

COMMERCIAL TRANSACTIONS SEMINAR 16/9/2014

D. Involvement of CDPP

When does ASIC involve the CDPP?

- varies from case to case - early engagement in complex/large matters. In 2009 CDPP pulled back from pre brief advice except in limited circumstances, due to resource issues [one exception was complex corporations matters]. Now a re-engagement in early advice. May consist of:
 - early informal discussion;
 - advice on question of law;
 - ‘scoping’ advice assisting focus of matter for later prosecution, identification of most likely charges., avoidance of chasing every rabbit down every burrow.
 - But avoid stepping in the investigation arena – not CDPP role. Decision whether to arrest is for ASIC not CDPP.
- Brief – referred by ASIC if ASIC of view is sufficient evidence. DPP then assesses in accordance with Prosecution Policy of the Commonwealth [‘PPC’];
- Liaison: monthly liaison between ASIC and CDPP in larger regions, quarterly on national basis.
- Respective roles for each – mou?

MOU signed 2006, also Best Practice Guidelines

CDPP has independent supervisory role re prosecution, not an investigator.

ASIC consult before making application for civil penalty order[unless ASIC of view investigation is not reasonably likely to disclose commission of an indictable offence]

If ASIC believes it has sufficient evidence of criminal offence, refer brief to CDPP.

DPP to assess brief and advise ASIC in writing of view. CDPP may request further investigation.

If satisfies PPC, DPP provides draft charges to ASIC, ASIC informant signs charge sheet.

ASIC may prosecute summary regulatory matter as agreed between ASIC and CDPP

CDPP to consult with ASIC, but CDPP makes final decision – eg. re sufficiency, bail, sentencing submissions

E. What can advisers do in relation to the CDPP?

When should they approach and who should they approach?

- pre referral of brief – to ASIC – but ASIC to consult CDPP
- post referral of brief – to CDPP

What kinds of deals will CDPP do – what is its general attitude? – indemnities under s 9 of the DPP Act, Letters of comfort, charge negotiations, discontinuance of proceedings, cf ACCC indemnity, representative charges, rolled up charges, letters of caution,

- witnesses seeking indemnities – query if require indemnity, or sufficient if provided with Letter of Comfort before sign statement. If to incriminate self, consider Induced Statement. Also note possible protection of a certificate under s. 128 *Uniform Evidence Act*.
- Letter of Comfort
 - Not an exercise of stat. function
 - Inappropriate if sufficient evidence committed an offence.
 - signed by PGL
- Indemnities:
 - By Director, not delegated.
 - Most common are ‘use’ indemnities under s. 9(6) - ie answer/document produced cannot be used against person and inadmissible in **civil and criminal** proceedings in a **federal, State or Territory court**, other than proceedings for falsity of evidence
 - Also ‘transactional’ indemnity under s 9(6D). – ie immunity from specified Cwlth offences.
- Charge negotiations
 - Encouraged, prosecution may initiate
 - Charges to bear reasonable r’ship to nature of alleged conduct
 - Option of rolled up charges or representative charges. Need to ensure rolled up charges leave sufficient sentencing scope for the court.
 - Avoid *R v De Simoni (1981) 147 CLR 383* or *Newman & Turnbull v R (1997) 1 VR 1* scenario where charges do not encompass aggravating features alleged. Court cannot sentence for offence not charged.
- Letter of caution – instead of instituting proceedings the CDPP may issue a letter of caution where of the view there is sufficient evidence but that prosecution is not in the public interest. Mostly re less serious alleged offending, but may apply to more serious allegations in exceptional

circumstances. [eg age of alleged conduct, age and health of offender - see factors in Ch. 2.10 PPC

- Discontinuance –
 - Summary/pre- committal – usually by branch head
 - Post committal – by branch head in certain circumstances, otherwise by PG Leader, or Director in limited circumstances.

What is useful to provide – form and content of information?;

is there a set of criteria applied – good crook / bad crook / nature of conduct / penalty etc?

if seeking indemnity – see chapter 6 PPC

- general rule – to prosecute. May be with view to D1 also becoming a witness.
- is evidence considered necessary to secure conviction of D2, or to fully disclose nature and extent of offending and that evidence not available from other sources
- is accomplice reasonably regarded as significantly less culpable
- is it in overall interests of justice to provide undertaking to prosecute another
- strength of case w/o evidence from prospective indemnified witness
- reliability/credibility of prospective witness

If not indemnified, are other options to minimise penalty:

- Plea – s. 16A(2)(g) Crimes Act 1914
- Past co-operation taken into a/c – s. 16A(2)(h)
- Discount for undertaking to co-operate in future proceedings - s. 21E [nb – may disclose further offending so may later require indemnity for that further offending].
- If fearful of giving evidence, option of post sentence applying for release on licence – see s. 19AP Crimes Act 1914