



Australian  
Competition &  
Consumer  
Commission

## **ACCC approach to cartel investigations**

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Australian Competition and Consumer Commission  
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# ACCC approach to cartel investigations

This document provides guidance as to how the Australian Competition and Consumer Commission (ACCC) will approach its investigation of cartels.

It should be read with other relevant ACCC publications, including the *ACCC immunity policy for cartel conduct* and its memorandum of understanding (MOU) with the Commonwealth Director of Public Prosecutions (CDPP).

The ACCC will supplement or modify these guidelines taking into account its experience over time investigating cartels.

## Background

1. The *Trade Practices Act 1974* (the Act) has long prohibited cartel arrangements and has provided for significant pecuniary penalties to be imposed under a civil enforcement regime.
2. From 24 July 2009 the Act and state and territory competition codes contain new provisions dealing with cartel conduct in the form of a civil prohibition<sup>1</sup> and a cartel offence.<sup>2</sup> The cartel offence provides sanctions for companies and individuals, including up to 10 years imprisonment for individuals involved in cartel conduct.<sup>3</sup>
3. These guidelines set out how the ACCC will investigate alleged cartel arrangements under the new provisions and make decisions in relation to referral of matters for possible criminal prosecution.
4. The ACCC seeks to enforce the cartel laws as is appropriate in individual cases. This document is intended to give some guidance to businesses, their legal representatives and others about how the ACCC will approach investigations and enforcement action in this area.
5. This document should be read with other relevant ACCC documents, including the ACCC immunity policy for cartel conduct and its MOU with the CDPP.

## Key differences—the cartel offence and the civil prohibition

6. While both the cartel offence and the civil prohibition outlaw cartel arrangements, there are a number of differences between the cartel offence and the civil prohibition. In particular, the law provides a number of additional requirements in prosecuting the cartel offence including the need to:

- Establish certain fault elements under the Criminal Code.

In relation to the offence of **making a contract, arrangement or understanding (CAU) containing a cartel provision**, it will be necessary to establish that a corporation **intended** to enter into a CAU and that it **knew** or **believed** the CAU contained a cartel provision.

In relation to the offence of **giving effect to a cartel provision** that is contained in a CAU, it will be necessary to establish that the corporation **knew** or **believed** a CAU contained a cartel provision and that it **intended** to give effect to that cartel provision.

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<sup>1</sup> Sections 44ZZRJ and 44ZZRK.

<sup>2</sup> Sections 44ZZRF and 44ZZRG.

<sup>3</sup> Section 79.

- Discharge a higher burden of proof—the need to prove the offence beyond reasonable doubt.
  - Obtain a unanimous verdict of the jury.
7. That legal framework will also apply to a prosecution of an individual who is involved in cartel conduct.

## **ACCC referral of matters for possible criminal prosecution**

8. The ACCC is responsible for investigating cartel conduct.
9. The CDPP is responsible for prosecuting offences against Commonwealth law, including the cartel offence, in accordance with the [\*Prosecution Policy of the Commonwealth\*](#).<sup>4</sup>
10. The ACCC's position is that serious cartel conduct should be prosecuted criminally whenever possible. For this reason, the ACCC will distinguish serious cartel conduct from that which is less serious in nature, including relatively minor conduct.
11. The ACCC will work closely with the CDPP in relation to matters that could be the subject of referral.
12. Where matters appear to involve serious cartel conduct, the ACCC will refer such matters to the CDPP as follows:
- it will seek preliminary advice from the CDPP in relation to whether a matter should continue to be pursued with a view to possible criminal proceedings
  - at a later stage, and upon formal referral of a matter to the CDPP, it will seek advice from the CDPP as to whether a prosecution should be commenced.
13. Serious cartel arrangements involve conduct of the type that usually causes, or has the potential to cause, large scale or serious economic harm.
14. The MOU sets out a non-exhaustive list of matters which the ACCC will have regard to in deciding whether the conduct is serious and therefore should be referred to the CDPP, namely whether:
- 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

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<sup>4</sup> To view this document online, go to [www.cdpp.gov.au](http://www.cdpp.gov.au) and follow the links to **prosecution policy**.

- 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 have exceeded \$1 million within a 12-month period (i.e. 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.
15. However, actual trade affected alone is not determinative of whether there should be a referral. An attempted cartel (i.e. a proposal that was not taken up) or a cartel that was shut down at an early stage by the ACCC, may still warrant criminal prosecution.
  16. While providing a useful guide, the above list is non-exhaustive and the ACCC may well consider other factors when determining the appropriateness of criminal prosecution. For example, elements of clandestine and/or covert behaviour in creating or implementing the cartel may support the view that the arrangements are serious.
  17. None of the above is to suggest that any one type of cartel conduct which may be prosecuted under the cartel offence (price fixing, output restrictions, allocating customers, suppliers or territories or bid rigging) is more likely to be subject to referral than another. The ACCC will take a holistic approach to any potential referral of a matter for CDPP consideration.
  18. Upon ACCC referral, the CDPP will advise the ACCC whether a criminal prosecution should be commenced. In considering this issue the CDPP will have regard to the *Prosecution Policy of the Commonwealth* and the matters set out in paragraph 4.4 of the MOU.
  19. The *Prosecution Policy of the Commonwealth* makes clear that criminal charges will not be laid simply because a prosecution is possible. The CDPP will consider not only whether there is sufficient evidence to prosecute the case with reasonable prospects of conviction, but also whether the public interest requires a prosecution. This will be evaluated having regard to all the circumstances of the case.
  20. Once a criminal prosecution is commenced, the CDPP will conduct the prosecution. Throughout the course of the prosecution the CDPP will monitor whether there are reasonable prospects of conviction and whether the prosecution remains in the public interest.
  21. In circumstances where the ACCC decides not to refer a cartel matter to the CDPP or the CDPP advises that a criminal prosecution should not be commenced, the ACCC may nevertheless decide to pursue the matter by way of civil penalty proceedings.

# ACCC approach to cartel investigations

## Maintaining evidence for criminal prosecution

22. As noted at paragraph 6 above, the nature of a criminal prosecution is quite different to that of civil proceedings. This is relevant to the type of investigative processes used.
23. At the beginning of a cartel investigation, it may not be immediately apparent whether a matter is likely to provide evidence of serious cartel conduct.
24. In the absence of a clear indication that a matter will be prosecuted criminally or subject to civil proceedings, the ACCC will require its investigators to conduct investigations in a manner that will preserve its capacity to seek criminal prosecution.
25. To ensure information gathered in the course of an investigation can be used against possible defendants in a criminal prosecution, investigators will:
  - use ‘cautions’ where considered appropriate, thereby placing persons on notice that their responses may later be given in evidence
  - conduct voluntary interviews having regard to the safeguards in Part IC of the *Crimes Act 1914* (Cwlth)
  - ensure evidence is handled in accordance with continuity of evidence principles.

## Investigative powers

26. The ACCC has available to it a number of tools that may be deployed in investigations into possible contraventions of the cartel offence and the cartel prohibition. It is also the case that certain investigative tools are only available in relation to the investigation of the cartel offence.
27. The ACCC has the capacity to issue notices under s. 155 of the Trade Practices Act to require a person or company to provide documents, information and/or to give evidence under oath at an examination. The ACCC also has the capacity to seek a search warrant from a magistrate. These investigative tools are available in relation to matters that may contravene either the cartel offence or civil prohibition.
28. In addition to the investigative tools identified above, should the ACCC become aware of ongoing cartel conduct that may be subject to prosecution as a cartel offence, it may notify the Australian Federal Police with a view to undertaking a joint investigation in relation to the conduct. A joint investigation would provide the opportunity to capture evidence of cartel conduct through the use of surveillance device and telephone intercept material for use in criminal proceedings.



## **Concurrent investigations**

29. As previously outlined, the ACCC will require its investigators to conduct investigations in a manner that will preserve its capacity to seek criminal prosecution of a cartel.
30. A dual track approach, whereby the ACCC assigns separate criminal and civil investigation teams, will be the exception rather than the norm for investigation of alleged cartel conduct.

## **The prosecution**

31. Generally a criminal prosecution in relation to cartel conduct will involve:
  - committal proceedings before a magistrate in a state or territory court. The magistrate decides whether the charges are sufficiently strong for the person to face trial before a jury
  - if the person is committed to stand trial, the matter will be heard in either the Federal Court or a state or territory supreme court<sup>5</sup>
  - the trial being heard by a jury.

## **Dual proceedings**

32. As set out in the MOU, the CDPP and the ACCC both acknowledge that some matters may warrant both criminal and civil proceedings. In these circumstances the CDPP and the ACCC will ensure that such matters are managed in an integrated fashion.
33. The ACCC considers that a range of circumstances may arise where both criminal and civil proceedings are available to be pursued in relation to the same or similar conduct. The ACCC will take a carefully considered and sensible approach based on the facts of each matter that presents itself and the safeguards built into the law.
34. The Act ensures that a person will not be put in a position of having to defend both a civil proceeding for a pecuniary penalty and criminal prosecution for substantially the same conduct at the same time by staying any concurrent civil proceedings.
35. Further, the ACCC is precluded from continuing civil proceedings seeking a pecuniary penalty against a person who has already been criminally convicted for their involvement in that cartel.

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<sup>5</sup> The Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008 is currently before the Parliament of Australia. It provides a procedural framework that will allow the Federal Court to exercise the indictable criminal jurisdiction provided by the Act to deal with serious cartel offences.

36. While it is possible that a criminal cartel prosecution against a person could follow a civil cartel proceeding against that person, such a circumstance would be rare. This is because the ACCC, by the terms of its MOU, would have either:
- not referred the matter to the CDPP as the conduct appeared to involve relatively minor conduct, or
  - referred the matter to CDPP, who, on the evidence available, advised that criminal proceedings should not be taken.

### **Charge negotiation—no negotiations with the ACCC**

37. The *Prosecution Policy of the Commonwealth* (2.21) stipulates that under no circumstances should charges be laid with the intention of providing scope for subsequent charge negotiation. Likewise, the ACCC will not put itself in a position where there might be a perception that it is using the possibility of a referral of a matter for consideration of criminal prosecution to obtain cooperation or resolution of civil proceedings.
38. A person will not be permitted to seek to ‘trade off’ a possible criminal prosecution with civil settlement. As set out above, if the ACCC forms the view that the alleged cartel conduct is serious, the ACCC will refer the matter to the CDPP for consideration. This is not a subject for negotiation.
39. The ACCC will not engage in discussions with parties under investigation as to possible resolution of civil proceedings until it has formed a view as to the seriousness of the conduct and either:
- made a decision not to refer the matter to the CDPP, or
  - received advice from the CDPP that a criminal prosecution should not be commenced.
40. Until this point, save for the general guidance set out above, the ACCC will not discuss with parties under investigation (or their representatives) whether matters are expected to be pursued under the civil prohibition or the criminal offence.
41. While the ACCC will endeavour to make decisions as to whether to refer cartel matters to the CDPP as soon as reasonably possible, in many cases such a decision will not be capable of being able to be made until late in the investigation.
42. The ACCC endeavours to conclude its investigations in a timely manner. In view of the gravity of criminal cartel conduct, the ACCC will apply its best endeavours to complete investigations concerning cartel conduct in a timely manner.

# Contacts

Infocentre: 1300 302 502

Website: [www.accc.gov.au](http://www.accc.gov.au)

Callers who are deaf or have a hearing or speech impairment can contact the ACCC through the National Relay Service [www.relayservice.com.au](http://www.relayservice.com.au)

For other business information go to [www.business.gov.au](http://www.business.gov.au)

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