

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

USE OF MARKERS IN LENIENCY PROGRAMS

-- Australia --

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*More documents related to this discussion can be found at:
<http://www.oecd.org/daf/competition/markers-in-leniency-programmes.htm>*

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Introduction

1. In Australia, a cartel may give rise to civil or (since 2009) criminal liability under the Competition and Consumer Act 2010 (CCA).¹ The Australian Competition and Consumer Commission (ACCC) is the sole point of contact for applicants for markers for both civil and/or criminal immunity. The procedure for placing and assessing markers is a key component of the ACCC's Cartel Immunity Program which is established under its *Immunity and Cooperation Policy for Cartel Conduct* (the ACCC Policy).

2. Immunity is only available to the first eligible party to disclose the relevant cartel. The marker system determines which party is first. A later party may choose to cooperate with the investigation and court proceedings in the expectation that it will receive more lenient treatment. In addition, if the first in marker applicant does not proceed with an application for immunity or otherwise loses its immunity then the next applicant in time would move into first place and receive immunity.

3. The ACCC Policy covers both immunity and cooperation by those without immunity. It was revised after a consultation and review process during 2014 and published in its current form in September 2014.²

4. The ACCC assesses each marker application against the eligibility criteria for conditional civil immunity in the ACCC Policy. In the case of matters giving rise to criminal liability, the ACCC makes a recommendation to the Office of the Commonwealth Director of Public Prosecutions (CDPP) to grant criminal immunity to a marker holder that meets the ACCC's eligibility criteria.³ Although the CDPP does not manage applications for immunity or markers, it does make decisions about criminal immunity.

5. The CDPP is Australia's national federal criminal prosecution service and is responsible for prosecuting offences including serious cartel offences. The head of the CDPP, who is the Commonwealth Director of Public Prosecutions (Director), is empowered to grant criminal immunity in cartel cases, and does so under Annexure B of the *Prosecution Policy of the Commonwealth* (the Commonwealth Prosecution Policy) applying the same criteria as contained in the ACCC Policy.

1. Please describe any marker system you have and its relationship to your leniency program.

1.1 Step 1: Marker

6. A Request for a marker is the gateway into the ACCC immunity program.

7. Once granted a marker is confirmation that an immunity applicant is the first party to approach the ACCC requesting immunity with respect to a particular cartel.⁴

¹ The relevant civil provisions are:

Division 1 of Part IV of the of the CCA, which prohibits a corporation from making or giving effect to contracts, arrangements or understandings that contain a cartel provision; and/or section 45(2) of the CCA.

The relevant criminal provisions are ss. 44ZZRF and 44ZZRG of the CCA.

² <http://www.accc.gov.au/publications/accc-immunity-cooperation-policy-for-cartel-conduct>.

³ <http://www.cdpp.gov.au/publications/prosecution-policy-of-the-commonwealth/>.

⁴ The marker also confirms that the ACCC does not already have reasonable grounds to institute proceedings, as this would mean a marker is not available.

8. The only valid ways to make an immunity application or request a marker is to contact the 'ACCC Immunity Hotline' by telephone or by sending an e-mail to cartelimmunity@acc.gov.au. This will secure contact with the Executive General Manager, Competition Enforcement, who will advise as soon as possible whether the requested marker is available. The ACCC records the time that any initial contact about a marker occurs or when an application for a marker is made.
9. To obtain a marker, the applicant must provide a description of the cartel conduct in sufficient detail to allow the ACCC to confirm that no one else has applied for immunity or obtained a marker for the cartel. This may include specifying the particular industry, product and/or time period in which the cartel conduct took place.
10. An applicant can request a marker on a hypothetical, anonymous basis. After a marker is granted, the applicant or its representative must be identified at the second stage of the process which is known as the proffer. (see *Step 2* below).
11. The effect of placing a marker is to preserve, for a period determined by the ACCC (usually 28 days), the marker holder's status as the first party to apply to the ACCC for immunity for the cartel. A marker allows the recipient that period to gather the information necessary to demonstrate to the ACCC that they satisfy the requirements for conditional immunity (see section 7 below).
12. That period may be as short as a few days in some circumstances, for example, if the applicant has delayed reporting or the ACCC is advanced in a pre-existing investigation. On the other hand, if the ACCC does not have an investigation on foot and the applicant can satisfy the ACCC that its internal investigation will be complex, a longer period may be justified. The ACCC will discuss timing requirements with the applicant. The ACCC may, at its discretion, extend the period of the marker for a further specified period to enable an applicant to provide additional information to support its application. As delays at the marker stage may adversely affect the ACCC's ability to obtain evidence or coordinate with other agencies, if the ACCC is to extend the allotted period it will need to be satisfied that the delays are justified and not disproportionate to the tasks to be undertaken.
13. In some unusual and very complex investigations the ACCC may permit an applicant to have considerable time in which to make internal inquiries to determine whether a contravention has occurred. In those cases there may be more than one proffer presentation required. An extension of the time for the proffer will be given.
14. The marker will lapse when the proffer period expires if the applicant has not demonstrated that it satisfies the requirements for conditional immunity. Generally where a marker lapses, the same or another person is free to apply for immunity or request a marker for the relevant conduct. A second person that has already requested a marker will be given an opportunity to satisfy the requirements for conditional immunity as if it were the first-in marker holder.
15. The ACCC expects a marker holder to notify the ACCC promptly if it considers it will not satisfy the conditions for conditional immunity and the marker will then lapse. The ACCC will cancel a marker if the applicant fails to meet the requirements of conditional immunity. For example, if in making internal enquiries an applicant discovers that it has been involved in coercing competitors into the cartel it would not be entitled to conditional immunity and may decide not to proceed with its application.
16. As long as a party holds the marker for particular cartel conduct, no other party involved in the same cartel conduct will be allowed to take first place in the immunity queue, even if they are able to satisfy all conditions immediately.

17. The ACCC will not accept joint immunity applications by more than one party. However an applicant can seek derivative immunity on behalf of its employees and officers as well as subsidiary businesses it controls. A business trading as a partnership will generally be regarded as a single immunity applicant.

1.2 Step 2: Proffer

18. The marker recipient must provide a detailed description of the cartel conduct in a 'proffer', either orally or in writing, if it is to proceed with its immunity application. The proffer needs to contain the information and evidence that the applicant is able to provide from their internal investigation regarding the nature and extent of the cartel conduct. It will need to disclose sufficient information to determine whether the applicant satisfies the criteria for conditional immunity (see section 7 below).

19. At the proffer stage, the ACCC will not accept a bare outline of the cartel conduct or speculation as to the applicant's role in the cartel. The ACCC requires the details of the applicant's role in the cartel conduct and sufficient information to obtain a clear appreciation of the evidence each witness identified by the applicant can provide about the conduct. Applicants should report as completely and accurately as possible with truthfulness and in a spirit of cooperation.

20. The ACCC will create its own records of all marker requests and applications, including proffers. Proffers are used by the ACCC for the purpose of obtaining legal advice from internal and/or external advisors on whether the marker applicant has been a party to a cartel, and information provided in a proffer will attract privilege on that basis. Lengthy, pre-prepared proffers are likely to be statements recorded for the purpose of obtaining that legal advice.

21. Before being eligible for conditional immunity, the applicant should be in a position to admit to being a party to a cartel, either as a principal or in an ancillary capacity. Whether or not the conduct amounts to a contravention of the CCA is a matter for the Court to decide. On the basis of the proffer, the ACCC will determine whether the marker holder satisfies the criteria for conditional immunity, and if it does the ACCC will advise in writing that the applicant has been granted conditional immunity.

22. The ACCC will also make a recommendation to the CDPP to grant criminal immunity. The Director will exercise independent discretion in deciding whether to grant criminal immunity (applying the same criteria as the ACCC does to granting civil immunity).⁵ As a first step the Director will ordinarily provide a letter of comfort to the applicant, recognising the applicant has 'first-in-status' and stating that the Director intends to grant an undertaking that the person will not be prosecuted.⁶ The letter of comfort will generally be provided at the same time as the ACCC grants conditional immunity for civil proceedings, and will be subject to continuing obligations and conditions (such as maintaining eligibility for conditional immunity, and providing on-going cooperation).⁷

⁵ See Annexure B to the Prosecution Policy of the Commonwealth.

⁶ The undertaking is given pursuant to section 9(6D) of the *Director of Public Prosecutions Act 1983*.

⁷ The strong relationship between the ACCC and CDPP is underpinned by a Memorandum of Understanding <http://www.cdpp.gov.au/wp-content/uploads/MR-20081201-ACCC-and-CDPP-Cartel-Conduct-Immunity-MOU.pdf>.

2. What is the principal purpose of your marker system? What are the potential benefits of your marker system for the agency and for marker applicants?

23. The immunity policy is intended to create a ‘race to the door’ by cartelists. The purpose of the marker is to determine the identity of the first eligible party to disclose the relevant conduct, in other words, the winner of the race for immunity.

24. In this way the ACCC Policy and Annexure B to the Commonwealth Prosecution Policy provide strong incentives to businesses and individuals to disclose cartels, and increase the risk of detection and punishment for cartel conduct.

25. Annexure B to the Commonwealth Prosecution Policy is based on a recognition that, in respect of serious cartel offences, it is in the public interest to offer immunity from prosecution to a party who is willing to be the first to break ranks with other cartel participants by exposing the cartel and fully cooperating with the ACCC in an investigation and the DPP in any prosecution.

26. Those that are not eligible for ‘first-in’ immunity still have an incentive to cooperate with the ACCC and, for criminal matters, the CDPP because the Court will generally afford more lenient treatment for doing so. Anyone that is not eligible for ‘first-in’ immunity but is cooperating with the ACCC in relation to one cartel may discover a second independent and unrelated cartel. In these circumstances, they may apply for conditional immunity for the second cartel and also seek ‘amnesty plus’ for the original cartel conduct (a recommendation for a further reduction in penalty in relation to the first cartel). A party seeking amnesty plus must seek a marker for the second cartel from the ACCC as soon as possible in the usual way.

3. Is your marker system created by statute or regulation, or simply by agency practice? How have you communicated your system to the public – by speeches, written policies or rules, or Frequently Asked Questions (FAQs)?

27. The ACCC immunity program including the marker system is established through agency practices which are described and explained in policy statements - specifically the ACCC Policy and Annexure B to the Commonwealth Prosecution Policy.

28. The ACCC Policy is supplemented by “Frequently Asked Questions” (FAQs).

29. Both the ACCC Policy and Annexure B to the Commonwealth Prosecution Policy (including predecessor versions) have been publicised extensively on the ACCC’s and CDPP’s websites, in media releases, in presentations to domestic and international Bar Associations and at international fora (notably the ICN).

30. Recent revisions leading up to the current ACCC Policy were the subject of extensive rounds of consultation both with regular users of the policy, academic experts in the area of competition law, the legal profession and the broader public.

4. Who is eligible to obtain a marker under your system? Is a marker available only to the first applicant, or also to subsequent applicants?

4.1 *Conditions to be satisfied by the marker holder*

31. Only those that are capable of satisfying the requirements for conditional immunity are able to apply for a marker (see section 7 below for conditions that the marker holder must satisfy). Immunity is available only for the first eligible party to disclose the cartel conduct. It is not necessary for a party to have gathered all of the required information when applying for a marker. A marker application may be made by (and immunity is available to) individuals and corporations (which includes partnerships, unincorporated businesses, government business enterprises and government departments or agencies carrying on a business) who have engaged in cartel conduct, whether as a primary contravener or in an ancillary capacity, in contravention of the CCA.

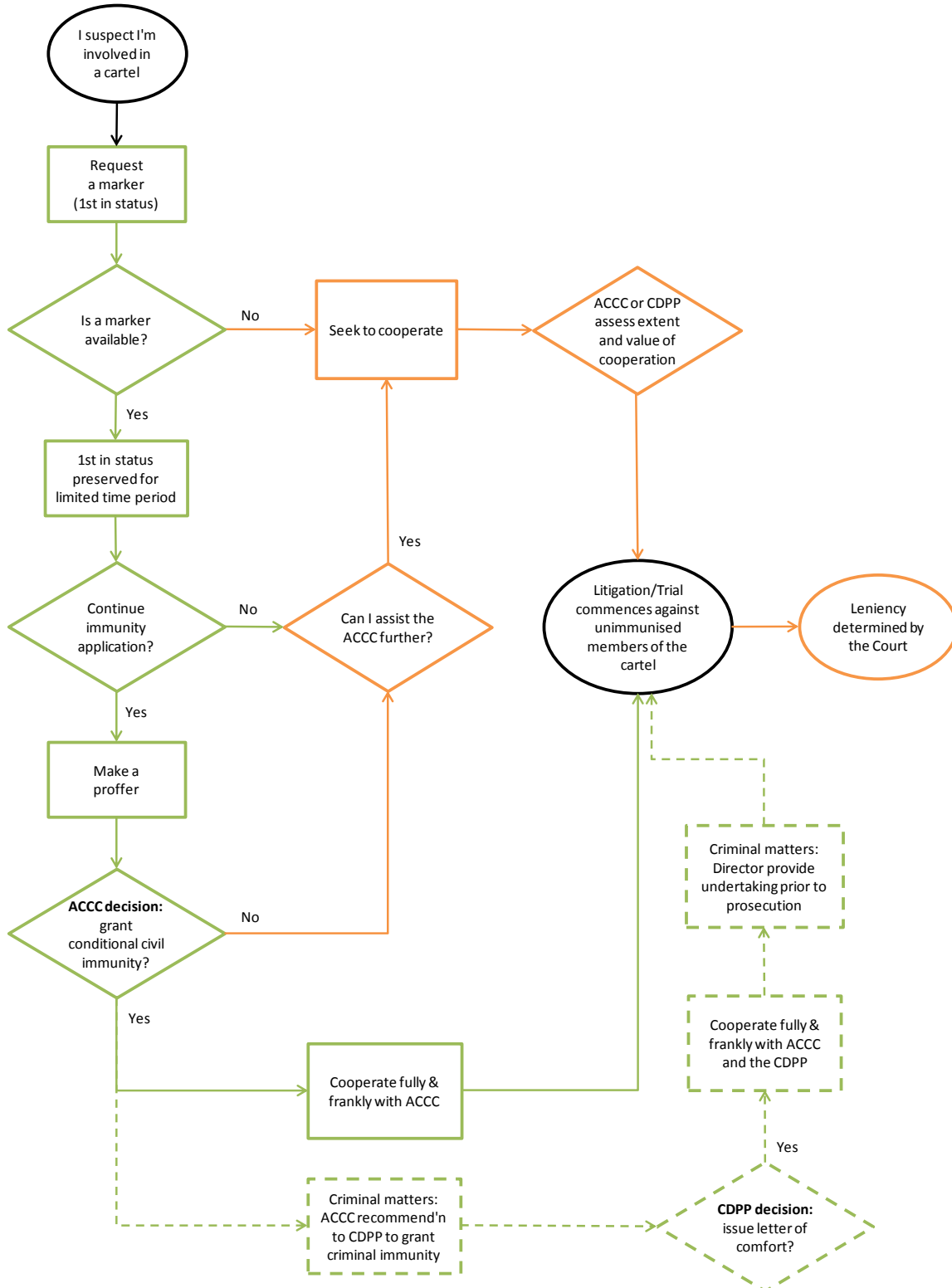
32. Corporations or individuals who have unilaterally attempted, without success, to get others to engage in cartel conduct will not be eligible for immunity and so may not apply for a marker.

4.2 *Derivative immunity*

33. A corporation may apply for a marker seeking derivative immunity for related corporate entities and/or for current and former directors, officers and employees of the corporation who were involved in the cartel conduct (they are to be listed at the time of the application). Derivative immunity may be granted for all, or part of, the relevant period of the cartel conduct and will be in the same form as the conditional immunity granted to the corporation.

5. What steps must be taken to initiate the process, and what are the threshold requirements for obtaining a marker?

34. The following flowchart sets out the process of seeking immunity and leniency for cooperation.



See also sections 1 and 4 above.

6. Is the grant of a marker automatic upon meeting these requirements, or does the agency retain some discretion? If the agency has some discretion, what factors does it consider?

35. If an application for a marker is accompanied by confirmation of eligibility for immunity and a description of the cartel conduct in sufficient detail to allow the ACCC to confirm that no other corporation or individual has applied for immunity or obtained a marker in respect of the cartel, the marker will be granted. If a business or person has unilaterally attempted, without success, to get others to engage in cartel conduct that business or person will not be given a marker. A marker will also not be granted if the ACCC is already aware of the cartel and has obtained legal advice that it has reasonable grounds to institute proceedings in relation to at least one contravention arising from the conduct in respect of the cartel. However, as noted in section 10 below, there may be issues concerning the availability of a marker, which are primarily factual matters requiring resolution at the marker stage.

36. The ACCC applies its discretion in determining the time allowed for the marker, as well as any extension, as outlined in section 1 above.

7. At what point does the marker ripen into a conditional offer of leniency (conditional on compliance with all the ongoing conditions for leniency, such as continuing cooperation with the agency)? What is the process for obtaining the conditional offer of leniency, and what showing by the applicant is necessary for this step?

7.1 Conditional immunity

37. If the ACCC is satisfied that the applicant has met the eligibility criteria for conditional immunity (see below), the ACCC will grant the marker holder conditional immunity against civil proceedings by letter (which will include a description of the relevant conduct and the terms and conditions upon which conditional immunity is granted). This will usually be at the same time the CDPP provides the letter of comfort regarding criminal immunity (see section 1 above).

38. The ACCC Policy outlines a number of mandatory conditions that the marker holder must satisfy before it will be granted conditional immunity, namely that it:

1. (if a corporation) is or was a party to a cartel, and (if an individual) is or was a director, officer or employee of a corporation that is or was party to a cartel - in each case as a primary contravener or in an ancillary capacity;
2. admits to conduct in respect of the cartel that may constitute a contravention of the CCA [a corporation's admissions must be a truly corporate act (as opposed to isolated confessions of individual representatives)];
3. is the first to apply to the ACCC for immunity in respect of the cartel;
4. has not coerced others to participate in the cartel;
5. has ceased (or is willing to cease) involvement in the cartel; and
6. has provided full, frank and truthful disclosure, and cooperated fully and expeditiously while making the immunity application, and undertakes to continue to do so throughout the ACCC's investigation and any ensuing court proceedings.

39. Also, at the time the ACCC receives the marker application, the ACCC must not have received written legal advice that it has reasonable grounds to institute proceedings in relation to at least one contravention of the CCA arising from the relevant conduct.

8. Please describe any rules or policies with respect to confidentiality of applications for a marker, and waivers of such confidentiality.

8.1 *Obligations of the marker applicant*

40. The ACCC requires the marker holder not to disclose its application for a marker and subsequent immunity, or any related information, to a third party (other than its counsel or regulatory agencies in foreign jurisdictions to which the applicant has made similar applications for immunity or leniency), without the ACCC's consent. Confidentiality helps to ensure that the other targets of the investigation do not become prematurely aware of the ACCC's investigation. This protects the integrity of the ACCC's investigation and ensures that evidence is not destroyed.

41. The only exception to this confidentiality requirement is if the marker holder is required by law to disclose the information, whether in Australia or elsewhere, in which case they must give notice to the ACCC as soon as practicable after becoming aware of the disclosure requirement.

8.2 *Obligations of the ACCC/CDPP*

42. The ACCC is legally obliged to protect any confidential information provided by the marker holder, including their identity.

43. In relation to international matters, the ACCC will ask the marker holder (and any other cooperating party) to provide a confidentiality waiver for each jurisdiction in which it has or intends to seek immunity for the cartel conduct or leniency. Although the grant of conditional immunity does not depend on a waiver being provided, a marker holder will be required to explain why it cannot provide one. Failure to provide a satisfactory explanation may be regarded as failure to provide full cooperation. The ACCC will progress its investigation even before conditional immunity is granted and waivers will facilitate that.

44. The ACCC's obligation of confidentiality in relation to a marker holder or other cooperating party excludes disclosure required by law and in accordance with Australia's 'information gateway', contained within section 155AAA of the CCA. The principal rationale for section 155AAA is to protect a range of information, including that provided by a marker holder, and it provides that the ACCC and its officers must keep that information confidential. It permits disclosure of such information only in strictly limited circumstances, including its use in conducting court proceedings or a prosecution. Sections 157B and 157C provide additional protection for information provided by an immunity applicant by requiring leave of the court for its production by the ACCC, and by limiting the ACCC's obligation of disclosure, pursuant to a subpoena, non-party discovery, pre-trial discovery, or similar order.

8.3 *Use of information at different stages of the immunity application process*

45. Proffers are generally provided on a 'without prejudice' basis by the applicant's legal representative. The ACCC uses information provided in support of an immunity application to progress the application and take initial steps in its investigation against other cartel participants.

46. Information provided to the ACCC after the grant of conditional immunity, by those covered by the immunity application, may be used in civil proceedings and/or criminal prosecutions against anyone without conditional immunity, and it may be shared with the CDPP. It is received on the basis that the ACCC and/or CDPP will not use it as evidence against those covered by the immunity application.

47. However, the ACCC will be entitled to use any of the above information, even against those covered by the immunity application, in civil and/or criminal proceedings for a substantive contravention of the CCA if conditional immunity is revoked. That information may also be used in criminal proceedings for failure by anyone to comply with a statutory notice requiring documents, information or evidence, or for knowingly supplying false or misleading information or documents, or for obstructing Commonwealth officers.⁸

9. If you do not have a marker system, have you considered adopting one? If so, what considerations led you to decide against doing so?

48. Not applicable.

10. If you have a marker system, please describe your experience with it. Has it been amended over time? Are you considering further amendments?

10.1 *Each marker must clearly distinguish the relevant cartel from other cartels*

49. One self-evident requirement of a marker applicant is that they must adequately describe the relevant conduct in a way that clearly identifies the cartel at issue, and effectively distinguishes that cartel from all others. This is often done without any visibility of similar or related cartels, and obviously without the benefit of cartel descriptions that accompany subsequent markers. On receiving any marker the task is obviously to determine whether first-in status is available, since the cartel scope for each marker queue must be unique.

50. Inevitably this gives rise to practical challenges. At the point a marker application is made the applicant's investigations are typically at a very early stage and there is understandable haste in making the application. This often means that the precise boundaries of the cartel conduct are not fully explored and are not clearly delineated by the applicant. When considering the first of a series of related marker applications the ACCC does not have the benefit of the detail and perspective of a matter that would inform the characterisation of the relevant cartel conduct. There is a tendency by marker applicants, as a matter of caution, to provide broader definition of the relevant conduct than is appropriate, and it is frequently necessary to require the applicant to be more specific. However, a proper balance must be maintained so that a marker definition is not too specific. The main purpose is to identify the relevant cartel.

51. There are two common risks with marker definition.

52. The first is the risk of inadequately distinguishing genuinely discrete cartels, causing different cartels to be wrongly perceived as the same. This can be the result of over-inclusion. An example of a marker application that is too broad might be one for price-fixing on a particular form of international freight services within a given date range. To avoid over-capture it may be necessary to particularise the relevant freight service, such as mode of transportation (land, air or multimodal), market sector (such as product type, express/standard service), routes or other geographical description, etc in order to achieve the necessary degree of precision to reach a basic level of marker description. It may also be appropriate to require the applicant to describe the cartel by reference to the originating conduct, such as meetings in a

⁸ S.155(5) of the CCA; ss. 137.1, 137.2 or 149.1 of the Criminal Code.

given place, between particular entities, or occurring at specified times. Marker definition is an exploratory exercise aimed at an appropriate level of detail that distinguishes separate and independent cartels.

53. The second risk at the marker application stage is the obverse, where instead of markers wrongly portraying different cartels as the same, they err in describing the same conduct as two distinct cartels. This can be the result of unclear attribute selection or over-specificity. For example, a first-in marker for price-fixing conduct might identify the relevant conduct by reference to a given set of distinguishing characteristics, such as the relevant product, rate values and timing of agreed pricing. The same conduct is capable of being characterised in a later marker by a different combination of attributes that focus on a geographical market or customers affected.

54. A common claim made by late-in applicants is that their marker application is unique for being based on particular facts or evidence, distinguishable from that of the first-in marker holder. More facts or different evidence do not necessarily signal a different cartel or investigation. This is likely to lead to error in over-specificity.

55. If the reality becomes apparent only after the markers have been granted the outcome is clearly undesirable.

56. These risks are greater when markers concern those industries with a propensity to collusion in which various cartels may be operating simultaneously with similar characteristics. The relevant distinctions may be harder to discern where the same characteristics are common to unrelated cartels.

57. The reality is that some matters involve cartel conduct that is sufficiently proximate and related to other conduct that conceptual differentiation can be difficult. In the case of overlap, the ACCC is able on occasion to identify the area of commonality with an earlier marker (and indicate that first-in status is not available for that) so that it may grant a first-in marker for the remainder of the conduct description.

58. These issues are resolved case-by-case with great care and precision in the process of communication at the marker application stage. The ACCC must be fully satisfied that no earlier marker has been granted for any aspect of the conduct described in a marker application. If there is any doubt about a marker description, then the marker is not granted. It is also possible in some cases of uncertainty for the ACCC to indicate that it does not currently consider that a marker is available but it undertakes to contact the relevant party if it becomes apparent at a later date that the marker sought is in fact available.

10.2 Different first-ins in different jurisdictions

59. There is always the risk of different first-in applicants in different jurisdictions for the same cartel.

60. In international matters cooperation between regulators is best facilitated by waivers where first-in status has been granted to the same person. This is likely to result in uniformity in the marker description. It is also much easier for a cooperating party to provide a waiver to enable one regulator to speak to counterparts where it has first-in status in the jurisdictions of those counterparts. In criminal matters especially, parties will be cautioned against giving a waiver to speak to a regulator in a jurisdiction where it does not have the prospect of immunity.

10.3 Statistics

September 2005 to September 2014	Number
Approaches	169
Approaches from individuals	14
First in markers	125 (78 since 2009)
Approaches resulting in no marker	62
Immunity application proffers	83 (48 since 2009)
Proffers not resulting in conditional immunity	7
Criminal conditional immunity granted	13
Final immunity applications granted	9