



ASIC

Australian Securities & Investments Commission

Memorandum of Understanding

**Australian Securities and
Investments Commission**

and

**Commonwealth Director of
Public Prosecutions**

1 March 2006

BACKGROUND

This Memorandum of Understanding ('**MOU**') dated 1 March 2006 records an agreement between the Australian Securities and Investments Commission ('**ASIC**') and the Commonwealth Director of Public Prosecutions ('**CDPP**') on principles to facilitate the working relationship between the two agencies for the investigation and prosecution of corporate and financial services crime in a timely and effective manner. It replaces an earlier MOU dated 22 September 1992 to substantially the same effect.

1. PURPOSE

1.1 ASIC and the CDPP recognise the need for the fullest collaboration and co-operation between the two organisations at all levels to discharge their respective functions in relation to the investigation and prosecution of corporate and financial services wrongdoing.

1.2 This memorandum sets out the principles that underpin the relationship between ASIC and the CDPP and is to be interpreted with that aim in mind.

1.3 ASIC and the CDPP recognise that proper and appropriate communication and liaison at all levels, approached in a spirit of cooperation, is essential to an effective working relationship. This memorandum outlines the expected liaison arrangements between ASIC and the CDPP. ASIC and the CDPP acknowledge that timeliness and accountability underpin the effective execution of their respective roles in the investigation and prosecution of corporate and financial services wrongdoing.

1.4 Where a matter is not dealt with explicitly in this memorandum, it is expected that both ASIC and the CDPP will discuss the matter and resolve it quickly in accordance with the principles of proper communication and cooperation.

2. ASIC

2.1 ASIC is a regulatory and law enforcement agency charged with promoting market integrity and consumer protection across the financial services sector existing under the *Australian Securities and Investments Commission Act 2001* (Cth) ('**ASIC Act**'). It is responsible for the administration and enforcement of the *Corporations Act 2001* (Cth) ('**Corporations Act**') and the other legislation listed in Appendix A (the '**ASIC Legislation**'). In the course of an investigation into apprehended serious corporate or financial services wrongdoing, ASIC gives the same consideration to identifying breaches of the general criminal law of the Commonwealth or a State or Territory as it gives to the examination of conduct that is a breach of the ASIC Legislation.

2.2 ASIC is empowered, among other things, to take whatever action it can take and is necessary in order to enforce and give effect to the ASIC Legislation.

2.3 ASIC has a range of remedies available to discharge its law enforcement responsibilities:

- (a) preservation remedies, that is, the use of remedies such as injunctions, receivership and provisional liquidation, which are designed to prevent damage, or prevent further damage, occurring;
- (b) recovery and remedial, including those remedies which exist under the ASIC Legislation to enable a person to recover either from the wrongdoer or a third party, property of the company or damages following a breach of the ASIC Legislation;
- (c) disciplinary or protective, including applications for the banning of directors and financial services representatives and disciplinary applications to the Companies Auditors and Liquidators Disciplinary Board
- (d) prosecution;
- (e) imposition of civil penalties and infringement notices.

2.4 These strategies are not mutually exclusive, but often need to be implemented at different times. Civil enforcement action to preserve or protect 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.

2.5 It is acknowledged that the public interest requires that criminal proceedings be instituted as soon as practicable. There may be both civil and criminal proceedings arising out of the same investigation. Civil proceedings will not be used in substitution for criminal proceedings in matters of serious corporate or financial services crime.

3. CDPP

3.1 The functions of the CDPP under the *Director of Public Prosecutions Act 1983* (Cth) include responsibility for the prosecution of offences against Commonwealth laws. The CDPP carries out this function on a national basis in accordance with the guidelines contained in the document entitled "Prosecution Policy of the Commonwealth". The CDPP has an independent, supervisory role in relation to the prosecution of Commonwealth offences. The CDPP is available to advise ASIC during the course of its investigation and assist in the settling of search warrants and search warrant informations. In certain cases where a prosecution is commenced or proposed or a matter is under investigation with a view to possible prosecution, the CDPP may take, or co-ordinate or supervise the taking of, civil remedies to recover amounts of money owing to the Commonwealth or authorities of the Commonwealth. The CDPP is also able to take actions under the *Proceeds of Crime Act 1987* (Cth) and the *Proceeds of Crime Act 2002* (Cth).

4. CIVIL PENALTY ACTION

4.1 ASIC will consult with the CDPP before making an application for a civil penalty order.

4.2 Where ASIC and the CDPP agree that it would be appropriate, ASIC will refer the matter to the CDPP to consider whether, in accordance with the Prosecution Policy of the Commonwealth, criminal proceedings should be instituted.

4.3 The CDPP will advise ASIC as soon as practicable after it forms the view, having regard to the entirety of the evidence and all relevant information then available, and to the Prosecution Policy of the Commonwealth, that criminal proceedings should not be instituted.

5. PROSECUTION DECISION

5.1 When ASIC believes a criminal offence may have been committed and has gathered sufficient evidence to enable it to support that view, ASIC will refer a brief of evidence to the CDPP in a timely manner. So far as practicable, ASIC will refer a completed brief of evidence to the CDPP in the form and in accordance with standards agreed between ASIC and the CDPP from time to time. In the normal course a disclosure certificate in the form agreed between CDPP and ASIC will be provided prior to charges being approved by the CDPP

5.2 In the event that ASIC forms the view that an investigation has failed to produce sufficient evidence to prosecute, ASIC need not refer a brief of evidence to the CDPP. However, ASIC may refer a brief of evidence to the CDPP in these circumstances if it considers that a final decision on prosecution should be made by the CDPP.

5.3 Where a brief of evidence has been referred to the CDPP and the CDPP decides that charges should be laid, it will advise ASIC in writing of that decision together with the draft charges. If ASIC requests that the CDPP provide reasons for the CDPP's decision the CDPP will provide those reasons in writing. Where a brief of evidence is referred to the CDPP and the CDPP decides that the evidence is insufficient for charges to be laid, it will provide written reasons for that decision to ASIC. Where appropriate CDPP will indicate the further evidence required to prove the offence. If the CDPP considers that the public interest does not require a prosecution it will advise ASIC in writing of the reasons for this decision.

5.4 The CDPP will give appropriate weight to ASIC's views concerning the public interest in prosecuting matters.

5.5 ASIC will continue to provide support to the matter once charges are laid including obtaining further evidence as agreed.

6. LIAISON ARRANGEMENTS

6.1 ASIC and the CDPP will liaise at a national and regional level and at the case officer level once a matter has been referred to the CDPP by ASIC.

National Liaison

6.2 Liaison at the national level will be conducted on a regular basis, ideally monthly and in any event not less than six times per year. The Deputy

Director, Commercial Prosecutions of the CDPP and the Executive Director, Enforcement of ASIC, in addition to such other senior officers as are agreed by the two agencies, will conduct this liaison. Such liaison will examine operational issues, organisational issues, expected workloads and systemic issues that may warrant law reform.

6.3 Any dispute arising which cannot be resolved at a National Liaison meeting, will be immediately referred to the Chairman of ASIC and the Director of Public Prosecutions.

6.4 If a dispute cannot be resolved by the Chairman of the ASIC and the Director of Public Prosecutions, it will be immediately referred to the National Steering Committee on Corporate Wrongdoing.

6.5 The National Steering Committee on Corporate Wrongdoing will consist of the Secretary to the Attorney-General's Department, the Chairman of ASIC and the Director of Public Prosecutions. The functions of the Committee will be to oversee, and report to the Attorney-General on compliance with the Attorney-General's directions and to seek to resolve by conciliation disputes referred to the Committee.

Regional Liaison

6.6 ASIC and the CDPP will meet, ideally on a monthly basis, and in any event not less than six times per year, at the Regional Office level to discuss generally the progress of current investigations and prosecutions and to resolve problems that arise either in the prosecution or investigation of particular matters or relationships between the two organisations. ASIC will advise the CDPP of the progress of any civil action that is related to any criminal proceedings.

6.7 It is expected that for the purpose of representation at the Regional liaison meetings the appropriate senior ASIC officers and the appropriate CDPP counter parts will be present. Where appropriate, other ASIC and CDPP staff will attend the meetings.

6.8 In those cases where ASIC and CDPP are unable to agree upon a proposed course of action at the officer level, the matter will be considered at the Regional Liaison meeting or if the matter is particularly urgent prior to then by the relevant Assistant Director, Enforcement of the particular region, and the equivalent CDPP officer. If, following consultation, the disagreement still cannot be resolved it will be referred forthwith for consideration at a National Liaison meeting.

7. PROSECUTION OF SUMMARY REGULATORY MATTERS

7.1 ASIC may prosecute such summary regulatory offences as are agreed from time to time between ASIC and CDPP at the national level. ASIC may conduct such proceedings where there is a guilty plea without reference to the CDPP and, where agreed, in such proceedings where there is a not guilty plea. Where it is not agreed that ASIC will conduct defended hearings and a defendant pleads not guilty and the matter is set down for hearing, ASIC will immediately refer the matter to the CDPP. If the defendant pleads not guilty to a combination of charges, including matters that may be conducted by ASIC,

and those that are to be referred to the CDPP, the entire matter will be referred to the CDPP to conduct the hearing.

7.2 Notwithstanding paragraph 7.1, ASIC will refer to the CDPP all cases falling into any of the categories listed below for consideration whether prosecution is warranted. Some cases may fall into more than one category and the categories are not meant to be exhaustive. In certain cases, a matter may not fall into any of the following categories, but it may nevertheless be considered by ASIC to be appropriate to refer the matter to the CDPP.

- (a) All offences capable of being dealt with on indictment;
- (b) All offences involving allegations of fraud or dishonesty;
- (c) Those prosecutions which involve complex questions of law. Included in this category are defended cases in which the defendant is legally represented and where it is apparent that the issue is one of substance;
- (d) All appeals, proposed appeals, or orders to review or proposed orders to review a decision of the court in criminal proceedings, whether by the person convicted or by ASIC or the informant;
- (e) Cases against a defendant where ASIC knows that the CDPP is conducting a prosecution or is taking criminal action in other matters against the same defendant involving offences against the laws of the Commonwealth;
- (f) Matters in which there is a reasonable prospect that the defendant will be sentenced to any form of custodial sentence; and
- (g) Those cases where it is alleged that the defendant has committed both minor regulatory offences (which would otherwise be handled by ASIC) and more serious offences which would be dealt with pursuant to these guidelines by the CDPP, all contemplated offences will be dealt with by the CDPP.

7.3 The CDPP is available to provide advice to ASIC in relation to those matter prosecuted by ASIC. The CDPP will assist ASIC where requested to draft the necessary court documents for those matters that are being dealt with by ASIC.

8. COUNSEL

8.1 The CDPP will consult with ASIC as to the appropriate counsel to be briefed in a matter. While it is the CDPP's decision whether to brief counsel and if so which counsel, CDPP will as far as possible give weight to ASIC's views.

8.2 CDPP will advise ASIC of all significant conferences with counsel prior to those conferences being held. As far as possible CDPP will attempt to arrange conferences at mutually convenient times for ASIC and ASIC officers will be entitled to attend all significant conferences with counsel.

8.3 Where ASIC briefs counsel to assist in its investigation, ASIC will inform CDPP. ASIC will provide a copy of any advices received from its counsel to the CDPP.

9. OTHER MATTERS

9.1 CDPP will consult with ASIC with regard to the prosecution position to be taken in relation to bail and give appropriate weight to ASIC's views. However, the final decision in relation to the prosecution's position on bail rests with the CDPP.

-6-

9.2 If ASIC or the CDPP wishes to release a media statement regarding prosecutions, proposed or underway, the organisation releasing the statement will, wherever possible, consult the other organisation as to the terms of the statement. Where appropriate, media releases will acknowledge the work of both organisations.

Dated 1 March 2006

Signed by Jeffrey Lucy AM
Chairman, Australian Securities
and Investments Commission.

Signed by Damian Bugg AM, QC
Commonwealth Director of
Public Prosecutions

APPENDIX A

Laws administered by ASIC

In addition to the *Corporations Act 2001*, ASIC administers the following legislation:

- (a) *Australian Securities and Investments Commission Act 2001* (Cth);
- (b) *Insurance (Agents and Brokers) Act 1984* (Cth);
- (c) *Insurance Contracts Act 1984* (Cth); and
- (d) *Superannuation (Resolution of Complaints) Act 1993* (Cth).

ASIC also performs consumer protection-related functions under the following legislation (prudential functions under these Acts are exercised by the Australian Prudential Regulation Authority):

- (e) *Superannuation Industry (Supervision) Act 1993* (Cth);
- (f) *Retirement Savings Accounts Act 1997* (Cth);
- (g) *Life Insurance Act 1995* (Cth); and
- (h) *Insurance Act 1973* (Cth).