

MEMORANDUM OF UNDERSTANDING

BETWEEN THE

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

AND THE

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

This memorandum of understanding (MOU) sets out a framework for co-operation between the Australian Securities and Investments Commission (ASIC) and the Australian Competition and Consumer Commission (ACCC) (the agencies) to facilitate liaison, co-operation, assistance, joint enquiries and the exchange of confidential information between the agencies in accordance with the relevant statutory provisions.

1. PURPOSE

- 1.1 The agencies recognise that co-operation between them is desirable to discharge their respective functions and maximise the effectiveness of their powers.
- 1.2 The agencies agree to assist each other in the exchange of information, the referral of matters and the delegation of powers, and to co-operate on compliance, education and enforcement activities within the framework of this MOU and consistent with all relevant laws.
- 1.3 The agencies do not intend this MOU to create legally binding obligations between them.

2. ASIC

- 2.1 ASIC is responsible for monitoring, regulating and enforcing corporations and financial services laws to protect consumers, investors and creditors and promote market integrity. ASIC is responsible for the administration and enforcement of the *Corporations Act 2001* (Cth) (the Corporations Act), the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act), and other relevant legislation.

3. ACCC

- 3.1 The ACCC is responsible for the promotion of competition and fair trading and provision of consumer protection. The role of the ACCC is to facilitate and encourage compliance with the laws for which it has administrative

responsibility, to take appropriate action in response to contraventions of those laws, to adjudicate on competition and access issues and to educate the community in relation to such matters. The ACCC is responsible for the administration and enforcement of the *Trade Practices Act 1974 (Cth)* (TPA) and other relevant legislation.

4. LIAISON

4.1 The agencies agree that there will be regular liaison meetings between the agencies as follows:

4.1.1 meetings at Commissioner/Executive Director level twice yearly, or otherwise as agreed between the agencies;

4.1.2 meetings at officer level on a monthly basis or otherwise as agreed between the agencies to provide information on current matters which may be of interest to each agency.

4.2 The agencies agree that, where appropriate, they will consult with each other in relation to recent judgments, current law reform, policy issues, media releases and other matters of mutual interest.

4.3 The agencies agree that, where appropriate, they will consult with each other in relation to arrangements for joint publications and joint contact with stakeholder groups.

4.4 Each agency will appoint liaison contact officers for the purposes of liaison, communication and exchange of information between the agencies under this MOU. The list of liaison contact officers is at Appendix A. Each agency may change its liaison contact officers as necessary, and will provide the other agency with an amended list.

5. INFORMATION IN RESPECT OF WHICH THIS MOU DOES NOT APPLY

5.1 This MOU does not cover access by the ACCC to ASIC's 'ASCOT' and 'DOCIMAGE' databases. ASCOT information is already available to the ACCC. Database material which must be certified for evidentiary purposes, is available to the ACCC for the scheduled fee through ASIC Service Centres.

6. EXCHANGE OF INFORMATION UPON REQUEST

6.1 The agencies agree that, subject to legislative provisions, information available to one agency, which is relevant to the responsibilities of the other agency, will be shared as requested, provided that compliance with the request will not adversely affect the operations of the complying agency.

- 6.2 Each agency will use its best endeavours to provide relevant information to the other agency in a timely manner.
- 6.3 When exchanging confidential information, ASIC and the ACCC acknowledge the confidentiality and secrecy requirements of the Acts under which each agency operates. The agency providing information has the right to specify the level of confidentiality attached to the information it provides to the other, and to place any caveats upon the use or disclosure of the information.

7. UNSOLICITED ASSISTANCE

- 7.1 Each agency recognises that in the course of carrying out its functions and exercising its powers, it may come into possession of information which would, if provided to the other agency, be likely to assist that other agency in administering or enforcing the particular laws for which that agency is responsible. Appendix B contains particulars of the types of matters which each agency considers relevant for the purposes of this paragraph.
- 7.2 Each agency agrees, subject to legal restrictions, to use reasonable endeavours to notify the other agency in a timely manner of the existence of any information of a kind referred to in paragraph 7.1 above, notwithstanding that it may not have received a request from the other agency for such information.

8. COST OF PROVISION ON INFORMATION

- 8.1 In general, the agency that provides information (the providing agency) will bear the cost incurred by it in locating and providing the information to the other agency.
- 8.2 If it appears to the providing agency that it will incur substantial costs in providing the information, it may discuss this with the other agency and the agencies may negotiate a cost-sharing arrangement in relation to the provision of that information.

9. REFERRAL OF MATTERS

- 9.1 The agencies recognise that once a complaint is received or an initial investigation has been conducted by an agency, it may become apparent that the matter more appropriately falls within the jurisdiction of the other agency (a matter). For example, ASIC may refer a matter to the ACCC where the matter being investigated primarily involves the application of the TPA. Similarly, the ACCC may refer a matter to ASIC which primarily involve breaches of the ASIC Act or the Corporations Act or other laws administered by ASIC.

- 9.2 The agencies agree that referral of matters between the agencies will take into account any administrative arrangements that have been agreed between the agencies from time to time.
- 9.3 Both agencies acknowledge that there may be circumstances where a matter will also be referred to other specialist Australian agencies, including the Australian Crime Commission, the Australian Taxation Office, the Australian Federal Police, the Australian Customs Service, State and Territory Consumer Affairs agencies or Offices of Fair Trading, or appropriate agencies of other countries. In those circumstances, ASIC and the ACCC will endeavour to consult each other prior to the referral of a matter to another agency.

10. DELEGATION OF POWERS

- 10.1 The agencies recognise that the effective and efficient handling of some matters may be significantly aided by the delegation of powers of one agency to the other agency, or by standing cross delegations of the respective powers of the agencies.
- 10.2 The ACCC will discuss with ASIC any intention to request ASIC to delegate any of its powers pursuant to paragraph 102(2)(e) of the ASIC Act.
- 10.3 ASIC will discuss with the ACCC any intention to request the ACCC to delegate any of its powers pursuant to section 26 of the TPA.
- 10.4 The agencies agree that the delegation of powers between the agencies may also be subject to administrative arrangements that have been agreed between the agencies at Executive Director level by ASIC and at Executive General Manager level by the ACCC.
- 10.5 Any media releases in relation to a matter in which a delegated power has been used will so far as is practicable be agreed between the agencies before publication.
- 10.6 If an agency is informed that an officer of the other agency is to use delegated power, the first agency may state that it does not wish the power to be used, in which case the delegate seeking to use the power shall not use it.
- 10.7 If a delegate using a delegated power is challenged in his or her use of that power, he or she will immediately notify the delegating agency.

11. JOINT TASK FORCE

- 11.1 The agencies acknowledge that, subject to secrecy and confidentiality obligations, an investigation or litigation may be conducted more effectively by the establishment of a joint task force consisting of members from both agencies.

- 11.2 The agency requesting the joint task force will advise the other agency of the background to the request and the objectives, estimated duration and expected resource requirements of the proposed joint task force.
- 11.3 If both agencies agree to take part in the joint task force, an agreed operational plan will be prepared between the agencies setting out the objectives, expected duration, funding and resourcing arrangements, publicity arrangements, accountability command and management of the joint task force.
- 11.4 Requests to ASIC for a joint task force should be made to a Deputy Executive Director, Enforcement. Requests to the ACCC should be made to the Executive General Manager, Enforcement and Compliance.

12. CONFIDENTIALITY

- 12.1 ASIC must take all reasonable measures to protect from unauthorised use or disclosure information given to it in confidence in or in connection with the performance of its functions or the exercise of its powers or that is protected information.
- 12.2 The Chairman of ASIC, or his or her delegate, is authorised to disclose confidential information pursuant to subsection 127(4) of the ASIC Act to various Commonwealth government agencies where such information will enable or assist the agency to perform or exercise any of its functions or powers. The ACCC is such an agency.
- 12.3 Subject to paragraph 12.5, when an agency receives information from the other agency in accordance with this MOU, it will:
 - 12.3.1 take all reasonable steps to ensure that such information is only used or disclosed for the purpose for which it was obtained, or as otherwise authorised by the other agency; and
 - 12.3.2 will observe and comply with any express conditions placed upon release of information by the other agency.
- 12.4 Without limiting the generality of paragraph 12.3 of the MOU, the agencies will comply with the Information Privacy Principles set out in section 14 of the *Privacy Act 1988*.
- 12.5 If an agency is required by law to disclose confidential information received from the other agency, it must:
 - 12.5.1 immediately, and prior to any disclosure being made, notify the other agency of the disclosure requirement to allow the other agency to take all reasonable steps to maintain the confidentiality of the information required to be disclosed, including, if necessary and appropriate, making a claim for public interest privilege or requiring confidentiality

undertakings from the person or body to whom the information is required to be disclosed; and

12.5.2 disclose only the confidential information required to comply with the applicable requirement.

12.6 For the purposes of paragraph 12.5, "required by law" means required by summons, subpoena, writ, order of any court, tribunal or other authority, or by Commonwealth legislation.

13. DISPUTES


13.1 Where there is conflict or disagreement between the agencies over any issue relating to or covered by this MOU, the agencies will seek to resolve the issue by negotiation between the Executive General Manager, Enforcement and Compliance, of the ACCC and the Executive Director, Enforcement or the Executive Director, Consumer Protection & International of ASIC.

14. REVIEW OF THIS MOU

14.1 The agencies will keep the operation of this MOU under continuous review and will consult with each other with a view to improving its operation and resolving any issues that may arise. The agencies agree that the Appendices to this MOU may be amended by agreement in writing signed by the Executive General Manager, Enforcement and Compliance, of the ACCC and the Executive Director, Enforcement or the Executive Director, Consumer Protection & International of ASIC at any time.

15. TERMINATION

15.1 Either agency may give written notice to the other agency of its intention to terminate this MOU. The MOU will terminate 30 days after the date upon which the notice was received.

DATED this 15 day of  2004



Jeffrey Lucy, AM
Chairman
Australian Securities and Investments
Commission



Graeme Samuel, AO
Chairman
Australian Competition and
Consumer Commission

APPENDIX A

Liaison contact officers under paragraph 4.4

1. ASIC contact officers

- For general liaison, communication and exchange of information the National liaison officer is:

Director, Compliance & Campaigns, Consumer Protection & International

- For enforcement liaison, the Enforcement liaison officer is:

Specialist Assistant Director, Consumer Protection, Enforcement

- For other issues concerning exchange of information, the contact officer is:

Manager, Enforcement Law & Policy

2. ACCC contact officers

- For general liaison on enforcement matters, the liaison officer is:

General Manager, Enforcement and Co-ordination

- For issues relating to policy and compliance matters and on issues relating to the exchange of information, the liaison officer is:

General Manager, Policy and Liaison

APPENDIX B

EXCHANGE OF INFORMATION UNDER PARAGRAPH 7.1

Matters of interest to ASIC

Listed below are the types of matters which are relevant to ASIC for the purposes of paragraph 7.1. This list is not exhaustive, and if the ACCC is in doubt as to whether a matter is likely to be of interest to ASIC, the ACCC should contact an ASIC liaison contact officer.

- companies:
 - registration of companies
 - conduct of company directors and officers
 - financial reporting
 - company mergers and acquisitions
- registration and conduct of company auditors, registered liquidators and official liquidators;
- financial markets (including the Australian Stock Exchange Ltd and Sydney Futures Exchange Ltd) and conduct of listed companies, brokers and traders;
- licensing, standards and conduct of financial services businesses, including fund managers, stockbrokers, financial advisers and insurance brokers;
- registration and records of, and conduct in relation to, managed investment schemes;
- APRA-regulated financial services businesses, including banks, superannuation funds and insurance companies:
 - how they comply with codes of practice
 - approval of consumer complaint resolution schemes
 - misconduct affecting consumers or misconduct as corporations
- misleading and deceptive, and unconscionable conduct, and undue harassment and coercion in relation to financial services including credit.

Matters of interest to ACCC

Listed below are the types of matters which are relevant to the ACCC for the purposes of paragraph 7.1. This list is not exhaustive, and if ASIC is in doubt as to whether a matter is likely to be of interest to the ACCC, ASIC should contact the ACCC contact officers referred to below.

- Business conduct:
 - Agreements, arrangements and/or understandings between competitors in a market which appear to involve:
 - Price fixing
 - Sharing/allocation of markets (customers/tenders etc)

➤ Bid or tender rigging

- Unfair, unconscionable and/or unilateral conduct which significantly damages/impacts small businesses;
- Product safety issues, particularly where consumers are at risk of injury;

(Contact: *Executive General Manager, Enforcement & Compliance Division*)

- Business conduct:

- Proposed mergers/takeovers between companies competing in the same or similar markets;

(Contact: *General Manager, Mergers & Asset Sales Branch*)