

# **Memorandum of understanding between the Australian Securities Commission and the Director of Public Prosecutions**

*This document represents the views of the Director of Public Prosecutions (DPP) and the Australian Securities Commission (ASC) on the nature of the guidelines and other matters relevant to the working arrangements between the two offices for the investigation and prosecution of serious corporate crime.*

1.1 The DPP and the ASC agree that the processes of the criminal law should be utilised as often as possible when serious contraventions of corporate law are detected. Formal guidelines will be developed forthwith to deal with the implementation of the terms of this MOU. This MOU supplements the existing arrangements between the ASC and the DPP, and it is intended that the existing arrangements will be amended at a later date to integrate the provisions of this MOU.

1.2 It is acknowledged that serious contraventions of corporate law will need to be addressed in a range of ways in order to achieve the results expected by the Government and the community. The available remedies include civil enforcement (interlocutory or final) and criminal prosecution.

These strategies are not mutually exclusive but often need to be implemented at different times. Civil enforcement will often need to be undertaken expeditiously and could therefore be the appropriate priority at the initial stages of the investigation of a matter. It will often be that evidence of serious criminality will emerge during the course of civil proceedings.

1.3 It is acknowledged that the public interest requires that criminal proceedings be instituted as soon as possible. Accordingly, there may be both civil and criminal proceedings arising out of the same investigation. It is accepted that civil proceedings will not be used in substitution for criminal proceedings in matters of serious corporate crime.

1.4 The guidelines to be developed from this MOU will describe the operational arrangements within the respective agencies in the time sequence in which they arise. For convenience, those sequences are referred to as the starting process, the investigation process, and the prosecution process. The object of the guidelines is to ensure that

the processes and resources of each agency are used quickly and efficiently to deal with such serious corporate crime.

## **2 The starting process**

2.1 The starting process is the process by which an investigation is commenced (ie causes the opening of an ASC investigation file and the allocation of resources to investigate the matter).

2.2 The ASC is responsible for commencing an investigation.

2.3 The ASC receives a very substantial number of complaints, which it must process and manage within its priorities having regard to its available resources. The ASC also considers allegations from a number of other sources; in particular from liquidators, from other law enforcement agencies, from foreign regulators, from the ASX, and from its own intelligence and surveillance systems.

2.4 The ASC sets its investigative priorities by reference to the seriousness of the allegations. It is understood that a substantial number of allegations will not result in investigations by the ASC because they cannot meet the ASC's criteria of seriousness. All matters that do not meet these criteria, but are within the jurisdiction of another law enforcement agency (State or Federal), will be promptly referred to that organisation. There will be some cases involving contraventions of both the Corporations Law and another law (eg a State Crimes Act) which do meet the ASC criteria, but which the ASC believes should also be referred, because the preponderance of criminality falls under that other law. The ASC will refer these serious matters to another agency only upon advice from that agency that they will handle the investigation into the matter - so as to ensure that the matter is not merely filed away.

2.5 It is agreed that it is not appropriate for the DPP to become involved in considering matters during the starting process.

2.6 The ASC will provide to the DPP a copy of any guidelines and instructions utilised by it from time to time to regulate the starting process. Matters which involve offences capable of being dealt with on indictment, or which involve fraud or dishonesty, or in respect of which there is a reasonable possibility of a term of imprisonment will always be regarded as serious crime.

2.7 Subject to practical investigative difficulties occasioned by the passage of time, a past (but serious) contravention of law will not be deferred for investigation in favour of a more recent contravention of a less serious nature. Subject to this, the DPP accepts and agrees with the desire of the ASC to act speedily in relation to current matters.

### **3 The investigation process**

3.1 The investigation process commences after the ASC has determined, pursuant to the starting process described above, that it is appropriate to investigate a matter and that resources will be allocated to it.

3.2 Once the ASC has decided to commence an investigation, it will develop an investigation plan. The objective of the first stage of the investigation will be to ascertain as quickly as possible the facts. This first phase of the investigation is for the purpose of facilitating an early assessment of the matter.

3.3 As the investigation progresses, the plan will be modified and developed.

3.4 It is agreed that it is not appropriate for the DPP to be involved in the development of the investigation plan or in making an assessment of the results of the first phase of the investigation. At this first assessment stage (assuming that the file is not closed at this point), the ASC will inform the DPP of the details of the investigation and the future anticipated direction of the investigation (ie civil or criminal or both). The purpose of this communication is to keep the DPP informed and not for the purpose of involving the DPP in detail of the investigation.

3.5 The ASC will further review each investigation approximately midway through the expected course of the investigation. After that midway assessment (assuming the file is not closed at that point) further investigation will continue by the ASC with a view to completing the investigation into all aspects of the matters within one year. Following the midway assessment, the ASC will take an early informed decision ("the ASC proceedings decision") as to whether civil or criminal, or both processes should be seriously contemplated. As indicated above, there will be cases where urgent civil proceedings are contemplated very early in the investigation, with the result that the first phase of the investigative process is virtually consumed by the first phase of the investigative process is virtually consumed by the support necessary for those civil proceedings.

3.6 When the ASC is seriously considering the ASC proceedings decision in those matters involving criminality, the ASC will consult with the DPP. The DPP will be provided with all relevant information and will also have full access to all relevant ASC files and documentation for this purpose. The ASC will inform the DPP of all contemplated civil actions where the factual basis for those actions also appears likely to involve the commission of criminal offences.

3.7 It is noted that the consultation between the ASC and the DPP, as discussed in the last preceding paragraph (where there is a possibility of criminality being alleged in court proceedings), may result in DPP advice as to the use of search warrants and similar criminal investigative techniques. The ASC shall reasonably utilise such techniques in addition to ASC powers under Part 3 of the ASC Law.

#### **4 The prosecution process**

4.1 When an ASC proceedings decision is that criminal proceedings should be instituted, and the ASC has gathered substantial evidence to enable it to support that view, the ASC shall seek the opinion of the DPP as to whether the matter should be referred to the DPP for the purposes of criminal proceedings. The process of the ASC requesting a referral is referred to as the "handover process".

4.2 Upon the DPP advising in writing that it is appropriate to do so, the ASC will refer the matter to the DPP. The date on which the DPP advises that the matter should be handed to it is referred to as the "handover date". The DPP letter triggering the handover date will be in the nature of a certification rather than an advice on evidence. It is not envisaged that the DPP would engage outside counsel prior to the handover date.

4.3 The significance of the handover date is that from that point of time there is a real prospect of the commencement of criminal proceedings and the DPP is the ultimate decision maker in relation to the conduct of the matter from the handover date. The DPP will consult fully with the ASC during the progress of the matter after handover date.

4.4 From the handover date the ASC will devote all resources that it is reasonably able to provide, for the purposes of progressing the matter to its early completion including the trial and any appeals.

4.5 It is intended that, as a result of the consultative process occurring during the investigation process, and DPP involvement up to the handover date, the focus of the investigation will be agreed and no major change of direction will be likely to occur in the absence of significant new facts coming to light.

4.6 If the DPP decides that a major change of direction is necessary it will advise the ASC accordingly, and this will have the result that the matter will revert back to the investigative phase.

4.7 The DPP will also consult with the ASC as to the progress of the matter for which they now have prime control, including the choice of appropriate charges and the question of counsel. The DPP will notify the ASC of all significant conferences with counsel prior to their being held and the ASC will be entitled to attend all such conferences. It is a legitimate expectation of the ASC that it will not be excluded during the progress of the matter after handover date. The relationship between the DPP and the ASC during the process is expected to be co-operative, recognising the interests of both agencies in the securing of convictions in matters of serious corporate crime.

4.8 ASC lawyers will support ASC investigative processes (including investigative processes after handover date) including statement taking.

ASC lawyers will not advise on prosecution decisions such as the appropriate charges to be laid and the evidence which is necessary to support those charges, but will be entitled to express an opinion in this regard.

There will be situations when ASC lawyers will be conducting civil litigation contemporaneously with the DPP lawyers conducting criminal proceedings. It is recognised that one agency cannot direct the other agency as to the manner in which it is to conduct its respective litigation. However, it is equally recognised that it is imperative that both sides work very closely to ensure co-ordination of effort, particularly in the collection of evidence, so as to support the approach of the other to the maximum effect.

4.9 The DPP acknowledges the concern of the ASC in respect of breaches which go to corporate market integrity - for example, situation involving the giving of information to the market which may be inaccurate or otherwise misleading. The views of the ASC on the seriousness of activity which affects market integrity will be taken into account by the DPP in determining whether, in terms of the public interest considerations contained in the Prosecution Policy of the Commonwealth, a prosecution should be instituted.

## **5 Other matters**

5.1 The DPP has a legitimate expectation that, in appropriate cases, general fraud conducted in the context of a corporation should be charged appropriately as fraud and not a lesser Corporations Law charge. On the other hand, the ASC should not be expected to resource essentially police prosecutions under the State Crimes Acts. The ASC believes that as a specialist agency responsible for the regulation of corporations and securities markets it should not be the prime law enforcement agency for frauds to which corporate

**MEMORANDUM OF UNDERSTANDING BETWEEN THE  
AUSTRALIAN SECURITIES COMMISSION AND  
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structures are merely incidental, where the substantive criminality is currently best addressed by State laws. This issue can give rise to operational friction between the two agencies, which is inefficient and does not achieve the best result for the Australian community.

The DPP and the ASC believe that the Attorney-General and the Government would be taking a very substantial progressive operational step which supports the prosecution of corporate crime if the Commonwealth Parliament were to insert general fraud provisions in the Corporations Law, throughout Australia. This would enable general fraud matters to be referred directly to the Australian Federal Police - considered to be a very desirable result.

The ASC and DPP accordingly strongly urge the Australian Government to take immediate steps to implement general fraud provisions in the Corporations Law which, both agencies believe, will very substantially enhance the enforcement effort of the Commonwealth in serious corporate crime.

5.2 The Chairman of the ASC and Director of Public Prosecutions agree that they will meet not less than quarterly for the purpose of reviewing the operation of this MOU and the guidelines to be developed from the MOU.

Dated this 22nd Day of September 1992.

Edwin J. Lorkin  
Associate Director of Public  
Prosecutions

A.G. Hartnell  
Chairman  
Australian Securities Commission