutory time frame within which an investigation must take place. However, proceedings by the ACCC for recovery of pecuniary penalties for breach of part IV of the TPA must be instituted within six years after the contravention. There is no power to extend that period.

The Court has exclusive jurisdiction to determine civil penalty matters arising under the TPA in proceedings before a judge. There are no time periods within which the hearing must be completed or judgment must be given. Generally, the court gives a judgment determining the liability issues and if a contravention is established, holds a separate hearing to determine the appropriate penalty or other relief.

It is not unusual for several years to pass between the initiation of an ACCC investigation of cartel conduct and the final resolution of the penalty proceedings.

Criminal proceedings will involve:

- committal proceedings before a magistrate in a state or territory court. The magistrate will decide whether the charges are sufficiently strong for the person to face trial before a jury; and
- if the person is committed to stand trial, the matter will be heard in either the Court or a state or territory supreme court, by a jury.

8 Investigative powers of the authorities

What investigative powers do the authorities have?

The ACCC may require any person in Australia who it reasonably believes is capable of providing documents, information or evidence in relation to a suspected contravention of the TPA, to provide such documents, information or evidence to the ACCC (section 155 notice). It is an offence not to comply with a section 155 notice. This procedure may be used after proceedings have been commenced.

A person is not excused from answering a section 155 notice on the ground that the response may tend to incriminate the person (self-incrimination). There is no right to remain silent. Testimony of an employee that has been compelled by the ACCC using a section 155 notice can be used against that individual and his or her employer in proceedings for breach of the TPA.

The ACCC cannot use section 155 to require the production of legally privileged material.

The ACCC may also obtain a warrant to tap phones, intercept emails and use surveillance devices in investigating criminal

cartel offences. In addition, the ACCC may enter the (commercial or domestic) premises of a person who it has reason to believe has engaged in or is engaging in conduct that contravenes the TPA, for the purposes of inspecting, copying or taking extracts of documents (including emails, mobile phone records, computer records, tapes, DVDs, etc). The ACCC can search premises and seize evidence during an investigation, but only if a federal magistrate has granted a search warrant or the party under investigation has consented.

International cooperation

9 Inter-agency cooperation

Is there inter-agency cooperation? If so, what is the legal basis for, and extent of, cooperation?

The ACCC and the DPP have entered into a memorandum of understanding (MoU) in relation to the prosecution and investigation of criminal cartel offences. The MoU outlines the matters to be considered and the circumstances in which the ACCC will refer cases to the DPP for criminal prosecution, rather than choosing to pursue civil penalties in the courts. According to the MoU, cases will be referred to the DPP where they involve 'conduct of the type that can cause large-scale or serious economic harm'. Some of the matters for consideration include the significance of the impact of the conduct on the market in which it occurred and whether the alleged participants have previously participated in cartel conduct.

There are no formal domestic cooperation agreements in place between the ACCC and customs agencies or state-based antitrust agencies. There is an agreement between the Australian Securities and Investments Commission and the ACCC in the financial services sector.

Internationally, the ACCC has several bilateral cooperation agreements in relation to cartel and competition issues with various international antitrust enforcement agencies, including those in the US, Europe, UK, Canada, New Zealand, South Korea, Taiwan, Fiji and Papua New Guinea. Australia also has relevant free trade agreements with New Zealand, the US, Singapore, Thailand and Chile, and is currently negotiating free trade agreements with China, the Gulf Cooperation Council, Japan, Korea, Malaysia and the 10 ASEAN countries.

The Australian government also has in place an agreement of treaty status with the US on mutual antitrust enforcement assistance. Various requests or investigations have been made on both sides to date. The 2004 Free Trade Agreement between Australia and the US envisages that the ACCC and US authorities will work closely together to investigate and regulate cartel-style behaviour affecting either nation.

The ACCC may provide information and assistance to foreign regulators either under the Mutual Assistance in Business Regulation Act 1992, under which a foreign regulator may request that the ACCC obtain information, documents or specific evidence, which it may provide if authorised to do so by the Commonwealth attorney general, or under section 155AAA of the TPA under which the ACCC may provide a foreign government body with information that would enable or assist that body to perform or exercise its functions. Conditions may be imposed on the disclosure by the ACCC.

Under the Mutual Assistance in Criminal Matters Act 1987, a foreign country can request that the Commonwealth attorney general obtain evidence, information and documents, and provide other assistance in relation to criminal proceedings in that foreign country.

10 Interplay between jurisdictions

How does the interplay between jurisdictions affect the investigation, prosecution and punishment of cartel activity in the jurisdiction?

The ACCC can use documents, information or other assistance provided by a foreign regulator in proceedings in the Court. Such material may be used if it relates to the Australian issues in the proceedings and is admissible in accordance with the Australian rules of evidence under the Evidence Act. The ACCC can seize material in Australia and may pass it on to a foreign government body (see question 9).

11 Adjudication

How is a cartel matter adjudicated?

Committal proceedings for criminal cartel offences will be heard before a magistrate in a state or territory court. If the accused is committed to stand trial, the matter will be heard in either the Court or the supreme court of a state or territory. This will be at the election of the DPP.

A right to a jury trial is guaranteed by section 80 of Australia's Constitution.

The Cartel Act amends section 163 of the TPA to confer federal indictable jurisdiction on the Court in relation to criminal proceedings instituted after the commencement of the Cartel Act. The amendments to the TPA also confer on the state and territory supreme courts, federal jurisdiction with respect to certain declarations and orders if those courts are hearing appeals arising out of prosecutions of criminal cartel offences.

Civil penalties proceedings under the TPA will be heard and determined by a single judge in the Court.

Penalty proceedings are 'adversarial' in nature and can only be brought by the ACCC or DPP. Actions for damages are also adversarial and can be brought by any person who suffers loss or damage as the result of an alleged contravention, or by the ACCC in a representative capacity.

12 Appeal process

What is the appeal process?

Appeals from decisions of the Court are made to a court of three judges, sitting as the Full Court of the Court. Any further appeals are, by leave only, to the High Court of Australia.

Appeals from decisions of the Supreme Court of a state or territory are made to the relevant court of appeal where they are generally heard by three judges. Any further appeals are, by leave only, to the High Court of Australia.

13 Burden of proof

With which party is the burden of proof?

In the case of civil penalty offences, the onus of proof lies with the plaintiff (the ACCC or any other party who has instituted proceedings), and a civil standard of proof applies, requiring proof 'on the balance of probabilities'.

The burden of proof for the new criminal cartel offences lies with the prosecution who must prove its case 'beyond reasonable doubt'. It is also necessary for the prosecution to prove that the relevant contract, arrangement or understanding was made, or given effect to and that the accused knew or were aware of the facts that would make up the offence.

Sanctions**14 Criminal sanctions**

What criminal sanctions are there for cartel activity? Are there maximum and minimum sanctions?

Individuals will face a maximum of 10 years' imprisonment, or fines of A\$220,000, or both. Corporations face a maximum penalty of either A\$10 million, or three times the amount of the benefit gained, or, if the amount of the gain cannot be determined, 10 per cent of the corporate group's annual turnover in Australia, whichever of the three is greater.

15 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Civil penalties may be imposed on corporations and individuals for breach of part IV of the TPA. Currently, the maximum penalties (which apply in relation to contraventions occurring after 1 January 2007) are:

- A\$10 million per contravention;
- if the court can determine the value, three times the value of the benefit that the body corporate and any related body corporate have obtained directly or indirectly that is reasonably attributable to the act or omission); or
- if the court cannot determine that value, 10 per cent of the annual turnover of the body corporate in Australia and any related body corporate during the 12 months ending at the end of the month in which the act or omission occurred (only supplies connected with Australia will count towards total turnover).

The maximum penalty for an individual is A\$500,000.

The ACCC may apply to the Court for any or all of the following orders against individuals or corporations involved in contraventions of part IV of the TPA, including:

- community service;
- probation (orders requiring a company to establish a compliance or training programme or revise its internal procedures); and
- adverse publicity (which may require the publishing of advertisements).

Individuals may also be disqualified from managing corporations.

It is a criminal offence for a corporation or an individual to refuse to answer a section 155 notice. This offence is punishable by:

- for a corporation, a maximum fine of A\$11,000;
- for an individual, a maximum fine of A\$2,200 or imprisonment for 12 months.

The ACCC has indicated that it will work closely with the DPP to prosecute and seek custodial sentences for people who mislead the ACCC during investigations.

16 Civil and administrative sanctions

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

The MoU between the ACCC and DDP (see question 9) acknowledges that some matters warrant both criminal and civil proceedings, but expressly states that the agencies will ensure that 'measures' are adopted to avoid civil proceedings adversely affecting a related criminal proceeding.

The TPA provides that a judge presiding at a trial against a person for contravening the cartel criminal offences may, where appropriate,

grant certain related civil orders. This ensures that a separate civil trial in such matters is not necessary.

17 Private damage claims and class actions

Are private damage claims or class actions possible?

Yes. Damages are assessed on the basis of the amount of loss or damage the person suffered as a result of conduct that contravened part IV. Punitive, exemplary or treble damages cannot be awarded.

The ACCC may bring representative proceedings for damages on behalf of any person who has suffered, or may suffer, loss or damage as a result of cartel activity.

Class actions can be taken for breach of part IV.

In a proceeding seeking damages for contravention of the TPA, a finding of fact by the court after hearing evidence in contested penalty proceedings in which a person has been found to have contravened a provision of part IV of the TPA is prima facie evidence of that fact.

The standard limitation period is six years after the day on which the cause of action accrued, that is, the day when loss or damage was suffered as a result of the breach. However, decisions in two recent cartel cases have suggested (without finally deciding) that there may be no time limit, other than one imposed at the court's discretion, for an action seeking both an injunction and compensation under the TPA (section 87(1)).

Facts recorded in 'agreed facts' submitted to the Court to justify a penalty agreed between the ACCC and a defendant are usually not admissible as proof of those facts in any other proceedings.

18 Recent fines and penalties

What recent fines or other penalties are noteworthy? What is the history of fines? How many times have fines been levied? What is the maximum fine possible and how are fines calculated? What is the history of criminal sanctions against individuals?

Penalties for cartel conduct are significant and have recently been increased. There have been many instances of successful prosecutions by the ACCC.

In October 2008, the ACCC announced that it had reached agreed penalties with Qantas and British Airways, both of which had approached the ACCC and voluntarily made admissions under the ACCC's cooperation policy in relation to alleged price fixing of fuel surcharges applied to international carriage of air cargo.

In December 2008, the Court accepted the penalties proposed by the ACCC, Qantas and British Airways and ordered that Qantas pay A\$20 million and British Airways pay A\$5 million in settlement of the claims brought against them by the ACCC, plus A\$200,000 in contribution to the costs of the proceedings.

In late 2007, the Court imposed a penalty of A\$36 million against Visy Corporation for involvement in price fixing and market sharing in the Australian cardboard packaging industry. The investigation was commenced after another company, Amcor, successfully sought immunity from the ACCC in exchange for cooperation pursuant to the ACCC's leniency policy. Visy Corporation initially defended the prosecution brought by the ACCC but then admitted involvement in the unlawful conduct and made joint submissions to the court with the ACCC as to the appropriate pecuniary penalties. Two executives had penalties, of A\$1.5 million and A\$500,000 respectively, imposed on them by the Court.

There have been no prosecutions to date, under the new criminal or civil cartel provisions.

Sanctions

19 Sentencing guidelines

Do sentencing guidelines exist?

No formal ACCC sentencing or penalty guidelines exist. The court has a broad discretion to order a person to pay pecuniary penalties in respect of each contravention of the TPA. Relevant factors include the nature and extent of the contravention and any loss or damage suffered as a result of the contravention, the circumstances in which the contravention took place and whether the person has previously been found to have engaged in any similar conduct. The following matters are also relevant in determining a penalty:

- the size of the contravening company;
- the degree of market power the company has;
- the deliberateness of the contravention and the period over which it extended;
- whether the contravention arose out of the conduct of senior management or at a lower level;
- whether the company has a corporate culture conducive to compliance with the TPA; and
- whether the company has cooperated with the ACCC in relation to the contravention.

Cooperating parties can negotiate 'suggested penalties' with the ACCC, if they admit to the contravention (see question 18). An agreed statement of facts and a joint submission on penalties can be submitted to the court (but see question 20).

20 Sentencing guidelines and the adjudicator

Are sentencing guidelines binding on the adjudicator?

No. The Court has a broad discretion to determine the level of pecuniary penalties. Where a penalty has been agreed between the ACCC and the contravening party, the Court's practice is generally to accept the agreed penalty if, after examining the circumstances, it is appropriate and within the range of what the court would otherwise impose but the Court retains the discretion to impose a different penalty.

21 Leniency and immunity programmes

Is there a leniency or immunity programme?

Yes. The ACCC's Immunity Policy for Cartel Conduct (the Immunity Policy) applies to domestic cartels and international cartels that affect Australia. The Immunity Policy is particularly directed at large corporations that have engaged in serious cartel conduct affecting Australian markets.

The ACCC will manage requests for immunity from criminal and civil proceedings. Immunity from civil prosecution will be granted by the ACCC in accordance with its Immunity Policy. The ACCC will make recommendations to the DPP about immunity from criminal proceedings. Immunity from criminal prosecutions will be determined by the DPP in accordance with the annexure to the prosecution policy of the Commonwealth, which incorporates the same principles that determine immunity under the Immunity Policy. The DPP's decision will be communicated to the applicant at the same time as the ACCC's decision whether to grant conditional immunity in relation to civil proceedings. In the case of a corporation, immunity generally extends to all current and former directors, officers and employees (unless specifically excluded), as long as the disclosures are 'a truly corporate act'. This means that disclosure cannot be an isolated confession of an individual representative of the corporation.

To obtain immunity from the ACCC under the Immunity Policy, the applicant for immunity must satisfy the following requirements:

- The ACCC will only grant full immunity where the ACCC does not have enough evidence to commence a prosecution and the applicant is the first person to alert the ACCC to the cartel.
- It is possible to approach the ACCC and preserve a place in the 'immunity queue' by placing a 'marker', for example, to conduct an internal investigation. It is also possible to approach the ACCC on a hypothetical basis and ask whether immunity would be available for cartel conduct in a certain industry. An approach to a foreign regulator does not qualify as an approach to the ACCC for the purposes of obtaining immunity in Australia.
- The applicant must give full and frank disclosure of the cartel conduct to the ACCC and admit its conduct.
- The applicant must provide full disclosure and cooperation to the ACCC throughout its investigation and any ensuing proceedings.
- The applicant must not be the 'clear leader' or have coerced others into taking part in the cartel.
- The ACCC requires that applications for immunity be made to the executive general manager of the Enforcement and Compliance Division. These applications may be made in writing or orally by telephone. The applicant must then provide the ACCC with detailed evidence and information about the suspected cartel conduct.

Importantly, the immunity offered by the ACCC does not limit the rights of injured third parties to take action under the TPA to recover damages against any cartel participant.

While the Immunity Policy will only apply to the first applicant, the ACCC's Cooperation Policy for Enforcement Matters (the Cooperation Policy) may offer some form of limited immunity to subsequent applicants.

The Cooperation Policy covers all applications for leniency not covered by the Immunity Policy (for example, applications by a corporation that is not 'first in'). Under the Cooperation Policy, leniency is most likely to be granted to applicants who:

- provide valuable and important evidence of a contravention of which the ACCC is either otherwise unaware or has insufficient evidence to initiate proceedings;
- upon discovery of their breach, take prompt and effective action to terminate its part in the activity;
- provide the ACCC with full and frank disclosure of the activity and relevant documentary and other evidence available to them;
- cooperate throughout the ACCC's investigation;
- take immediate steps to rectify the situation and ensure that it does not happen again;
- do not have a prior record of TPA or related offences;
- were not ringleaders;
- (for an individual) agree not to use the same legal representation as their employer; and
- (for a corporation) are prepared to make restitution where appropriate.

It is the responsibility of the court to determine penalties for contraventions of the TPA. However, under the Cooperation Policy, the ACCC may reach an agreement with parties as to joint submissions about penalties to be placed before the court for adjudication (see question 20).

22 Elements of a leniency or immunity programme

What are the basic elements of a leniency or immunity programme?

See question 21.

23 First in

What is the importance of being 'first in' to cooperate?

The Immunity Policy only applies to those who are 'first in' to cooperate. Subsequent applications for leniency are decided pursuant to the Cooperation Policy (see question 21).

24 Going in second

What is the importance of going in second? Is there an 'immunity plus' or 'amnesty plus' option?

In Australia, if a person is second to cooperate with the ACCC in respect of a cartel investigation, the Cooperation Policy applies (see question 21).

The ACCC describes 'Amnesty Plus' as allowing an applicant who is not eligible for full immunity in relation to its involvement in a particular cartel, to receive an increased penalty discount if it informs the ACCC of another cartel of which the ACCC is not aware. The ACCC states that 'Amnesty Plus' is implemented informally, through the Cooperation Policy.

25 Approaching the authorities

What is the best time to approach the authorities when seeking leniency or immunity?

The Immunity Policy applies up until the point when the ACCC receives written legal advice that it has sufficient evidence to institute proceedings in respect of at least one contravention of the TPA arising from the cartel conduct. Accordingly, the best time to approach the ACCC is well before it has completed (or, if possible, commenced) its investigation, and certainly before it has instituted proceedings in respect of any of the cartel participants.

The ACCC offers a 'marker' system to intending applicants.

26 Confidentiality

What confidentiality is afforded to the leniency or immunity applicant and any other cooperating party?

The ACCC provides confidentiality to all parties during the course of its investigations, subject to the ACCC's practice of fully publicising the cartel from the time the ACCC commences proceedings. The ACCC practice is to initiate substantial publicity when a court hands down a decision on a cartel case. The ACCC will not settle an investigation on a confidential basis where breaches of the TPA are established.

While the ACCC's investigations into the cartel are underway, the ACCC expects an immunity applicant to not disclose that it has applied for immunity without first informing the ACCC (so as to not jeopardise ACCC investigations). This includes immunity applicants' proposed statements to stock exchanges under disclosure obligations.

27 Successful leniency or immunity applicant

What is needed to be a successful leniency or immunity applicant?

See question 21.

28 Plea bargains

Does the enforcement agency have the authority to enter into a 'plea bargain' or a binding resolution to resolve liability and penalty for alleged cartel activity?

The ACCC may reach an agreement with parties as to joint submissions about penalties to be placed before the court for adjudication. Such an agreement is not binding on the court (see question 20).

Update and trends

The introduction of criminal penalties for cartel conduct has fundamentally changed the Australian landscape for cartels, and will require global investigations to treat any conduct falling under Australian jurisdiction as a priority. The ACCC continues to be vigilant in investigating cases and actively pursuing its leniency policy.

29 Corporate defendant and employees

What is the effect of leniency or immunity granted to a corporate defendant on its employees?

Under the Immunity Policy, if a corporation qualifies for immunity, all current and former directors, officers and employees of the corporation who admit their involvement in the cartel will receive immunity in the same form as the corporation, unless specifically excluded and as long as the individual provides the ACCC with full and frank disclosure in similar terms to that required of the corporation.

Under the Cooperation Policy, the ACCC may decide, on a case-by-case basis, not to bring proceedings against employees of a corporation. The factors discussed in question 21 are relevant.

30 Cooperation

What guarantee of leniency or immunity exists if a party cooperates?

If the ACCC grants immunity under the Immunity Policy, this is binding on the ACCC, which has the sole power to bring penalty proceedings.

31 Dealing with the enforcement agency

What are the practical steps in dealing with the enforcement agency?

An immunity or leniency application can be in writing or made orally. Applying orally may avoid the creation of documents that could be discoverable in Australian and offshore civil litigation.

Persons wishing to make an immunity or leniency application, but who are uncertain as to the possible application of the various leniency policies, may approach the ACCC for clarification, including on a ‘hypothetical’ basis. Any information provided to the ACCC in this context will not be used by the ACCC for any purpose other than to provide the clarification. A ‘marker’ may be requested of the ACCC for a limited time to preserve the applicant’s place in the queue for immunity.

An immunity applicant must, to the best of its ability, provide the ACCC with detailed information and evidence relating to the potential cartel. After this evidence and information is provided, the ACCC will grant conditional immunity to the applicant and set out the next steps the applicant must reasonably take. These can include steps such as engaging IT experts to analyse electronic records, reviewing phone records, delivering mobile phones and diaries to the ACCC or bringing overseas executives to Australia to make a statement.

32 Ongoing policy assessments and reviews

Are there any ongoing or proposed leniency and immunity policy assessments or policy reviews?

No.

Defending a case

33 Representation

May counsel represent employees under investigation as well as the corporation? Do individuals require independent legal advice or can counsel represent corporation employees? When should a present or past employee be advised to seek independent legal advice?

As a general principle, in Australia counsel may represent both employees and a corporation only if there is no conflict of interest between them. In practice, it is usual for each employee to obtain independent legal advice because of the possibility of a conflict of interest. A present or past employee is generally advised to seek independent legal advice at the time proceedings are commenced or threatened. The Cooperation Policy states that an individual is more likely to be granted leniency or immunity if he or she agrees to use separate legal representation from his or her employer.

34 Multiple corporate defendants

May counsel represent multiple corporate defendants?

In general, no, because of conflict-of-interest rules referred to in question 33. Counsel usually represents multiple corporate defendants in proceedings for breach of part IV of the TPA only where those corporate defendants are related, or all part of the same corporate group.

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35 Payment of legal costs

May a corporation pay the legal costs of and penalties imposed on its employees?

For contraventions occurring after 1 January 2007, corporations are prohibited from paying the pecuniary penalties or legal costs of 'officers' who have breached part IV of the TPA, regardless of whether the conduct was undertaken in good faith. Corporations are allowed to indemnify and pay the legal costs of employees and agents who are not 'officers'. The term 'officers' is defined in the Corporations Act 2001 and will generally include senior managers and directors of a company.

36 Getting the fine down

What is the optimal way in which to get the fine down?

The best method is to approach the ACCC early, once the facts are known to the corporation. If the corporation is not 'first in' to cooperate, the extent of leniency afforded will depend upon:

- the seriousness of the conduct;
- comparisons drawn with other Australian decisions establishing levels of penalty;
- any prior contraventions on the part of the defendants;
- the level and degree of cooperation;
- the time at which cooperation was offered;
- the size and scale of the defendant's operations; and
- the degree of commerce affected by the activity.

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