

Memorandum of Understanding
between
the Commonwealth Director of Public Prosecutions
and
the Australian Competition and Consumer Commission
regarding
Serious Cartel Conduct

1: Introduction

1.1 Price fixing, market sharing, output control and bid rigging ('cartel conduct') adversely affect Australia's domestic and international competitiveness. Such conduct harms consumers, businesses and the economy by increasing prices and reducing choice, service, innovation and efficiencies.

1.2 The Australian Government has introduced criminal sanctions for serious cartel conduct, which operate in parallel with civil sanctions for cartel conduct. This enables a proportionate response to cartel conduct. Criminal investigations and prosecutions will be targeted at serious cartel conduct, and relatively minor conduct will ordinarily be pursued civilly.

2: Responsibilities

2.1 The DPP and the ACCC recognise each other's respective roles in the criminal investigation and prosecution process, and that close cooperation and consultation is required to achieve efficient and effective outcomes.

2.2 The DPP is responsible for:

- prosecuting offences against Commonwealth law, including serious cartel offences under the *Trade Practices Act 1974* and State and Territory Competition Codes, in accordance with the *Prosecution Policy of the Commonwealth*; and
- seeking associated remedies, including by taking proceedings under the *Proceeds of Crime Act 1987* and *Proceeds of Crime Act 2002*.

2.3 The ACCC is responsible for:

- investigating cartel conduct and gathering evidence;
- managing the immunity process, in consultation with the DPP; and
- referral of serious cartel conduct to the DPP for consideration for prosecution.

3: Decision to investigate

3.1 The ACCC gives high priority to deterring, detecting and dismantling cartels that affect Australia.

3.2 Not all ACCC investigations concerning cartel conduct will result in enforcement action or be referred to the DPP.

3.3 In conducting investigations of alleged cartel conduct the ACCC will have regard to whether the conduct is such that it would warrant referral to the DPP if evidence sufficient to found a prosecution were obtained.

3.4 The ACCC will review cartel investigations to ensure they are proceeding effectively and efficiently, including whether referral to the DPP for consideration for prosecution is warranted.

4: ACCC referral to the DPP

4.1 Where the ACCC is considering referral of a matter to the DPP, the ACCC will consult the DPP and the DPP will provide preliminary advice as to whether the matter should continue to be pursued with a view to possible criminal proceedings, and in relation to evidentiary considerations as requested.

4.2 Factors in the ACCC considering whether to refer serious cartel conduct to the DPP for consideration for prosecution are related to the ACCC's assessment of how such conduct can be best addressed to achieve general and specific compliance, and to factors to which the DPP has regard in considering whether to prosecute.

4.3 The ACCC will not ordinarily refer relatively minor cartel conduct to the DPP for consideration for prosecution.

4.4 Referral of possible serious cartel conduct will concentrate upon conduct of the type that can cause large scale or serious economic harm, and the ACCC will have regard to considerations including such as whether:

- the conduct was longstanding or had, or could have, a significant impact on the market in which the conduct occurred
- the conduct caused, or could cause, significant detriment to the public, or a class thereof, or caused, or could cause, significant loss or damage to one or more customers of the alleged participants

- one or more of the alleged participants has previously been found by a court to have participated in, or has admitted to participating in, cartel conduct either criminal or civil
- the value of the affected commerce exceeded or would exceed \$1 million within a 12 month period (that is, where the combined value for all cartel participants of the specific line of commerce affected by the cartel would exceed \$1 million within a 12 month period)
- in the case of bid rigging, the value of the bid or series of bids exceeded \$1 million within a 12 month period.

4.5 The ACCC will formally refer matters to the DPP as soon as reasonably possible for determination as to whether prosecution is warranted.

4.6 The referral will comply with the *Guidelines for departments and agencies on submitting briefs to the DPP* or as otherwise agreed with the DPP. Where the DPP requests the ACCC to undertake further investigations, the ACCC will as far as reasonably possible undertake them.

4.7 The ACCC will keep cartel investigations under review to ensure they are proceeding effectively and efficiently, including whether referral to the DPP for consideration for prosecution is warranted.

5: DPP decision to prosecute

5.1 Upon formal referral of a matter to the DPP by the ACCC the DPP will, as soon as reasonably possible, advise the ACCC whether in accordance with the *Prosecution Policy of the Commonwealth* a prosecution should be commenced.

5.2 In considering whether a prosecution should be commenced the DPP will have regard to:

- The impact of the cartel on the market;
- The scale of the detriment caused to consumers or the public; and
- Whether any of the cartel members have previously been found by a criminal or civil court, or admitted, to have engaged in cartel behaviour.

6: Related criminal and civil proceedings

6.1 The DPP and ACCC acknowledge that some matters may warrant both criminal and civil proceedings.

6.2 The DPP and ACCC will ensure that such matters are managed in an integrated fashion, including through the adoption of measures to avoid any potential for civil proceedings conducted by the ACCC to adversely affect a related criminal investigation or prosecution.

7: Immunity from proceedings for cartel conduct

7.1 The DPP and the ACCC recognise that maximisation of certainty and minimisation of discretion as far as reasonably possible are crucial to the effective operation of immunity policies for cartel conduct.

7.2 The ACCC will publish from time to time its immunity policy in relation to cartel conduct so that the availability and conditions of civil immunity from proceedings by the ACCC for cartel conduct may be clearly ascertained.

7.3 The ACCC will receive and manage requests for immunity from both criminal and civil proceedings, and make recommendations to the DPP based on the ACCC's assessment as to whether the applicant for immunity meets the criteria set out in the ACCC's immunity policy in relation to cartel conduct. The ACCC will decide whether to grant immunity from civil proceedings in accordance with its published policy.

7.4 The DPP will decide whether to grant immunity from criminal proceedings in accordance with the *Prosecution Policy of the Commonwealth* (including the Annexure to the policy) and upon the recommendation of the ACCC.

7.5 The ACCC will consult with the DPP in relation to the ACCC's decision as to whether or not to grant immunity and the management of requests for immunity from ACCC civil proceedings where the matter also concerns criminal investigation or prosecution.

7.6 Where application is made for immunity from civil and criminal proceedings, and the matter is not referred to the DPP for criminal prosecution, the ACCC will make a recommendation to the DPP based on the ACCC's assessment as to whether the applicant for immunity meets the criteria set out in the ACCC's immunity policy in relation to cartel conduct.

7.7 Where the ACCC makes a recommendation that the applicant meets the ACCC's criteria for civil immunity the DPP will decide whether to grant immunity from criminal proceedings in accordance with the *Prosecution Policy of the Commonwealth* (including the Annexure to the policy).

8: Liaison

8.1 The Commonwealth Director of Public Prosecutions and the Chairman of the ACCC will meet at least once per annum to review the general working relationship between the DPP and the ACCC.

8.2 The ACCC and DPP have nominated organisational relationship managers for regular and ad hoc national liaison to facilitate, amongst other things:

- the ACCC advising the DPP in relation to immunity applications and matters that are likely to be referred;
- the review of current matters that have been referred to the DPP;

