

12 August 2009

## Commercial Law e-alert

### Anti-Cartel Legislation commenced 24 July 2009

The anti-cartel legislation that we described in our e-alert of [23 June 2009](#) has now commenced operation and the ACCC has issued [guidelines](#) as to how it will approach the prosecution of cartels. The ACCC has also signed an [MOU](#) with the Commonwealth Director of Public Prosecutions (CDPP) as to how the two agencies propose to work together in prosecutions. Whilst the ACCC has said it will take the view that serious cartel conduct will warrant criminal prosecution rather than the imposition of civil penalties, it has not sought to define what it means by this, to the contrary, advising us that:

*"Lawyers who concern themselves with trying to second-guess the ACCC about the line between the possibility of a gaol term or civil penalty are missing the point.*

*They should simply advise their clients not to participate in any cartel. You do not fix prices, you do not rig bids, you do not allocate customers. This is the kind of conduct which could expose your client to gaol. The ACCC will use the full force of the law to bring you to account, either financially or through incarceration."*

(Source – ACCC news release 14 July 2009)

There is a non-exhaustive list of matters in the MOU that seek to indicate what will constitute serious cartel conduct, but the message is that these will not necessarily bind the ACCC in its decision whether to seek criminal penalties, so the time to stop engaging in cartel conduct is now. The other relevant ACCC document to be considered in these cases is of course the [ACCC immunity policy for cartel conduct](#), although it must be noted that whilst the ACCC will be deciding whether to apply this policy in civil penalty cases, the MOU provides that the decision whether to grant immunity from criminal prosecution will rest with the CDPP to decide in accordance with the Prosecution Policy of the Commonwealth.

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