

International **Comparative** Legal Guides



Cartels & Leniency **2020**

A practical cross-border insight into cartels & leniency

13th Edition

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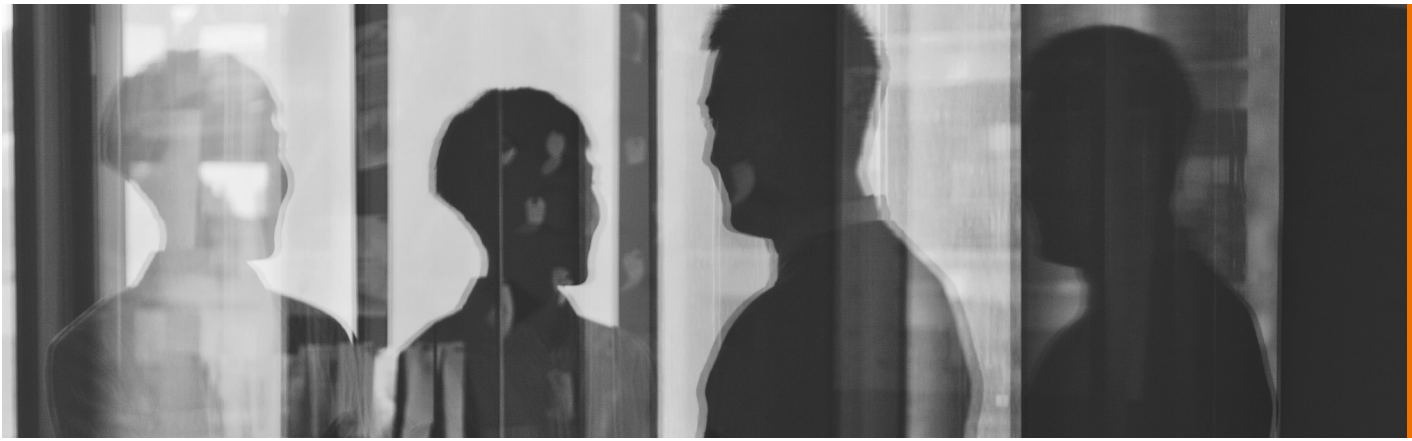
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Cartels & Leniency 2020

13th Edition

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This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

Expert Chapters

- 1** **Cartel Updates: Recent Trends in Fine Calculations, Hybrid Settlement Procedures and Judicial Review at EU Level**
Elvira Aliende Rodriguez & Geert Goeteyn, Shearman & Sterling LLP
- 5** **Flexibility and Discretion in the EU Commission's Cartel Fines Calculation: Recent Decisions and Judgments**
Ingrid Vandendorpe, Thorsten Goetz & Caroline Janssens, Skadden, Arps, Slate, Meagher & Flom LLP
- 11** **Disincentives to Leniency: Proposals to Revive the Golden Goose**
Frédéric Louis, Wilmer Cutler Pickering Hale and Dorr LLP

Country Q&A Chapters

- 17** **Australia**
Nyman Gibson Miralis: Dennis Miralis & Phillip Gibson
- 25** **Austria**
Preslmayr Rechtsanwälte OG: Dieter Hauck
- 32** **Bulgaria**
Popov, Arnaudov & Partners: Hristo Koparanov & Emiliyan Arnaudov
- 39** **Canada**
Cassels Brock & Blackwell LLP: W. Michael G. Osborne & Chris Hersh
- 46** **Chile**
Carey: Claudio Lizana & Carolina Veas
- 52** **China**
DeHeng Law Offices: Ding Liang
- 63** **European Union**
Shearman & Sterling LLP: Elvira Aliende Rodriguez & Geert Goeteyn
- 73** **Finland**
Borenius Attorneys Ltd: Ilkka Aalto-Setälä & Henrik Koivuniemi
- 80** **France**
Aramis: Aurélien Condomines & Pierre Galmiche
- 87** **Germany**
Shearman & Sterling LLP: Mathias Stöcker
- 95** **Hungary**
Bán, S. Szabó & Partners: Chrysta Bán & Álmos Papp
- 102** **India**
Cyril Amarchand Mangaldas: Avaantika Kakkar & Anshuman Sakle
- 110** **Indonesia**
ABNR Counsellors at Law: Chandrawati Dewi & Gustaaf Reerink
- 115** **Italy**
Shearman & Sterling LLP: Elvira Aliende Rodriguez & Agostino Bignardi
- 122** **Japan**
Nagashima Ohno & Tsunematsu: Yusuke Kaeriyama & Takayuki Nakata
- 128** **Luxembourg**
NautaDutilh Avocats Luxembourg: Vincent Wellens
- 134** **Malaysia**
Rahmat Lim & Partners: Azman bin Othman Luk & Penny Wong Sook Kuan
- 140** **Netherlands**
AKD: Joost Houdijk & Robbert Jaspers
- 146** **North Macedonia**
Debarliev Dameski & Kelesoska Attorneys at Law: Dragan Dameski & Jasmina Ilieva Jovanovik
- 154** **Portugal**
Morais Leitão, Galvão Teles, Soares da Silva & Associados: Luís do Nascimento Ferreira & Inês Gouveia
- 166** **Russia**
ALRUD Law Firm: Alla Azmukhanova & Daniil Lozovsky
- 172** **Slovakia**
URBAN FALATH GAŠPEREC BOŠANSKÝ: Ivan Gašperek & Ondrej Urban
- 179** **Spain**
King & Wood Mallesons: Ramón García-Gallardo & Pablo Vila Chirinos
- 194** **Sweden**
Hannes Snellman: Peter Forsberg & Johan Holmquist
- 200** **Switzerland**
Bär & Karrer Ltd.: Mani Reinert
- 206** **Turkey**
ELIG Gürkaynak Attorneys-at-Law: Gönenç Gürkaynak & Öznur İnanılır
- 215** **Ukraine**
Ilyashev & Partners: Oleksandr Fefelov & Haryk Matosian
- 223** **United Kingdom**
Shearman & Sterling LLP: Matthew Readings & Simon Thexton
- 231** **USA**
Paul, Weiss, Rifkind, Wharton & Garrison LLP: Charles F. (Rick) Rule & Joseph J. Bial

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From the Publisher

Dear Reader,

Welcome to the 13th edition of *The International Comparative Legal Guide to: Cartels & Leniency*, published by Global Legal Group.

This publication, which is also available at www.iclg.com, provides corporate counsel and international practitioners with comprehensive jurisdiction-by-jurisdiction guidance to cartels & leniency laws and regulations around the world.

This year, three general chapters cover trends, decisions and judgments in recent cartels cases.

The question and answer chapters, which cover 29 jurisdictions in this edition, provide detailed answers to common questions raised by professionals dealing with cartels & leniency laws and regulations.

As always, this publication has been written by leading cartels & leniency lawyers and industry specialists, to whom the editors and publishers are extremely grateful for their invaluable contributions.

Global Legal Group would also like to extend special thanks to contributing editors Geert Goeteyn, Matthew Readings and Elvira Aliende Rodriguez of Shearman & Sterling LLP for their leadership, support and expertise in bringing this project to fruition.

Rory Smith

Group Publisher

International Comparative Legal Guides

Australia

Nyman Gibson Miralis



Dennis Miralis



Phillip Gibson

1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

Cartel conduct in Australia is regulated by Part IV of the *Competition and Consumer Act 2010 (Cth)* (“CCA”). A contravention of a cartel provision can result in both civil and criminal penalties.

1.2 What are the specific substantive provisions for the cartel prohibition?

A cartel exists when actual or potential competitors agree to a cartel provision. Under s 45AD(2)–(3) of the CCA, a corporation must not make, or give effect to, a contract, arrangement or understanding that contains a cartel provision. Cartel conduct occurs in circumstances where the purpose or effect of a condition is to:

- a) price fix;
- b) prevent, restrict or limit production, capacity or supply;
- c) allocate customers, suppliers or territories; or
- d) bid rig.

In both civil and criminal proceedings against a corporation, s 84 of the CCA stipulates it is necessary to establish the state of mind of the body corporate in relation to the contravention. This can be achieved by looking at the actions and intentions of a director, employee or agent of the body corporate. The CCA determines that it is sufficient to show that:

- a) they engaged in the conduct;
- b) in engaging in the conduct, they acted within the scope of their actual or apparent authority; and
- c) they had that state of mind.

If the above criteria are satisfied, the body corporate has engaged in the conduct.

Similarly, in proceedings against a person other than a body corporate, it is necessary to establish that the individual knowingly and intentionally entered into or gave effect to a cartel provision. Under s 85 of the CCA, the Courts are given discretion to determine whether the defence of “acting honestly and reasonably in the circumstances” is available.

The CCA has recently prohibited corporations from engaging with one or more persons in a concerted practice that has the purpose, or likely effect, of lessening competition. Although s 45 of the CCA does not define “concerted practice”, guidelines published by the Australian Competition and Consumer Commission (“ACCC”) in August 2018 attempt to provide an explanation. The guidelines state that “it involves communication or cooperative behaviour that does not require all of the elements of an understanding but involved more than

a person independently responding to market conditions”. In addition, the Explanatory Memorandum to the Bill, which amended the CCA, states that a concerted practice is “any form of cooperation between two or more firms (or people) or conduct that would likely establish such cooperation, where this conduct substitutes, or would be likely to substitute, cooperation in place of uncertainty of competition”.

It is important to note that in Australia, different standards of proof apply to civil and criminal contraventions. The civil standard of proof is “on the balance of probabilities” while the criminal standard of proof is “beyond reasonable doubt”. The difference in standards reflects the serious nature of criminal provisions and offences.

1.3 Who enforces the cartel prohibition?

The ACCC is responsible for the investigation of all cartel conduct. They are also responsible for bringing civil actions against individuals or corporations who contravene the CCA.

Criminal prosecutions of cartel conduct are investigated by the ACCC who then refer the matter to the Commonwealth Director of Public Prosecutions (“CDPP”).

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The ACCC are able to commence investigations based on an internal decision; however, most investigations are commenced based on information provided to them by whistle-blowers. Generally, whistle-blowers come forward after an application for immunity or leniency.

If a determination is made to commence civil proceedings only, s 86 of the CCA specifies that these proceedings are to be commenced in the Federal Court of Australia. The proceedings are commenced before a single Judge.

Where a serious breach of the CCA occurs, the ACCC will recommend the offending corporation to the CDPP for prosecution. According to the ACCC’s and CDPP’s Memorandum of Understanding (“MOU”), the following conduct constitutes a “serious” breach if one or more of the following applies:

- a) the conduct was covert;
- b) the conduct was caused, or could have caused, large-scale or serious economic harm;
- c) the conduct was longstanding or had a significant impact on the market;
- d) the conduct caused or could have caused significant detriment to the public;
- e) one or more of the alleged participants has previously been found by a Court to have participated in cartel conduct, either criminal or civil;
- f) senior representatives within the relevant corporation(s) were involved in authorising or participating in the conduct;

- g) the government and, thus, taxpayers were victims of the conduct; and/or
- h) the conduct involved the obstruction of justice or other collateral crimes committed in connection with the cartel.

Once a matter is referred to the CDPP, they then make a determination about whether to proceed with criminal charges. If so, they also initiate proceedings in the Federal Court of Australia. The criminal proceedings then occur before a jury or proceed directly to sentence before a Judge, if a guilty plea is entered. Examples of CDPP prosecution in Australia can be seen below.

The first company to be criminally prosecuted in Australia for cartel conduct was the Japanese shipping company Nippon Yusen Kaishiki Kaisha (“NYK”). The company was charged, in 2018, under s 44XRG(1) of the CCA for “giving effect to a cartel provision” and ultimately pleaded guilty to the offence. It was estimated that the company received a total benefit of approximately AUD\$15.4 million from the cartel conduct. On sentencing, after considering the appropriate discounts, the Federal Court ordered NYK to pay AUD\$25 million in penalties.

As part of the same cartel, Kawasaki Kisen Kaisha (“K-Line”) was investigated by the Department of Justice in the United States of America (“U.S.”). The corporation pleaded guilty to the U.S. charges and were ordered to pay USD\$67.7 million as a penalty. Following the outcome in the U.S., Australia commenced its own investigation and determined that the cartel had been in operation since at least February 1997. The CDPP commenced prosecution against the corporation for 37 contraventions of s 4ZZRG(1) of the CCA. K-Line pleaded guilty to the offences on 5 April 2018, after the penalty for NYK was handed down. In August 2019, the Federal Court of Australia ordered that K-Line pay AUD\$34.5 million as a penalty.

1.5 Are there any sector-specific offences or exemptions?

While there are no sector-specific exemptions, there are a number of general exemptions listed under Part IV, Division 1 – Subdivision D and Division 2 of the CCA. They include:

- a) conduct subject to a collective bargaining notice accepted by the ACCC;
- b) conduct subject to authorisation by the ACCC;
- c) agreements between related bodies corporate;
- d) conduct for the purpose of supply, production and/or acquisition of joint ventures;
- e) anti-overlap provisions including re-sale price maintenance;
- f) exclusive dealings;
- g) dual-listed company arrangements;
- h) collective acquisition of shares, assets, goods or services; and
- i) conduct authorised by State, Territory or Commonwealth legislation.

On 18 February 2019, the CCA was amended to remove an exemption relating to intellectual property rights such as patents, registered designs, copyright and circuit layout rights. It is now an offence to engage in typical cartel conduct involving intellectual property.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

The CCA captures some conduct that occurs outside the typical Australian jurisdiction. Under s 5 of the CCA, the jurisdiction extends to extraterritorial conduct engaged in outside Australia to include:

- a) bodies corporate incorporated or carrying on business within Australia;
- b) Australian citizens;
- c) persons ordinarily resident within Australia;
- d) New Zealand and New Zealand Crown corporations;
- e) bodies corporate carrying on business within New Zealand;
- f) persons ordinarily resident within New Zealand; or

- g) conduct outside Australia by any person in relation to the supply by those persons of goods or services to persons within Australia.

On 6 November 2017, following an extensive review into the adequacy of the CCA, the “trade and commerce” requirement came into effect. Essentially, the cartel conduct must occur in trade or commerce within Australia or between Australia and other places outside Australia.

Although Australia’s legislative regime does not cover a great deal of conduct outside its jurisdiction, it is one of 64 countries that have joined the Cartel Working Group (“CWG”). The CWG forms part of the International Competition Network (“ICN”) which assists with the prevention, detection, investigation and punishment of cartel conduct. The CWG not only serves as an information-sharing platform, it also facilitates international assistance in relation to enforcement.

In 2018, the ICN published its priorities for 2018–2021. They include the following:

- a) improve the effectiveness of anti-cartel enforcement through education, examining legal challenges and identifying investigative techniques;
- b) promote familiarity with, and use of, existing work product and projects;
- c) expand existing work products;
- d) develop new practical guidance and avenues for exchanging effective enforcement practices;
- e) organise annual cartel workshops;
- f) strengthen CWG working procedures; and
- g) continue with the broader work of the ICN.

In addition to the CWG collaboration, Australia has recently signed a MOU with The People’s Republic of China (“China”). This agreement allows Australia and China to share information and evidence in relation to cartel conduct.

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory Power	Civil/ Administrative	Criminal
Order the production of specific documents or information	Yes	Yes
Carry out compulsory interviews with individuals	Yes	Yes
Carry out an unannounced search of business premises	Yes*	Yes*
Carry out an unannounced search of residential premises	Yes*	Yes*
■ Right to ‘image’ computer hard drives using forensic IT tools	Yes*	Yes*
■ Right to retain original documents	Yes*	Yes*

Investigatory Power	Civil/ Administrative	Criminal
■ Right to require an explanation of documents or information supplied	Yes*	Yes*
■ Right to secure premises overnight (e.g. by seal)	Yes*	Yes*

Please Note: * indicates that the investigatory measure requires the authorisation by a court or another body independent of the competition authority.

2.2 Please list specific or unusual features of the investigatory powers referred to in the summary table.

In June 2019, the ACCC produced a set of guidelines for the use of powers found under s 155 of the CCA. The guidelines confirm that the ACCC must first consider the value of the information requested, as well as the burden of the notice on the recipient. Its Chair or Deputy Chair must have a reason to believe that the information requested is capable of being produced. Furthermore, the ACCC cannot obtain information that is protected by legal professional privilege (“LPP”). It can, however, override an individual’s privilege against self-incrimination.

2.3 Are there general surveillance powers (e.g. bugging)?

There is no general surveillance power granted under the CCA; however, the ACCC may apply for and obtain a warrant from the Court in order to gather information through the use of listening devices and telephone intercepts.

2.4 Are there any other significant powers of investigation?

In order to investigate extraterritorial conduct related to New Zealand (as mentioned in section 1), the CCA grants power to obtain information and documents in New Zealand provided they relate to trans-Tasman markets.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

Under s 154B of the CCA, the Chairperson may appoint a member of staff assisting the Commission to be inspector of a search. The selected individual must have suitable qualifications and experience to exercise the powers of an inspector. When entering the premises, s 154D of the CCA stipulates that the inspector may be accompanied by another member of staff and/or a consultant. Additionally, s 154K permits a member of the Australian Federal Police to assist in the execution of a search.

There is no specific obligation for ACCC to wait for legal advisors to arrive at the premises, nor is there a specific right of the occupier to have legal advisors present. The occupier does, however, under s 154P, have a right to observe the search being conducted.

2.6 Is in-house legal advice protected by the rules of privilege?

The ACCC’s guidelines state that while an examinee is entitled to a legal adviser, it is not usually appropriate for in-house lawyers of the examinee’s employer to be present during an examination. This is due to the potential for a conflict of interest to arise. This does not, however, allow the ACCC to obtain documentation that would ordinarily be protected by LPP.

It is important to note that LPP only applies to in-house advice if, at the time the advice was given, they were acting in their capacity as legal counsel and it was considered to be independent legal advice.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

While the ACCC has a number of investigative powers granted to it under s 155 of the CCA, the legislation also provides some reprieve for those subjected to such powers. For example, while the ACCC has the power to order the production of specific documents or information, a person will not be in breach of the order if they can prove that, after a reasonable search, they are not aware of the documents. To be eligible for the defence under s 155(5B), the person must provide a written statement which includes the scope and limitations of the search.

In order to determine what constitutes a reasonable search, s 155(6) indicates the following may be taken into account:

- the nature and complexity of the matter to which the notice relates;
- the number of documents involved;
- the ease and cost of retrieving a document relative to the resources of the person who was given the notice; and
- any other relevant matter.

Although the ACCC has the power to override an individual’s privilege against self-incrimination, the evidence obtained is not admissible in criminal proceedings.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities’ approach to this changed, e.g. become stricter, recently?

It is an offence under s 155(5) of the CCA for a person to refuse or fail to comply with an investigatory notice given by the ACCC. It is also an offence to knowingly provide false or misleading information. According to s 155(6A), an individual who is guilty of the above is “guilty of an offence punishable on conviction by imprisonment for two years or a fine not exceeding 100 penalty units” (AUD\$21,000.00). The maximum penalty for a corporation is a fine of AUD\$105,000.00. Additionally, implications of non-compliance include referral to the CDPP for prosecution and a Court Order directing compliance.

In 2015, the Court ordered Mr Boyle (*ACCC v Boyle*) to pay a fine of AUD\$3,500.00 for non-compliance. In the same year, the Court also ordered Mr Davis (*ACCC v Davis*) to complete 200 hours of community service.

Prior to 6 November 2017, the maximum penalty for a contravention of s 155 of the CCA was AUD\$4,200.00 or imprisonment for 12 months. Although penalties have significantly increased, a report published by the Organisation for Economic Co-operation and Development (“OECD”) on 26 March 2018 found that on average, Australian penalties are significantly lower than those imposed in comparable jurisdictions. Given the important nature of compliance, this may be an area which requires further review by Australian authorities.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

There are two contraventions involving cartel conduct. Under s 45AF of the CCA, it is an offence to be involved in the making of a contract, arrangement or understanding that contains a cartel provision. The second offence, contained under s 45AG, is giving effect to such a cartel provision. The sanctions are the same for each. A company found to be in contravention of s 45AF and/or s 45AG will be punished with a fine not exceeding the greater of the following:

- a) AUD\$10 million;
- b) three times the benefits attributable to the offence, if it can be determined; or
- c) 10% of the corporation's annual turnover in the 12 months preceding the offence, if the benefits cannot be determined.

These penalties can be imposed on companies in both civil and criminal proceedings. The Federal Court also has the power to impose injunctions, probation orders, community service orders and adverse publicity orders.

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

Individuals who knowingly participate in cartel conduct can receive fines of up to AUD\$500,000.00 for each contravention. The Federal Court of Australia can also impose orders that exclude an individual's eligibility for company management.

Pursuant to s 79 of the CCA, a person who:

- a) attempts to contravene;
- b) aids a contravention;
- c) induces or attempts to induce a person to contravene; or
- d) conspires with others to contravene,

is punishable by a term of imprisonment not exceeding 10 years or a fine of 2,000 penalty units (AUD\$420,000.00) or both.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

There are no specific provisions allowing for reduction of penalties; however, the Courts consider financial means (along with other factors) when determining the appropriate sanction.

3.4 What are the applicable limitation periods?

In relation to civil proceedings, s 82 of the CCA states that actions must be brought within six years after the day on which the contravention occurred. There is currently no legislated limitation period in relation to criminal proceedings; however, prohibitions for cartel conduct were introduced in mid-2009 and do not apply retrospectively.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

Companies are prohibited from indemnifying officers and employees against civil pecuniary penalties under s 77A of the CCA. This section also prohibits indemnification against legal costs that are incurred in defending or resisting proceedings in which the individual is found to have liability. If a company is found to contravene this section, it can receive a fine of up to AUD\$5,250.00.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

The CCA currently does not contain any provisions which allow an employer to hold an employee liable for financial penalties imposed as a result of the employee's conduct. An employer may, however, have a claim in negligence against the employee for breach of duty. The employer would be limited in their claim by the financial circumstances of the employee.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

In Australia, subsidiary companies are recognised as a separate legal entity to that of their parent company. Parent companies are therefore not normally responsible for the actions of a subsidiary company. Liability may arise, however, if the actions of the subsidiary were engaged in on behalf of the body corporate and it can be determined that the conduct fell within the scope of actual or apparent authority.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

Civil Immunity

A corporation may apply to the ACCC for immunity; however, they must satisfy the following criteria:

- a) they must admit to engaging in cartel conduct as either a principal or in an ancillary capacity, and that the conduct may contravene the CCA;
- b) they must be the first party to apply within the cartel;
- c) they must not have coerced others to participate in the cartel;
- d) they must have ceased or undertake to cease involvement in the cartel;
- e) the admissions must be a truly corporate act;
- f) they have provided full, frank and truthful disclosure and have cooperated fully and expeditiously during the process, including taking all reasonable steps to procure the assistance and cooperation of witnesses and to provide sufficient evidence to substantiate its admissions, and agrees to continue to do so;
- g) the corporation has entered into a cooperation agreement; and
- h) the corporation has maintained and agrees to maintain confidentiality regarding the status of its immunity and the details of the investigation.

If the ACCC is satisfied the above criteria are met, the corporation will be granted conditional immunity. In order to gain final immunity, the corporation must maintain its eligibility as outlined above and it must continue to provide full and frank disclosure. Conditional immunity will become final immunity at the conclusion of any ensuing proceedings.

Provided a corporation is eligible for conditional immunity, they may apply for derivative immunity for related corporate entities and/or current and former directors, officers and employees that were involved in the cartel conduct. During the application process, the corporation must submit a list of all entities/individuals seeking derivative immunity and must be able to demonstrate the relationship at all relevant times.

It is important to note that the ACCC will not grant immunity if they are already in possession of evidence that is likely to establish at least one contravention of the CCA. They may also revoke immunity if, on reasonable grounds, they are satisfied the applicant has failed to meet the conditions for immunity.

Criminal Immunity

In order for criminal immunity to be granted, the ACCC must first be satisfied the corporation (or derivative entity) meets the criteria. If so, they can then make a recommendation to the CDPP for immunity from prosecution to be granted. As with initiating proceedings, the CDPP will exercise independent discretion when considering an immunity application. If the CDPP are also satisfied, they will typically provide a letter of comfort to the corporation. This letter recognises the corporation's "first-in" status and states the CDPP's intention to provide immunity provided they maintain eligibility and enter into a cooperation agreement. Prior to initiating any criminal proceedings, the CDPP will then issue a written undertaking which effectively grants immunity to the corporation.

The CDPP may revoke immunity on recommendation from the ACCC or on their own belief that the corporation has not fulfilled the conditions or has provided false and/or misleading information.

Civil Leniency

Parties not eligible for immunity are still encouraged to cooperate with the ACCC. During proceedings, the ACCC will make submissions to the Court which outline any cooperation provided including the extent and value of that cooperation. In determining the extent and value of the cooperation, the following factors will be considered:

- a) was the ACCC approached in a timely manner seeking to cooperate;
- b) has the party provided significant evidence which was previously unknown;
- c) has the party provided full, frank and truthful disclosure and continued to cooperate;
- d) has the party ceased or indicated they will cease involvement in the cartel;
- e) did the party coerce others to participate in the cartel; and
- f) has the party acted in good faith in dealing with the ACCC.

In determining an agreement on civil penalties, the ACCC will take the following into consideration:

- a) the extent and value of the cooperation;
- b) whether the contravention arose out of senior management conduct or at a lower level;
- c) whether there is a corporate culture of compliance;
- d) the nature and extent of the contravening conduct;
- e) whether conduct has ceased;
- f) the amount of loss/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.

In some circumstances, the ACCC can invite the cooperating party to write its own submissions and provide evidence as to the appropriate extent and value of the cooperation provided.

In exceptional circumstances, the ACCC may use its discretion to grant full immunity to a cooperating party despite the party not being eligible. This may be, for example, if the cooperating party was not the first party in the cartel to make admissions to the ACCC.

Criminal Leniency

The ACCC will consider the factors above and make recommendations to the CDPP. The Court will then weigh these with the general sentencing considerations and determine an appropriate outcome.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

Yes. A corporation or an individual may approach the ACCC and request placement for a marker. A marker has the effect of preserving the first-in status which allows for an immunity application to take

place. Once a marker is granted, no other participant of the same cartel can take the applicant's place in the immunity queue.

The marker generally lasts 28 days. In that time, the applicant can gather information relating to the cartel conduct to present as evidence to the ACCC. The information must include a description of the cartel conduct in enough detail for the ACCC to confirm that no other corporation or individual currently holds immunity for the same cartel.

A marker will be cancelled if sufficient information is not provided or where the ACCC determines the applicant will be unable to satisfy the criteria for immunity. If the marker is cancelled, the same applicant may re-apply at a later date.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

Applications and information can be provided to the ACCC orally; however, the ACCC will create its own records. This allows an accurate record of information to be kept to ensure only one entity is granted immunity per cartel.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

Information provided to the ACCC during an immunity or leniency application can and will be used in civil proceedings. The information may also be shared with the CDPP for criminal prosecution. Provided immunity is not revoked, the use of the information is limited in the sense that it will not be used against the applicant in proceedings that relate to that particular cartel.

The most recent policy published by the ACCC states that it will use its best endeavours to protect any confidential information provided from being disclosed to third parties. This does not prevent disclosure when required by law.

The CCA specifies, under s 157B, that the ACCC is not required to disclose protected cartel information to a Court except with leave. In determining whether to grant leave, the Court must consider only the following:

- a) the information was provided to the ACCC in confidence;
- b) Australia's relations with other countries;
- c) the need to avoid disruption to national and international investigations/enforcement;
- d) protection or safety of the informant;
- e) the potential of discouraging future informants from coming forward; and
- f) the administration of justice.

Private litigants may therefore apply for leave in order to access such documents.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

The continuous cooperation requirement ceases to operate at the conclusion of Court proceedings.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

In Australia, this is known as "amnesty plus". Amnesty plus is available where a party discovers information relating to a second, unrelated cartel while cooperating in relation to the first.

Simply put, a party is eligible for amnesty plus if:

- a) it is cooperating in relation to cartel A; and
- b) receives conditional immunity for cartel B.

The same criteria for immunity and cooperation apply.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Individuals have the same options available to them as corporations; however, the criteria differs slightly. For individual immunity, the two differences are:

- a) the application need not be a truly corporate act; and
- b) the individual must be a director, officer or employee of a corporation engaging in cartel conduct.

Additionally, in relation to cooperation in civil matters, the ACCC will consider whether the individual has agreed not to use the same legal representation as the corporation.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

As indicated in section 4, the ACCC may consider an agreement on civil penalties. This agreement may be presented to the Court; however, it is ultimately for the Court to decide the appropriate penalty.

7 Appeal Process

7.1 What is the appeal process?

Given that proceedings are commenced in the Federal Court of Australia before a single Judge, any appeals are to be brought before the Full Court of the Federal Court before at least three Judges.

7.2 Does an appeal suspend a company's requirement to pay the fine?

In Australia, it is commonplace for sentences to occur only once a conviction and any conviction appeals have been determined. In the rare scenario where an appeal is heard after sentence, the applicant can apply to the Court to stay the penalty until the appeal has been determined.

7.3 Does the appeal process allow for the cross-examination of witnesses?

In Australia, appeals are limited to errors in law. Cross-examination of witnesses may be allowed in the circumstances of a re-trial.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Any corporation or person who has suffered loss or damage as a result of cartel conduct is able to bring a claim in the Federal Court of Australia. The limitation period under s 82 of the CCA applies.

S 83 of the CCA assists parties who wish to make a "follow on" action in relation to cartel conduct. It stipulates that a finding of any fact made by a Court, or an admission of any fact made by the person in proceedings where they have been found to contravene Part IV of the CCA, is *prima facie* evidence of that fact. This may be proved by production of relevant Court documents. It therefore stands to reason that "follow on" actions will be slightly easier than "stand alone" actions as they have the benefit of relying on past proceedings.

8.2 Do your procedural rules allow for class-action or representative claims?

S 33C of the *Federal Court of Australia Act 1976 (Cth)* ("FCAA") sets out the following requirements that must be met before a class action can be brought:

- a) seven or more persons have claims against the same person(s);
- b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
- c) the claims of all those persons give rise to a substantial common issue of law or fact.

The legislative regime in Australia automatically includes all those who meet the description of the "group" and requires positive steps to be taken in order to "opt out". If damages are awarded, they are calculated based on the group as a whole.

Additionally, pursuant to s 87(1B) of the CCA, the ACCC may bring representative proceedings on behalf of persons who have suffered or are likely to suffer as a result of a contravention to cartel provisions.

8.3 What are the applicable limitation periods?

As in section 3, the limitation period is six years from the date on which the conduct occurs.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

Australia has not yet determined the availability of a "passing on" defence for cartel conduct. This indecisiveness was expressed in the Judgment of *Auskey International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd* in 2008.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

It is the general position that the unsuccessful party will be ordered to pay at least part of the costs of the successful party. S 43(1A) of the FCAA limits a costs order in representative proceedings to be against the initiating party only.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

To date there have been no finalised private actions under the new cartel legislation. On 27 May 2019, however, an Australian law firm issued the Australian Foreign Exchange Cartel Class Action in the Federal Court of Australia. The proceedings are still in the very early stages and there is currently little information available.

In one of the first private follow-on cases in 2006, the same Australian law firm successfully negotiated a settlement of AUD\$30.5 million. This is known as the “Vitamins Class Action”.

Shortly after, in 2007, the Federal Court of Australia fined Visy (a cardboard manufacturer) AUD\$36 million for its contravention of the CCA relating to cartel conduct. Later, in 2011, the Court approved a settlement, for a class action brought against Visy and Amcor (another manufacturer), in the amount of AUD\$95 million.

More recently, in 2014, the Court approved the settlement for a class action against an international air cargo cartel. The amount approved was AUD\$38 million.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

The ACCC’s new immunity and cooperation policy for cartel conduct, outlined in section 4, will commence in October 2019 and replace the September 2014 policy. The main developments of the policy are updated criteria and the need for a cooperation agreement to be in place.

The alleged cartel of Citigroup Global Markets Australia Pty Limited, Deutsche Bank Aktiengesellschaft, and Australia and New Zealand Bank reported in Australia’s 2019 chapter has had some recent developments. In March 2019, the CDPP served the statement of facts to the accused, nearly 10 months after the initial charges were laid. The Local Court must now complete a committal hearing before the matter can be referred to the Federal Court to be heard before a jury.

Similarly, the alleged cartel involving The Country Care Group Pty Ltd, its managing director, and one employee, has also had some recent developments. The accused were committed for trial in the Federal Court of Australia which is expected to take place over six weeks, commencing 3 February 2020.

The most recent and arguably one of the most important legislative changes was introduced by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017 (Cth)*. The change was a result of a three-year review into the adequacy of the legislation, known as The Harper Review. Essentially, the amendment extended the investigative powers given to the ACCC under s 155, increased fines for non-compliance, introduced the “reasonable search” defence, updated the “joint-venture” defence and introduced the “trade or commence” requirement.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

There are no further issues.

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The authors would like to thank Jasmina Ceic, criminal trial advocate, and Shae Ingold, Solicitor, for their invaluable contributions to the writing of this chapter.

Jasmina advises and acts in complex criminal law matters at all levels of the Court system, with a specialist focus on serious matters that proceed to trial in the Superior Courts, as well as conviction and sentence Appeals heard in the Court of Criminal Appeal. Shae assists the Partners on international criminal law cases and cross-border investigations.



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Phillip Gibson is one of Australia's leading criminal defence lawyers, with over 30 years of experience in all areas of criminal law. Phillip has significant experience in transnational cases across multiple jurisdictions, often involving: white-collar and corporate crime; assets forfeiture; money laundering and proceeds of crime; extradition; mutual assistance; Royal Commissions; bribery and corruption; and ICAC and Crime Commissions matters. He has extensive experience in dealing with all major Australian and international investigative agencies.

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Nyman Gibson Miralis is an international award-winning criminal defence law firm based in Sydney, Australia. For over 50 years it has been leading the market in all aspects of general, complex and international crime, and is widely recognised for its involvement in some of Australia's most significant criminal cases.

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Nyman Gibson Miralis strategically advises and appears in matters where transnational cross-border investigations and prosecutions are being conducted in parallel jurisdictions, involving some of the largest law enforcement agencies and financial regulators worldwide.

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