

Annexure to the *Prosecution Policy of the Commonwealth for Immunity from Prosecution in Serious Cartel Offences*

1. Preface

- 1.1 This document outlines the policy of the Commonwealth Director of Public Prosecutions (DPP), in considering an application for immunity from prosecution by a person implicated in a serious cartel offence. A serious cartel offence refers to the offences in sections 44ZZRF and 44ZZRG of the *Trade Practices Act 1974* (TPA) and the corresponding offences in the State and Territory *Competition Codes*.
- 1.2 This policy is based on a recognition by Government that, in respect of serious cartel offences, it is in the public interest to offer immunity from prosecution to a person who is willing to break ranks with other cartel participants by exposing the illegal conduct and fully cooperating with the Australian Competition and Consumer Commission (ACCC) and the DPP.
- 1.3. Following a recommendation from the ACCC, the Director will decide whether to grant immunity from prosecution by applying the same criteria as contained in the ACCC's immunity policy. The decision of the Director whether to grant immunity will be communicated to the applicant at the same time as the ACCC's decision whether to grant conditional immunity.
- 1.4 If the Director decides to grant immunity, an undertaking under the *Director of Public Prosecutions Act 1983* (DPP Act) will be given to the applicant in writing. The undertaking will be subject to conditions and on-going obligations on the applicant throughout the period of the ACCC investigation until the conclusion of any criminal proceedings against other cartel participants.
- 1.5 This policy is to be read in conjunction with Memorandum of Understanding Between the ACCC and the DPP.

2. Roles of the ACCC and the DPP

- 2.1 The DPP is an independent statutory agency established under the DPP Act and is responsible for prosecuting offences against Commonwealth laws.
- 2.2 The DPP is not an investigative agency and does not investigate criminal offences. The decision to investigate an alleged offence under the TPA and refer the matter to the DPP for prosecution is made by the ACCC. The DPP may however provide advice to the ACCC on legal and related issues during investigations.

- 2.3 The ACCC is an independent Commonwealth statutory authority established under the TPA. The ACCC is responsible for investigating alleged contraventions of the TPA including contraventions of the serious cartel provisions. Where it is alleged that a person has contravened a civil provision of the TPA the ACCC is also responsible for deciding whether to commence Court proceedings.
- 2.4 Applications for immunity are made to the ACCC and subject to the conditions set out in paragraphs 3.1 and 3.2 below, the ACCC may make a recommendation to the Director to grant immunity to a person implicated in a serious cartel offence. Only the Director can grant a person immunity from prosecution.
- 2.5 An undertaking provided by the Director to grant immunity from prosecution to a person implicated in a serious cartel offence can only operate in accordance with its terms and the DPP Act.

3. Obtaining Immunity

ACCC's criteria for conditional immunity

- 3.1 The ACCC's immunity policy outlines a number of mandatory conditions that must be satisfied before conditional immunity will be granted namely:
1. That the corporation or individual:
 - i. is or was a party to a cartel or is or was a director, officer or employee of a corporation that was a party to a cartel;
 - ii. admits that its / their conduct in respect of the cartel may constitute a contravention of the TPA;
 - iii. is the first corporation / individual to apply for immunity in respect of the cartel;
 - iv. provides full cooperation to the ACCC during the investigation period;
 - v. is not the clear leader, and has not coerced others to participate in the cartel;
 - vi. have either ceased involvement in the cartel or indicates to the ACCC that it / they will cease its / their involvement in the cartel
 - vii. undertakes to the ACCC to provide full disclosure and cooperation
 - viii. (for corporate applicants only) that the corporation's admissions are a truly corporate act; and
 2. At the time the ACCC receives the application, the ACCC has not received written legal advice that it has sufficient evidence to commence proceedings in relation to at least one contravention of the TPA arising from the conduct in respect of the cartel.

- 3.2 In addition to satisfying the above conditions, an applicant must provide full disclosure and cooperation to the ACCC for conditional immunity to remain in place and to be eligible for final immunity.

DPP's criteria for granting immunity from prosecution

- 3.3 Where the ACCC is of the view that the applicant satisfies the conditions for conditional immunity it may make a recommendation to the Director that immunity from prosecution be granted to the applicant. This recommendation will provide as much information as possible in relation to the criteria listed in paragraph 3.1.
- 3.4 The Director will exercise an independent discretion when considering a recommendation by the ACCC. Where the Director is satisfied that the applicant meets the ACCC's criteria for conditional immunity contained in the ACCC's immunity policy the Director will grant immunity. The decision of the Director whether to grant immunity from prosecution will be communicated to the applicant at the same time as the ACCC's decision whether to grant conditional immunity.
- 3.5 If the Director decides to grant immunity, the Director will provide to the applicant a written undertaking pursuant to section 9(6D) of the DPP Act that, subject to fulfilment of on-going obligations and conditions, the applicant will not be prosecuted for the cartel offence for which immunity is sought.
- 3.6. The conditions for immunity will include that the applicant provide on-going full cooperation during the ACCC investigation and, in respect of an individual:
- i. that they will appear as a witness for the prosecution as and where requested in any proceedings against the other cartel participants; and
 - ii. that any evidence they are called upon to give will be given truthfully, accurately and withholding nothing of relevance.
- 3.7 Any undertaking granted under section 9(6D) will remain in place unless revoked and therefore an undertaking granting final immunity is not required.
- 3.8 Cartel participants who cooperate with the ACCC pursuant to the Cooperation Policy rather than the Immunity Policy will have their request for immunity from criminal prosecution determined in accordance with the *Prosecution Policy of the Commonwealth per se*, rather than pursuant to the Annexure to that policy.

4. Corporate Immunity/Derivative immunity

- 4.1 The ACCC's immunity policy provides that where a corporate applicant is granted conditional immunity by the ACCC all past and present directors, officers and employees who request immunity, admit their involvement in the conduct of the corporation in respect of the cartel and provide full disclosure and co-operation to the ACCC will be eligible for a grant of immunity in the same form as the corporation.
- 4.2 Similarly if a corporate applicant is granted immunity from prosecution by the DPP all past and present directors, officers and employees who request immunity, admit their involvement in the conduct of the corporation in respect of the cartel and undertake to provide full disclosure and co-operation to the ACCC will be eligible for a grant of immunity from prosecution in the same form as the corporation.
- 4.3 Where the ACCC recommends to the Director that a corporate applicant should be granted immunity from prosecution the ACCC will also make a recommendation to the Director in relation to granting immunity to all past and present directors, officers and employees who meet the criteria in paragraph 4.2. This recommendation will set out all relevant information in relation to a grant of immunity for these persons. The Director will exercise an independent discretion when deciding whether to grant immunity pursuant to the criteria set out in paragraph 4.2.
- 4.4 If immunity is granted a written undertaking, pursuant to section 9(6D) of the DPP Act will be provided, which will be subject to fulfilment of on-going obligations and conditions. The Director's decision in relation to the grant of immunity to these persons will be communicated to the applicant at the same time as the ACCC's decision whether to grant immunity.
- 4.5 Directors, officers or employees of a corporation that cooperates with the ACCC pursuant to the Cooperation Policy rather than the Immunity Policy will have their request for immunity from criminal prosecution determined in accordance with the *Prosecution Policy of the Commonwealth* per se, rather than pursuant to the Annexure to that policy.

5. Revocation of Immunity by Director

- 5.1 The Director may revoke immunity at any time during the investigation and prior to the conclusion of criminal proceedings if:
1. the ACCC makes a recommendation to revoke immunity, and the Director, exercising independent discretion, agrees with that recommendation; or
 2. the Director believes on reasonable grounds:

- i. that the recipient of the undertaking has provided information to the DPP that is false or misleading in a relevant matter; or
 - ii. that the recipient of the undertaking has not fulfilled the conditions of the undertaking.
- 5.2 The Director will notify the recipient in writing if an undertaking is to be revoked, and the recipient will be afforded a reasonable opportunity to make representations.

6. Disclosure issues

- 6.1 The DPP has a published policy in relation to the prosecution's obligation to disclose relevant material to the defendant. Reference should be made to that policy.
- 6.2 Where an applicant is granted immunity from prosecution, the terms of the undertaking between the DPP and the applicant, will be disclosed to the court in accordance with the Disclosure Policy of the Commonwealth.

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