



Australian
Competition &
Consumer
Commission

Effective Anti-Cartel Enforcement Tools-Leniency and Settlement

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Outline

- What is Cartel conduct
- ACCC's Immunity policy
- ACCC's Cooperation policy
- Settlements



What is Cartel conduct in Australia

There are certain forms of anti-competitive conduct that are known as cartel conduct. They include:

- **price fixing**, when competitors agree on a pricing structure rather than competing against each other;
- **sharing markets**, when competitors agree to divide a market so participants are sheltered from competition;
- **rigging bids**, when suppliers communicate before lodging their bids and agree among themselves who will win and at what price; and
- **controlling the output or limiting the amount of goods and services** available to buyers.

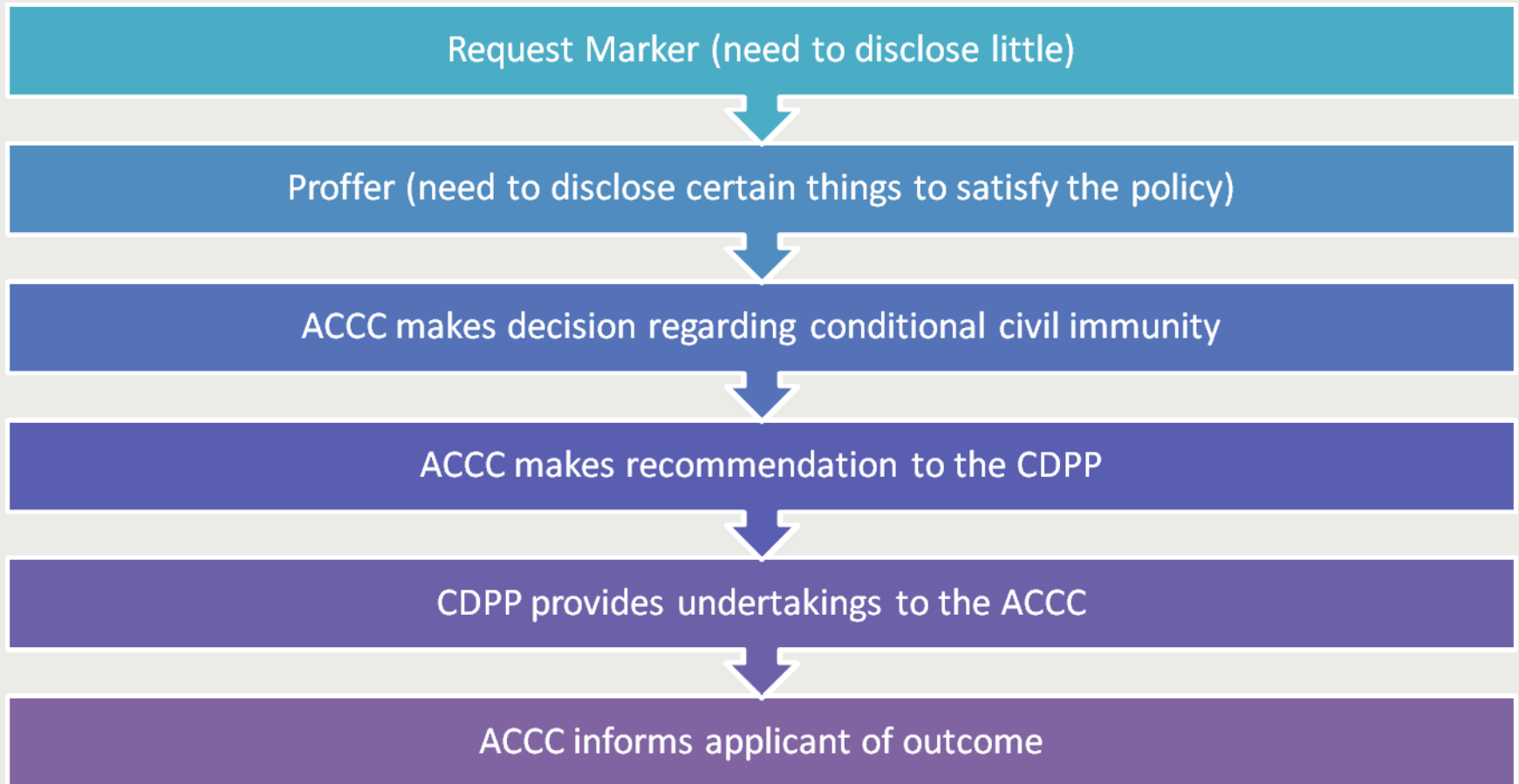


Penalties for Cartel conduct

- The maximum penalties include
 - For **corporations** it is the greater of AU\$10 Million, or three times the benefit gained from the conduct whichever is the greater, or where that cannot be ascertained 10% of annual turnover for the period covering the first 12 months where the cartel operated.
 - For **individuals** it is up to 10 years jail and fined up to 2,000 penalty units (AU\$340,000) in the criminal regime and up to AU\$500,000 for civil actions.
 - Other consequences include Disqualification orders etc.



How do you apply for immunity?



ACCC's decision

Party to a cartel

Admits conduct may contravene the CCA

First party to apply for immunity

Not clear leader and have not coerced others to join

Ceased or will cease involvement in cartel

Corporate admission

Undertakes to cooperate

ACCC has not received legal advice



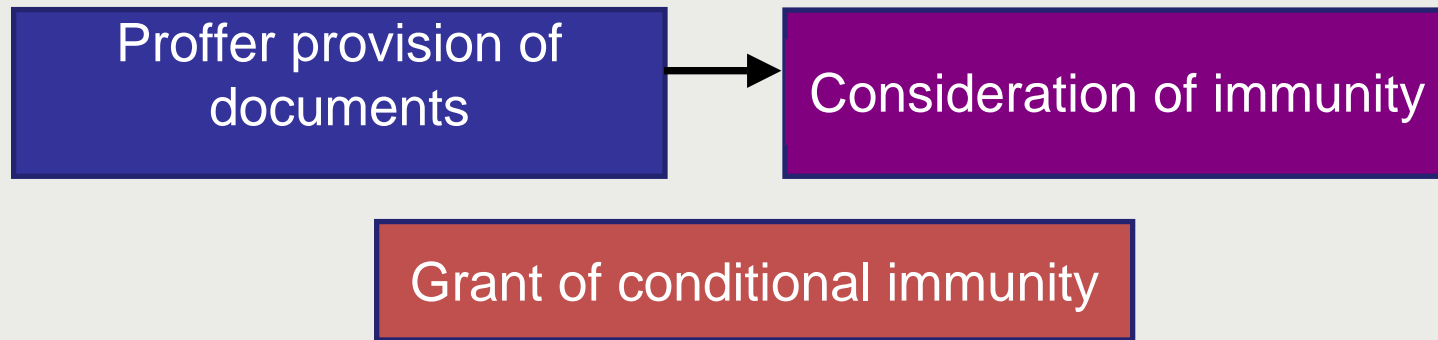
Conditions of immunity

Confidentially

Cooperation



Immunity cooperation during investigations



- Provision of documents and or factual information
 - Coordination of interviews
 - Coordination of inspections
 - Request to compulsorily obtain information
 - Marker stage information that becomes available
- Notification of cartel to other agencies



Cooperation post investigation

Investigation of and proceedings against cartel participants not granted immunity this may include imposing fines or prosecutions in Court

- Provision of agency documents and/or evidence
 - Request factual information
 - Coordination of interviews
 - Discuss settlement strategy
 - Request to compulsorily obtain information for determining remedies or imposing sanctions
- Identification of cartel to other agencies



Our current work

Current cartel litigation and investigations

Status	Total	Immunity element	International element
Current litigation	8	6	5
Current in-depth investigations	19	13	9



Cooperation agreements

Those who are not first in the door may still place a marker and although not entitled to complete immunity may approach the ACCC seeking leniency under a cooperation agreement.

However there are conditions.....



Leniency is considered for a corporation which

- Gives valuable and important evidence which the ACCC is otherwise unaware or has insufficient evidence to initiate proceedings.
- takes prompt and effective action to terminate its part in the activity
- provides the ACCC with full and frank disclosure and all relevant documentary and other evidence available to it, and cooperates fully with the ACCC investigation and any ensuing litigation.
- has not compelled or induced any others to take part and was not a ringleader or originator of the activity.
- is prepared to make restitution.
- takes immediate steps to rectify the situation and ensure that it does not happen again, undertakes to do so and complies with the undertaking.
- does not have a prior record of CCA, or related, offences.



Cartel settlements

Interplay between leniency and settlements

- Those who can't get full immunity but are still in a position to cooperate may still receive reduced sentences or fines.
- So they have a choice – litigate against the government or cooperate to receive these reductions.
- Some countries have regimes which stipulate % discount for settling in a timely manner.
- Policy plight – hitting the critical balance between creating incentive while still obtaining deterrence message of fines.



Keys to inducing settlements

- Cartelists must fear the real possibility of detection and prosecution before they are willing to enter into settlement discussions.
- Cartelists must trust the government entity to and believe there are adequate procedural safeguards in place.



Benefits of cartel settlements

- The benefits must outweigh the option of litigation
- Time and resources
- Momentum and cooperation
- More favourable treatment
- Transparency – proportional and equitable outcomes
- Agency credibility
- Finality
- Certainty



Drawbacks & Impediments

- Multi jurisdictional conduct may impact on where to settle
- Agreed settlements can ultimately mean that the penalty is something less than the maximum otherwise possible in a fully contested court case
- Parity
- Perceived compromise of justice
- Precedent value
- Court criticism for “rubber stamping”



Key elements in discussions

- Who will enter into settlement
- What violations with it cover
- Will an admission of guilt be required
- What cooperation will be required
- Can they identify other cartels?
- Who will be covered by agreement
- What will the penalty or sentence be?



Substantive elements of settlement terms

- Broad statement of facts
- Admission of guilt
- Penalty or sentence
- Details of cooperation
- Agreement NOT to bring further charges
- Cease conduct
- Confidentiality
- Key dates



Other issues

- Waivers
- What will the court do?
- Confidentiality
- Withdrawal of agreement
- Documents and witnesses
- Third party class actions



Questions?

