

ACCC OFFERS PROTECTION TO WHISTLEBLOWERS

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The ACCC has finally issued its leniency policy, giving conditional

immunity to whistleblowers of cartel conduct such as price fixing, bid rigging and market sharing.

Detecting, stopping and deterring hard-core cartels is a high priority for the Australian Competition and Consumer Commission (ACCC) because of the real harm the cartels can cause to Australian consumers, businesses and the economy for as long as they go undetected. On 27 June this year, the ACCC issued a leniency policy giving incentives to businesses and individuals to disclose such behaviour.

The leniency policy gives a degree of certainty to potential whistleblowers as to whether the ACCC will afford them immunity.

People can approach the ACCC on a hypothetical basis to see whether the leniency policy applies to them. However, while a request for clarification will not be regarded as an application for leniency, the ACCC will only provide a clarification to genuine potential leniency applicants and (unlike the draft version) the policy does not say that the ACCC will not use the information for any other purpose.

The policy is limited to breaches of the Trade Practices Act (the Act) involving more than one business entity. The ACCC's view is that providing immunity for unilateral conduct is not appropriate because, in such cases, the only party to the conduct may receive immunity.

The policy also only applies to civil contraventions of the Act and, if criminal sanctions are introduced for such conduct in the future, the ACCC will reconsider the leniency policy in light of those changes.

The leniency policy does not limit the rights of potentially injured parties to take action for damages.

KEY FEATURES OF THE POLICY

The policy applies to cartels and

includes any of the following conduct engaged in by two or more competitors:

- price fixing;
- market sharing, including bid rigging or customer sharing; and
- production or sales quotas.

The policy only applies to suspected contraventions, not to unsuccessfully attempted contraventions.

Leniency may be afforded to corporations and to individuals, and the type of immunity provided depends on whether the ACCC is aware of the alleged cartel.

WHERE THE ACCC IS UNAWARE OF THE ALLEGED CARTEL

The ACCC will grant a corporation or individual conditional immunity from ACCC-initiated proceedings where the ACCC is unaware of the alleged cartel and the corporation or individual is the first person to disclose its existence. The ACCC will consider itself aware of a cartel where it has in its possession information from any source suggesting that the cartel has operated in Australia or affected a market in Australia.

Only the first eligible person to approach the ACCC will receive complete immunity. Applications for leniency by subsequent persons will be considered under the ACCC's Cooperation Policy for Enforcement Matters, issued in July 2002, which sets out the circumstances in which leniency (although not necessarily immunity) may be provided to corporations and individuals that assist the ACCC. Generally, the degree of leniency will be scaled down for each subsequent person who approaches the ACCC.

WHERE THE ACCC IS AWARE OF THE ALLEGED CARTEL

Where the ACCC is aware of an alleged cartel but has insufficient evidence to institute proceedings

in respect of the allegations, a corporation or individual may be eligible for conditional immunity from the ACCC applying for the imposition of a pecuniary penalty if it is the first person to make an application for leniency.

The ACCC considers itself to have sufficient evidence to institute proceedings where it has sufficient material to institute proceedings on reasonable grounds.

CONDITIONS OF IMMUNITY

For both types of immunity, the following three conditions will apply:

The corporation or individual must give full and frank disclosure to the ACCC

The corporation and individual must give up all evidence and information in their possession, and cooperate fully on a continuous basis and expeditiously throughout the ACCC's investigation and any proceedings. If a person deliberately misleads the ACCC, provides false evidence or withholds or destroys important evidence, the ACCC may revoke the leniency.

The corporation or individual must cease its involvement in the suspected cartel

Leniency applicants are encouraged to speak to the ACCC before making it known they have ceased their involvement in the conduct. In certain circumstances, the ACCC may request the applicant to act in a manner that does not disclose ACCC awareness of the cartel, to allow the ACCC an opportunity to obtain important evidence against other cartel participants.

The corporation or individual must not have coerced others to participate in the cartel and must not have been the clear leader in the

cartel

The mere fact that one party has arranged a meeting or maintained records does not necessarily mean that the person is the clear leader, particularly when other participants took part freely and willingly. If two or more parties are properly considered joint leaders in the conduct, there will be no clear leader.

For corporate leniency, the following additional two conditions will apply:

The admissions and cooperation must be a 'truly corporate act', as opposed to isolated confessions of individuals

The ACCC will have regard to whether the corporation has taken all legal and reasonable steps to cooperate and secure the cooperation of its directors, officers and employees and the number and significance of individuals who elect not to cooperate.

Where possible, a corporation must make restitution to injured parties

Restitution is most likely to be possible when the parties harmed by the conduct can be identified, e.g. where the conduct directly affects particular customers or where there has been bid rigging or there are customer-sharing cartels.

Corporate directors, officers, and employees of a corporation qualify for corporate leniency if they admit their involvement in the cartel and provide the ACCC with full and frank disclosure. Former employees are not specifically covered by the corporate leniency policy. However, the ACCC may extend an offer of corporate leniency to former employees, if appropriate, having regard to all of the circumstances.

The leniency policy is particularly directed at large corporations, but smaller businesses or individuals that may have been involved in

less-serious cartel conduct are also encouraged to take advantage of the new policy.

Jacqueline Downes' article first appeared in Allen Arthur Robinson's Focus: Competition Law (July 2003). Reprinted with permission.
