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COMMERCIAL TRANSACTIONS IN AN  
INSOLVENCY CONTEXT - DEALING WITH  
ASIC & THE CDPP  
16/9/2014 - by Shane Kirne, CDPP



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## INTRODUCTION

The Practice Group Model [post 2/6/14]:

- 6 national Practice Groups
- the Commercial , Financial & Corruption PG is responsible for referrals re:

ASIC matters

Large scale tax fraud [eg Project Wickenby]

Overseas bribery and major corruption

Large scale finance related money laundering

Cartels

CFC Practice Group Leader - S Kirne [Melb. based] .



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## Typical offences re commercial transactions in a commercial insolvency context

Insolvent trading – s. 588G Corp Act

Ponzi schemes – State Crimes Act and s. 184 Corp Act

Managed Investment Schemes - s. 601ED Corp Act and s.184 Corp Act/State offences re losses/gains

No AFSL re financial services business- s. 911A Corp Act.

Falsification of books – s. 1307 Corp Act

False /misl. documents lodged with ASIC – s. 1308 Corp Act

False information to auditor & Ors – s. 1309 Corp Act.

Fail to disclose ppty, fraudulent concealment or removal of ppty/omission in RATA – s. 590 Corp Act

With intent to defraud coy/creditors remove ppty – s. 596

Fail to deliver books to /co-operate with liq'or – s. 530A



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## INVOLVEMENT OF THE CDPP

### Early engagement:

- monthly liaison meetings at regional level in Victoria, NSW, Qld and regularly in other regions, quarterly at national level
- DPP provides pre brief advice/scoping advice

### MOU

- ASIC consults before applying for a civil penalty order
- If ASIC of view sufficient evidence of criminal offence, refers brief to CDPP
- CDPP decides if charges ought be laid – in accordance with Prosecution Policy of the Cwlth ['PPC'] [2 step process]. In doing so, has regard to ASIC's views
- agreement as to prosecution by ASIC of specified regulatory offences



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The Prosecution Policy test – see chapter 2 of PPC

Bare prima facie case insufficient to institute/continue charges [see 2.5].

Need reasonable prospect of securing a conviction [see factors in 2.7] AND

The prosecution is in the public interest [see factors in 2.10].



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## Letters of 'Caution/Warning'

Generally only given in less serious matters where view is taken there is sufficient evidence to prosecute but prosecution not in public interest.

Rare re ASIC matters due to the serious nature of most allegations. Would have regard to factors such as early confession, self reporting, if complied at time brief referred or before charges issued [ eg complied with liquidator requests, filed outstanding documents, delivered property, liquidation complete, company deregistered etc].



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## WHAT CAN ADVISORS DO?

### When approach CDPP?

- if pre referral of brief to CDPP – to ASIC, but ASIC will consult CDPP if charges likely to be laid – eg in settling Agreed Facts
- If post referral of brief to CDPP – to Branch Head of the Commercial, Financial & Corruption Practice Group in region.



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## 'DEALS' TO BE DONE?

If act for prospective witness fearful of self incrimination in statement?

- Consider if likely to incriminate
  - If not, consider option of letter of comfort
  - If may, option of induced statement [with view to later indemnity]
- Investigation agency to consult CDPP – see 6.9 PPC

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### Indemnities under s. 9(6) DPP Act

s9(6) (use/derivative use immunity for evidence in 'specified proceedings – ie offences against Cwlth laws' – answer/disclosure made/document produced will not be used in evidence against the person and is not admissible in civil or criminal proceedings in a federal/State/Territory court, other than re falsity of evidence);

s9(6B) (use/derivative use immunity preventing testimony given in proceedings under State or Territory law from use in proceedings under Commonwealth law),

or

s9(6D) (immunity from prosecution for specified Commonwealth offences, acts or omissions)

Most indemnities are under s9(6) of the DPP Act.

Undertakings will only be provided under section 9(6D) in exceptional circumstances.



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### Indemnities [cont].

Requires Director's approval – ie power not delegated.

Criteria in clause 6 of the PPC

6.4 – general rule is an accomplice should be prosecuted

6.6 – only given if conditions met\*:

- evidence necessary to secure conviction of D or essential to fully disclose nature and scope of offending and not available from other sources; and

- accomplice reasonably regarded as significantly less culpable than D.

6.7 – matters to take into account.

\* Cf Annexure B of PPC re cartel matters



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### Letters of Comfort [LOC] – to witnesses

- a representation that based on the information then available the Office does not propose to prosecute that person.
- not an exercise of any statutory function or power under the DPP Act. It is advice that the person will not be prosecuted because on the information available the person has not committed any offence related to the conduct that is the subject of the prosecution [cf indemnity].
- Inappropriate to issue LOC where there is information that the person has committed an offence involving matters linked with the prosecution. In that case, the ordinary principles and practices for the giving of undertakings should be applied.
- LOC signed by Practice Group leader



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## IF ACT FOR PERSON YET TO BE CHARGED

May submit that client of more value to prosecution as a witness – consider induced statement with view to indemnity. Address factors in cl. 6.7 PPC. May provide ‘can say’ to investigator pre taking of induced statement. Investigator to liaise with CDPP.

Or if client will be charged, may be able to minimise penalty via co-operation, agreement to Statement of Agreed Facts, to waive committal, to accept plea brief, to proceed via straight hand up brief or via direct indictment – expedites process, reduces expense, facilitates administration of justice.

If to plead guilty, potential for ‘rolled up’ charges to be laid.



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## IF CLIENT CHARGED

### Charge negotiation – see 6.14- 6.20 PPC & Website

- encouraged, may occur at any stage of the matter.
- prosecution may initiate.
- charges to bear reasonable r'ship to nature of alleged conduct.
- not agreed to if D maintains innocence.
- P open to roll ups and in some circumstances representative charges.
- may be able to settle Agreed Statement of Facts.
- May be able to schedule some offences – see s.16BA Crimes Act 1914 re federal offences.

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## IF PROSECUTED [cont.]

### Discounts:

- discount for plea – s. 16A(2)(g) Crimes Act 1914
- discount for co-operation – s. 16A(2)(h) CA
- discount for undertaking re future co-operation under s. 21E CA [can be appealed by Director if not fulfilled w/o reasonable excuse]



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## **APPLICATIONS FOR DISCONTINUANCE – WHO CAN DECIDE?**

Summary matters or pre – committal – by Branch Head, or Practice Group Leader if contentious.

Post committal –

- As general rule, by Branch Head where charges remaining or being substituted adequately reflect the nature and extent of the criminal conduct disclosed by the evidence and which will provide the court with an appropriate basis for sentence.

- By Practice Group Leader in every other circumstance except where the matter is politically sensitive or a matter of national significance.

By Director where the matter is:  
politically sensitive;  
a matter of national significance; or