

11 October 2018

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By email: Marcus.Bezzi@acc.gov.au

Dear Mr Bezzi

Review of the ACCC immunity and cooperation policy for cartel conduct

1. I refer to your letter dated 21 August 2018 and thank you for the opportunity for the Law Council to comment on the draft revised Australian Competition and Consumer Commission (**ACCC**) *immunity and cooperation policy for cartel conduct (Immunity and Cooperation Policy)*.
2. The Law Council is grateful for the assistance of its Competition and Consumer Committee of the Business Law Section and its National Criminal Law Committee in the preparation of this submission.
3. The Law Council has taken into consideration the ACCC's reasons for the proposed changes to the Immunity and Cooperation Policy, and its comments are limited to only some of the proposed key changes, as set out below.

Application of Immunity and Cooperation Policy

4. Paragraph 3 of the proposed Immunity and Cooperation Policy provides that the protections available under the Immunity and Cooperation Policy will apply in respect of the cartel prohibitions under Division 1 of Part IV, and in respect of paragraphs 45(1)(a) and 45(1)(b) of the *Competition and Consumer Act 2010* (Cth) (**CCA**). The protections under the Immunity and Cooperation Policy are not stated to apply in respect of a concerted practice in contravention of paragraph 45(1)(c) of the CCA.
5. The Law Council is of the view that the protections in section H of the Immunity and Cooperation Policy should also apply to concerted practices for the following reasons:
 - the Law Council understands that the rationale for excluding concerted practices is so the immunity is to cover only conduct that can be prosecuted criminally. However, the current policy, in referring to what was subsection 45(2) until 6 November 2017, covered all of the civil prohibitions in section 45 up to that time and the policy has in general terms worked effectively in that form. Although the Law Council understands there is current uncertainty surrounding the scope of a "concerted practice", the rationale for excluding

one form of prohibited cartel-like behaviour but continuing to include others is not clear;

- evidence to establish a contravention of either paragraph 45(1)(a), 45(1)(b) or 45(1)(c) may be provided as part of a cartel immunity application. However, there is uncertainty in regard to how Courts will distinguish a “concerted practice” from an “understanding” – and the distinction may not always be obvious for immunity applicants – such that it is possible that evidence provided in a cartel immunity application under the current draft could be used in a subsequent concerted practices case. In circumstances where there are no protections in relation to the future use of evidence submitted to found an immunity application and while the law is unclear in order to facilitate the making of such applications the immunity should extend to cover concerted practices; and
 - contraventions of paragraph 45(1)(c) attract the same potential penalties as contraventions of paragraphs 45(1)(a) and 45(1)(b) to which the Immunity and Cooperation Policy (and section H in particular) will apply.
6. The Law Council is concerned that the different treatment of concerted practices may unintentionally deter potential cartel immunity applicants from seeking immunity and providing evidence to the ACCC in circumstances where:
- the evidence may indicate the existence of both a cartel provision and a concerted practice; or
 - it is not obvious if the conduct in question amounts to an “understanding” as opposed to a “concerted practice. In some circumstances, an immunity applicant could take the view that the conduct in question is likely to amount to an “understanding” between competitors for the purposes of the cartel provisions and paragraphs 45(1)(a) and 45(1)(b) in circumstances where the ACCC considers there to be insufficient evidence to establish an “understanding”, but sufficient evidence to establish a “concerted practice”. Given that there is no case law on what amounts to a “concerted practice” as compared to an “understanding” in Australia, this will be a significant concern for potential applicants.
7. Corporations and individuals are likely to take comfort from the fact that section H is directed to cartel conduct as defined and specific sections of the CCA as they apply to such conduct (rather than applying more generally), and is also part of the broader policy on cartel immunity. Where evidence presented as part of a cartel immunity application captures a potential concerted practice, corporations or individuals would likely be more comfortable presenting such evidence to the ACCC where they know that it will be subject to a single immunity and cooperation policy rather than potentially being redirected to an older and more general policy that still refers to the Trade Practices Act.
8. This appears to be the rationale for including paragraphs 45(1)(a) and 45(1)(b) in the Immunity and Cooperation Policy, and it is not clear why these prohibitions should be treated differently to the concerted practices prohibition for the purposes of the Immunity and Cooperation Policy.

Immunity eligibility

9. A key change to the eligibility criteria for corporations and individuals is that the corporation or individual will need to admit that they have or are engaging in cartel conduct that is “likely” to contravene the CCA. The criteria previously only required that the corporation or individual admit that they have or are engaging in cartel conduct that “may” contravene the CCA.
10. The Law Council notes that the change to “likely” may deter some corporations and individuals from seeking immunity. It is more difficult, for one party to reach the position that its conduct is likely to contravene the cartel prohibitions. That party is likely to have imperfect knowledge of the conduct and intentions of other parties that bear upon whether a contravention has occurred or is likely. Moreover, parties may be reticent to admit likely contravention because of potential follow-on proceeding consequences for the admitting immunity applicant.
11. The Law Council also considers that there is an opportunity to make some of the eligibility criteria clearer by:
 - defining “ancillary capacity” in paragraphs 12, 19(a) and 25(b) to ensure that it is clear what must be admitted to the ACCC by an applicant;
 - inserting the words “direct or indirect” before “controlling interest” in paragraphs 25(a);
 - making it clear that, for the purposes of paragraphs 19(f) and 25(f), a corporation seeking immunity will not be ineligible for immunity solely because it has not been able to provide witnesses that are not employed by the corporation; and
 - clarifying in paragraph 23 and 24 that derivative immunity extends to current and former directors, officers and employees of the related corporate entities (as well as the corporate applicant).

Unilateral attempts

12. Paragraph 13 of the proposed Immunity Policy provides that the policy applies to corporations and individuals that attempt to cause others to engage in cartel conduct, but only where such an attempt is successful.
13. It is not clear what the ACCC’s policy rationale is for distinguishing between successful and unsuccessful attempts, in circumstances where the success of the attempt is not an element in establishing an “attempt” contravention in law. Further, in circumstances where the immunity applicant may not know whether its attempt was successful or not (e.g. where the immunity applicant was active at the cartel formation stage, but not at the stage of giving effect to the cartel provision) it seems counter-productive to the policy that underlies the immunity to deny its beneficial effect simply because the ACCC ultimately concludes that the attempt was unsuccessful. That would have the perverse effect of endangering an unsuccessful immunity applicant (thereby dissuading them from seeking immunity) whilst protecting a successful one.
14. The Law Council recognises that an immunity applicant that successfully attempted to cause others to engage in cartel conduct is likely to be better able to offer useful

information to the ACCC in circumstances where a cartel provision was subsequently entered into or given effect to. However, the Law Council is of the view that a person or corporation that unsuccessfully attempts to cause others to engage in cartel conduct could also potentially provide equally useful information to the ACCC, for example, because there may be other persons or corporations that also attempted others to engage in cartel conduct that the ACCC may decide to investigate.

Other points

15. In paragraph 78 of section H (Cooperation Policy), it may be more practical to refer to a position rather than to an individual person (Rob Ghali). This avoids the need to amend the policy should Mr Ghali change positions at, or leave, the ACCC.

General immunity principles

16. While the Law Council is supportive of appropriate immunity provisions in the context of cartels and noting that the current consultation does not seek views on the fundamental aspects of the Immunity and Cooperation Policy, the Law Council's National Criminal Law Committee would be grateful for the opportunity to discuss some of these aspects with the ACCC in the future.
17. In particular, the Law Council's National Criminal Law Committee has noted that a key principle of the rule of law is that the law should be applied to all people equally and should not discriminate between people on arbitrary or irrational grounds.¹
18. The Immunity and Cooperation Policy would allow immunity on a 'first-in' basis only. There is the potential for possibly the principal party to be granted the immunity and not others who may be less criminally culpable. The immunity functions therefore in a manner that is atypical of other criminal law immunity provisions. Further, the immunity grant may be unduly restrictive and the 'first-in' scenario may have the potential to result in an injustice.
19. The Law Council's National Criminal Law Committee considers that the use of such policies for regulatory purposes must be tempered against traditional requirements under criminal law that offenders be treated fairly and equally. It is also of the view that there should be more flexibility and discretion in the decision-making process.

Contact

20. Please contact Dr Natasha Molt, Director of Policy, Policy Division (02 6246 3754 or Natasha.molt@lawcouncil.asn.au), in the first instance should you require further information or clarification.

Yours sincerely



Arthur Moses SC
President-elect

¹ Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011) Principle 2.