The Section of Antitrust Law of the American Bar Association (“the Section”) welcomes the opportunity to participate in the Australian Competition and Consumer Commission’s (“ACCC”) public consultation process on the ACCC’s Draft Guidelines on Immunity and Cooperation Policy for Cartel Conduct (the “Draft Guidelines”).

Executive Summary

The Section commends the ACCC’s efforts to consult with stakeholders on the Draft Guidelines. The ACCC has achieved a well-earned reputation within the international bar of applying its leniency program in a fair, consistent and transparent manner. The ACCC’s pledge in the Draft Guidelines “to interpret the policy in favor of an applicant in case of ambiguities in the policy” instills confidence in the domestic and international antitrust private bar and the business community that the ACCC will work with leniency applicants to ensure that they secure the benefits of self-reporting cartel activity.

The ACCC recognizes the value of an immunity/cooperation policy in detecting and prosecuting cartels. International experience and the experience of the ACCC demonstrates that effective immunity and cooperation policies encourage companies and individuals to disclose cartel behavior and this, in turn, assists the ACCC in stopping the harm arising from this illegal conduct and to act against participants. Granting conditional immunity enables the immunity applicant and its cooperating officers, directors and employees receive protection from sanctions by the enforcement agency in return for providing information and continued cooperation that allows the enforcement agency to prosecute other culpable individuals and entities. While immunity is extremely valuable, particularly immunity from criminal prosecution, there are other significant costs to the immunity applicant that flow from self-reporting cartel activity, including civil damage lawsuits from private plaintiffs as well as
potential sanctions sought by other government authorities. With increasing frequency, leniency applicants are being placed in a worse position in other legal proceedings for having self-reported cartel activity as compared to non-cooperators.

Numerous authorities have reported that the disincentives to seeking immunity are leading to a substantial drop in leniency applications around the world. It is important, therefore, that competition authorities carefully weigh whether certain provisions are necessary in the immunity/cooperation policy to insure complete and continuing cooperation and/or whether there are less onerous means for the agency to insure it gets the benefit of the bargain.

Based on the broad experience of the Section members as defense counsel, in-house counsel, and government enforcers in addressing issues involving leniency applications, the Section wishes to comment on a few areas of the Draft Guidelines and request that the ACCC consider some proposed revisions. While we believe overall that the ACCC draft immunity/cooperation policy achieves its goal of being fair and transparent, we respectfully offer the comments below relating to ways in which the policy, as drafted, may unnecessarily discourage immunity applicants.

Draft Guidelines Comments

I. Affirmation That All Exculpatory Information Has Been Provided

The Draft Guidelines provide that the immunity applicant will be required to certify in writing at the end of the evidence gathering phase that it has complied with its obligations to identify all relevant witnesses and produce all relevant documents. The immunity applicant will also be required to certify that “it has included all material which is exculpatory, or otherwise likely to be relevant, to a defence which may be advanced by other parties implicated in the reported conduct.”

It is reasonable for the ACCC to require certification that: (1) the immunity applicant has complied with its obligations to conduct reasonable searches and provide all relevant witnesses, information and non-privileged documents to the ACCC; and (2) it has not provided false or misleading information. The Section has a concern, however, that the immunity applicant may not be in a position at the end of the evidence gathering phase, which may be prior to the conclusion of the ACCC’s overall investigation, to certify that it has produced all exculpatory material.

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1 Page 4, paragraph 9.
The immunity applicant may not fully understand the entire scope of the conduct under investigation or eventual charges the ACCC may contemplate bringing. Nor is an applicant in a position to anticipate defenses that might be raised by other parties. This could lead to premature and false sworn affirmations of compliance that could potentially create new liability and exposure to sanctions for the applicant, which will be a disincentive to self-reporting to the ACCC.

The ACCC’s conditional leniency letter requires the applicant to provide non-privileged documents requested by the ACCC. No other affirmation is required to protect the integrity of the ACCC’s investigations or proceedings. The US DOJ and European Commission do not require an applicant to certify to the provision of exculpatory evidence, and the Section is not aware of any other jurisdiction that has adopted this practice.

II. Derivative Immunity From Proceedings

The Draft Guidelines state that “if a corporation qualifies for conditional immunity (see paragraph 19), it may seek 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.”\(^2\) Moreover, “[a]t the time of making an application for immunity under this policy, the corporation must list all related corporate entities and/or current and former directors, officers and employees of the corporation seeking derivative immunity who are known to have been involved in the alleged conduct at that point in time.”\(^3\)

The Section has concerns that conditional immunity would not automatically extend to all current and former officers, directors and employees but rather only to those listed by the Applicant. The discretionary element of this provision adds uncertainty as to the extent of the immunity coverage for cooperating employees. This uncertainty would not only create a disincentive to seeking corporate immunity, it would also make it more difficult for companies to conduct effective internal investigations. Company lawyers currently inform employees that all cooperating officers, directors and employees will receive protection in the ACCC’s grant of conditional and final immunity. If the ACCC adopts the provision at issue, then counsel would have to inform employees that the grant of leniency extends to those employees listed by the applicant. Employees who fear that the Company may not include them in the list provided to the ACCC may fail to cooperate fully to the detriment of the employee, the applicant and the ACCC.

The lack of certainty in the scope of the immunity coverage to cooperating individuals creates difficulties in conducting internal investigations, while providing little benefit to the ACCC. Alternatively, blanket immunity coverage for all cooperating current and former officer,

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\(^2\) Page 4, paragraph 23.
\(^3\) Page 4, paragraph 24
directors and employees is a critical positive incentive in an immunity/cooperation policy. Uncertainty as to whether an employee or former employee will be covered creates an obstacle for the corporate immunity applicant since it cannot be sure that all employees willing to cooperate will also receive immunity. Equally important, the internal corporate investigation is seriously handicapped when counsel must tell an employee that the ACCC may grant him/her immunity. An employee may be reluctant to full cooperate given this uncertainty. The same transparency and certainty that is given to the corporate immunity applicant (if you meet these conditions, you will be granted immunity) are necessary to optimize individual cooperation.

It is also premature to require a list of individuals who are known to have been involved in the alleged conduct when making the immunity application. The list will certainly be incomplete. Cartel investigations and prosecutions evolve in response to evidence from multiple sources, often over an extended period of time. In many cases, there will be numerous individuals within a company who have at least peripheral involvement in cartel activity. Individuals may have information, the value of which does not become apparent until well after the immunity application is made.

The ACCC already has as a condition of obtaining immunity that the “corporation’s admissions are a truly corporate act (as opposed to isolated confessions of individual representatives).” This requirement will ensure that the most significant individual participants are identified and given an opportunity to cooperate in return for derivative immunity coverage. The ACCC will not grant conditional immunity unless it is satisfied that the “corporation has provided full frank and truthful disclosure.” These immunity conditions amply protect the ACCC’s interest in getting full disclosure.

At bottom, the creation of a list of all current and former employees who require immunity protection is an unnecessary burden to the immunity applicant and an impediment to the process of self-reporting at the critical juncture when a company is making the decision whether to come forward. The Section recommends that the ACCC not require such a list and the ACCC extend leniency protection to all cooperating current and former officers, directors and employees of a corporate immunity applicant without limitation.

III. Requesting Confirmation Of Final Immunity

The Draft Guidelines state: “The applicant may request the ACCC to confirm that it has final immunity status after the resolution of such proceedings.”

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4 Page 5, paragraph 22. The same language regarding an applicant seeking confirmation of final immunity status appears on page 6, paragraph 27; page 7, paragraphs 30 and 35; page 9, paragraph 3; and page 10, paragraphs 6 and 11. The Section has the same recommendation that the ACCC confirm final immunity status when all conditions have been met and the proceedings have been resolved.
The Section suggests that this paragraph be changed to indicate that the ACCC will orally confirm, without request, that an entity/individual has final immunity status (if the entity/individual has complied with the immunity conditions) after the resolution of the proceedings. The Section further recommends that, after receiving oral confirmation, the applicant would have the option of requesting that the ACCC confirm the grant of final immunity in writing. The Section also recommends that the ACCC post a model Final Leniency Letter on its website.

IV. Provision For Recording Of Oral Proffer In The Immunity Process

The Draft Guidelines state: “If a proffer is made orally, the ACCC may record the oral proffer.”

The Section recommends that the ACCC’s immunity/cooperation policy not allow for tape/digital recording of attorney proffers. The Section recognizes that, by offering a paperless proffer process, the ACCC is seeking to be sensitive to the discovery of leniency proffers in private damage lawsuits in the United States and, with increasing frequency, around the world. However, a tape/digital recording can potentially create its own discovery risks, placing the applicant in a worse position than non-cooperating defendants and creating a disincentive to self-reporting.

There is uncertainty in the United States and elsewhere over whether materials prepared specifically for the immunity process are discoverable and thus can be used by plaintiffs as evidence in private damage actions. The possibility of discovery may negatively influence a corporation’s decision of whether to seek immunity by creating a record that is not generated by non-cooperating co-conspirators. The US DOJ does not tape/digitally record attorney proffers. Future applicants reporting international cartel activity to the US DOJ may elect not to report the same conduct to the ACCC if they are unwilling to accept the risk that a tape/digital recording made by the ACCC may be subject to discovery in private damage litigation in the US or elsewhere.

The Draft Guidelines note that the benefit of recording the proffer to the ACCC is “[r]ecording an oral proffer enables an accurate record of the proffer to be submitted to the ACCC’s legal advisors so that they may provide advice to the ACCC on whether the applicant has been a party to a cartel.” A simpler solution would be to have the necessary decision makers attend the proffer itself to facilitate and expedite the application process. When that is not feasible, the ACCC’s legal advisors may rely on the ACCC staff’s notes and its work product. If

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5 Page 10, paragraph 51 (Proffer).
the ACCC’s advisors require additional information, then the ACCC would be free to require that the applicant provide a follow-up proffer to the ACCC and/or its legal advisors.

V. Provision For Signed Witness Statements

The Draft Guidelines propose the potential that the ACCC will require “a signed statement from, one or more witnesses” during the application process.6

As noted with regard to the prospect of taping/digitally recording proffers, requiring signed witness statements during the leniency process risks placing an applicant in a worse position than non-cooperating defendants and creating a disincentive to self-reporting. The requirement runs counter to the paperless process, exposing the applicant to grappling with the potential need to produce such witness statements to private damage claimants.

It also raises substantive risks for applicants, witnesses and authorities alike, as witnesses are often interviewed multiple times by various authorities over the lifecycle of a multi-jurisdictional investigation and may have their recollections of events refreshed by new evidence as investigations evolve. This raises the potential that aspects of a signed statement obtained during the leniency process may be rendered inaccurate at a later stage. This risk may impact an applicant’s ability to secure the cooperation of certain witnesses concerned with their individual exposure in Australia or elsewhere and/or, and perhaps most likely, cause applicants to seriously consider whether to self-report to the ACCC at a stage later than other authorities in a multi-jurisdictional investigation to avoid the potential for any evolution in witness recollections.

The Section suggests that the ACCC consider removing the potential for signed witness statements during the leniency process. The ACCC is capable of carefully taking a record of witness statements during the leniency process in the form of its own notes and work product. The Director of Public Prosecutions (“DPP”) also possesses means to take formal testimony from witnesses when or if the need arises.

VI. Confidentiality Waivers For Foreign Jurisdictions

The US DOJ, European Commission and the vast majority of competition authorities have adopted a voluntary waiver practice whereby the authority promises not to share the applicant’s information with any other authority unless the applicant voluntarily waives confidentiality. The key to the granting of a waiver is that it be truly voluntary. The Draft Guidelines, when read as a whole, create the possibility of involuntary waivers whereby an applicant will have to choose between involuntarily consenting to the ACCC’s sharing of its

6 Page 12, paragraph 53.
leniency information with another authority, and potentially exposing the applicant to possible sanctions by the receiving authority by relying upon information disclosed by the applicant, or stand accused of breaching its cooperation commitment to the ACCC.

The Draft Guidelines provide that: “Whilst the grant of conditional immunity is not dependent on a waiver(s) being provided, an applicant will be required to explain why a waiver(s) cannot be provided. A failure to provide a satisfactory explanation may be regarded as a failure to provide full cooperation as per the immunity criteria.”7 The criteria for what would be judged by the ACCC to be a “satisfactory explanation” are not provided in the Draft Guidelines, likely because it is not possible to provide transparent and predictable guidance. Companies greatly value the confidentiality assurances provided in leniency programs, and transparency and predictability are the touchstones of every leniency program. The ACCC’s leniency program will suffer if it introduces a subjective and undefined test for making waivers involuntary. Whether the applicant consents to the sharing of its information with another jurisdiction should be its decision. An applicant should be allowed to decline a waiver without repercussion if it feels it is in its best interest.

Conclusion

The Section appreciates the opportunity provided by the ACCC’s public consultation process to comment on the Draft Guidelines. The Section would be pleased to respond to any questions ACCC may have regarding these comments or to provide any additional comments or information that may assist ACCC in finalizing the Draft Guidelines.

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7 Page 10, paragraphs 54 and 55 (Waivers).