



Commonwealth
Director of Public
Prosecutions



Australian
Competition &
Consumer
Commission

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.

2: Responsibilities

- 2.1 The Commonwealth Director of Public Prosecutions (CDPP) and the Australian Competition and Consumer Commission (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 CDPP is responsible for:
 - prosecuting offences against Commonwealth law, including serious cartel offences under the *Competition and Consumer Act 2010* and State and Territory Competition Codes, in accordance with the *Prosecution Policy of the Commonwealth*; and
 - seeking associated remedies, including by taking certain 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 CDPP; and
- referral of serious cartel conduct to the CDPP 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 CDPP.

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 CDPP if evidence sufficient to found a prosecution was obtained.

4: ACCC referral to the CDPP

4.1 The ACCC will refer serious cartel conduct to the CDPP.

4.2 The ACCC is more likely to consider conduct it is investigating to be serious cartel conduct if one or more of the following factors apply:

- the conduct was covert;
- the conduct caused, or could have caused, large scale or serious economic harm;
- the conduct was longstanding or had, or could have had, a significant impact on the market in which the conduct occurred;
- the conduct caused, or could have caused, significant detriment to the public, or a class of the public, or caused, or could have caused, 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;
- senior representatives within the relevant corporation(s) were involved in authorising or participating in the conduct;
- the Government and thus, taxpayers, were victims of the conduct - even where the value of affected commerce is relatively low; and
- the conduct involved the obstruction of justice or other collateral crimes committed in connection with the cartel activity.

4.3 Where the ACCC is considering referral of a matter to the CDPP, the ACCC will consult with the CDPP and the CDPP will provide preliminary advice, as appropriate.

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

- 4.5 The referral will comply with the CDPP's *Guidelines on Brief Preparation* or as otherwise agreed with the CDPP. Where the CDPP requests the ACCC to undertake further investigations, the ACCC will as far as reasonably possible undertake them.
- 4.6 The ACCC will keep cartel investigations under review to ensure they are proceeding effectively and efficiently, including whether referral to the CDPP for consideration for prosecution is warranted.

5: CDPP decision to prosecute

- 5.1 Upon formal referral of a matter to the CDPP by the ACCC the CDPP 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 CDPP will also have regard to the factors in paragraph 4.2.

6: Related criminal and civil proceedings

- 6.1 The CDPP and ACCC acknowledge that some matters may warrant both criminal and civil proceedings.
- 6.2 The CDPP and ACCC will ensure that such matters are managed in an integrated manner, 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 a party who meets the criteria for conditional immunity under the ACCC's Immunity and Cooperation Policy

- 7.1 The CDPP 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 and Cooperation 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 CDPP based on the ACCC's assessment as to whether the applicant for immunity meets the criteria set out in the ACCC's Immunity and Cooperation 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 CDPP will decide whether to grant immunity from criminal proceedings for a party who meets the criteria for conditional immunity under the ACCC's Immunity and Cooperation Policy in accordance with Annexure B of the *Prosecution Policy of the Commonwealth* and upon the recommendation of the ACCC.

- 7.5 The ACCC will consult with the CDPP 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 an application is made for immunity from civil and criminal proceedings, and the matter is not referred to the CDPP for criminal prosecution, the ACCC will make a recommendation to the CDPP based on the ACCC's assessment as to whether the applicant for immunity meets the criteria set out in the ACCC's Immunity and Cooperation Policy in relation to cartel conduct.
- 7.7 Where the ACCC makes a recommendation that the applicant meets the criteria for conditional immunity under the ACCC's Immunity and Cooperation Policy the CDPP will decide whether to grant immunity from criminal proceedings in accordance with Annexure B of the *Prosecution Policy of the Commonwealth*.

8: Immunity from prosecution for a party who does not meet the criteria for conditional immunity under the ACCC's Immunity and Cooperation Policy

- 8.1 A party that does not meet the criteria for conditional immunity under the ACCC's Immunity and Cooperation Policy (for example, a party cooperating under Section H of the ACCC's Immunity and Cooperation Policy) may apply for immunity from prosecution but that application will be determined by the Director in accordance with Chapter 6 of the *Prosecution Policy of the Commonwealth*, not Annexure B of that policy. Such an application will be considered following consultation with the ACCC.

9: Liaison

- 9.1 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 CDPP and the ACCC.
- 9.2 The ACCC and CDPP have nominated organisational relationship managers for regular and ad hoc national liaison to facilitate, amongst other things:
- the ACCC advising the CDPP in relation to immunity applications and matters that are likely to be referred;
 - the review of current matters that have been referred to the CDPP;
 - the ACCC and CDPP ensuring that case officers have been nominated for every matter that is referred; and
 - the review of the effectiveness of operational arrangements.
- 9.3 The national relationship managers are:
- CDPP: Deputy Director (Commercial, Financial and Corruption)
- ACCC: Executive General Manager (Competition Enforcement)

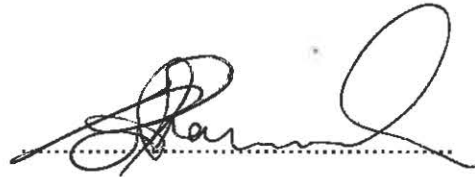
- 9.4 If there is a dispute as to whether a particular matter should or should not be the subject of criminal investigation or prosecution and it cannot be resolved between the relationship managers, the dispute will be referred to the Commonwealth Director of Public Prosecutions and the Chairman of the ACCC to be resolved by them.



Rod Sims

Chairman
Australian Competition and
Consumer Commission

15 August 2014



Robert Bromwich SC

Commonwealth Director of
Public Prosecutions

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