



CDPP

*Australia's Federal Prosecution Service*

PROSECUTION POLICY OF THE COMMONWEALTH  
GUIDELINES FOR THE MAKING OF DECISIONS IN THE PROSECUTION PROCESS



## FOREWORD

In February 1986 the then Attorney-General presented to the Parliament a Statement prepared by the Office of the Director of Public Prosecutions setting out the guidelines to be followed in the making of decisions relating to the prosecution of Commonwealth offences. That document, the *Prosecution Policy of the Commonwealth*, reflected the significant changes to the Commonwealth prosecution process effected by the *Director of Public Prosecutions Act 1983*. The *Prosecution Policy of the Commonwealth* was revised in 1990 and has recently been reviewed and revised again.

Although this revised version of the *Prosecution Policy of the Commonwealth* deals with some new areas, including victims, mental health of the alleged offender and prosecution disclosure, in most respects it represents a refinement of the 1986 and 1990 Statements.

The test in the *Prosecution Policy of the Commonwealth* in relation to the decision to commence or continue a prosecution remains the same and this test is contained in the Prosecution Policies of all the Australian States and Territories.

The *Prosecution Policy of the Commonwealth* will continue to serve two main purposes. The first is to promote consistency in the making of the various decisions which arise in the institution and conduct of prosecutions. The second is to inform the public of the principles upon which the Office of the Director of Public Prosecutions performs its statutory functions.



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## GENERAL PRINCIPLES

The Prosecution Policy of the Commonwealth provides guidelines for the making of decisions regarding the prosecution process.

The Policy is a public document based on the principles of fairness, openness, consistency, accountability and efficiency that the Office of the Director of Public Prosecutions (DPP) seeks to apply in prosecuting offences against the laws of the Commonwealth.

The Policy does not attempt to cover all questions that may arise in the prosecution process and the role of the prosecutor in their determination. It is sufficient to state that throughout a prosecution the prosecutor must conduct himself or herself in a manner which will maintain, promote and defend the interests of justice. In the final analysis the prosecutor is not a servant of government or individuals - he or she is a servant of justice.

It is also important not to lose sight of the fact that prosecutors discharge their responsibilities in an adversarial context and seek to have the prosecution case sustained. Accordingly, while that case must at all times be presented to the Court fairly and justly, the community is entitled to expect that it will also be presented fearlessly, vigorously and skilfully.

The Policy will be reviewed regularly, and any changes will be made public.

## 1. INTRODUCTION

- 1.1 On 5 March 1984 the *Director of Public Prosecutions Act 1983* (the Act) came into operation. It established an Office of the Director of Public Prosecutions (DPP) controlled by the Director of Public Prosecutions (the Director).
- 1.2 The Act effected a number of significant changes to the Commonwealth prosecution process. Perhaps the most significant change is the effective removal of the prosecution process from the political arena by affording the Director an independent status in that process. The Attorney-General as First Law Officer is responsible for the Commonwealth criminal justice system and remains accountable to Parliament for decisions made in the prosecution process, notwithstanding that those decisions are now in fact made by the Director and lawyers of the DPP, subject to any guidelines or directions which may be given by the Attorney-General pursuant to section 8 of the Act. Such guidelines or directions may only be issued after consultation with the Director, and must be published in the Gazette and tabled in each House of the Parliament. Although the power under section 8 may be exercised in relation to particular cases, in his second reading speech to the Director of Public Prosecutions Bill the then Attorney-General, Senator Evans QC, indicated that it would be very unusual for that to be done in relation to a particular case. Directions under section 8 occur very rarely and have not been provided in relation to a particular case.
- 1.3 The Act has also ensured that there is a separation of the investigative and prosecutorial functions in the Commonwealth criminal justice system. Prosecution decisions will be made independently of those who were responsible for the investigation. If a prosecution is commenced by arrest and charge, once it has been referred to the DPP, the decision whether to proceed with that prosecution is made by the DPP.
- 1.4 The DPP seeks to meet standards of fairness, openness, consistency, accountability and efficiency in prosecuting offences against the laws of the Commonwealth and in meeting these standards maintain the confidence of the public it serves.
- 1.5 The DPP has regional offices in New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania and the Northern Territory. Prosecutions in the Australian Capital Territory for offences against Commonwealth law are conducted by DPP Canberra Office.

## 2. THE DECISION TO PROSECUTE

### Criteria governing the decision to prosecute

- 2.1 It has long been recognised that not all criminal offences must automatically result in a criminal prosecution. The resources available for prosecution action are finite and should not be wasted pursuing inappropriate cases, a corollary of which is that the available resources are employed to pursue with appropriate vigour those cases worthy of prosecution.
- 2.2 The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system.
- 2.3 It follows that the objectives previously stated - especially fairness and consistency - are of particular importance. However, fairness need not mean weakness and consistency need not mean rigidity. The criteria for the exercise of this discretion cannot be reduced to something akin to a mathematical formula; indeed it would be undesirable to attempt to do so. The breadth of the factors to be considered in exercising this discretion indicates a candid recognition of the need to tailor general principles to individual cases.
- 2.4 The initial consideration in the exercise of the discretion to prosecute or not prosecute is whether the evidence is sufficient to justify the institution or continuation of a prosecution. A prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the alleged offender.
- 2.5 When deciding whether the evidence is sufficient to justify the institution or continuation of a prosecution the existence of a bare prima facie case is not sufficient to justify the prosecution. Once it is established that there is a prima facie case it is then necessary to give consideration to the prospects of conviction. **A prosecution should not proceed if there is no reasonable prospect of a conviction being secured.** In indictable matters this test presupposes that the jury will act in an impartial manner in accordance with its instructions. This test will not be satisfied if it is considered to be clearly more likely than not that an acquittal will result.
- 2.6 The decision as to whether there is a reasonable prospect of a conviction requires an evaluation of how strong the case is likely to be when presented in Court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact, and the admissibility of any alleged confession or other evidence. The prosecutor should also have regard to any lines of defence which are plainly open to, or have been indicated by, the alleged offender and any other factors which in the view of the prosecutor could affect the likelihood or otherwise of a conviction. This assessment may be a difficult one to make, and of course there can never be an assurance that a prosecution will succeed. Indeed it is inevitable that some will fail. However, application of this test dispassionately, after due deliberation by a person experienced in weighing the available evidence, is the best way of seeking to avoid the risk of prosecuting an innocent person and the useless expenditure of public funds.
- 2.7 When evaluating the evidence regard should be had to the following matters:
  - (a) Are there grounds for believing the evidence might be excluded bearing in mind the principles of admissibility at common law and under statute? For example, prosecutors will wish to satisfy themselves that confession evidence has been properly obtained. The possibility that any evidence might be excluded should be taken into account and, if it is crucial to the case, may substantially affect the decision whether or not to institute or proceed with a prosecution.

- (b) If the case depends in part on admissions by the defendant, are there any grounds for believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the defendant?
- (c) Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the defendant, or may be otherwise unreliable?
- (d) Has a witness a motive for telling less than the whole truth?
- (e) Are there matters which might properly be put to a witness by the defence to attack his or her credibility?
- (f) What impression is the witness likely to make on the arbiter of fact? How is the witness likely to stand up to cross-examination? Does the witness suffer from any physical or mental disability which is likely to affect his or her credibility?
- (g) If there is conflict between eye witnesses, does it go beyond what one would expect and hence materially weaken the case?
- (h) If there is a lack of conflict between eye witnesses, is there anything which causes suspicion that a false story may have been concocted?
- (i) Are all the necessary witnesses available and competent to give evidence, including any who may be abroad?
- (j) Where child witnesses are involved, are they likely to be able to give sworn evidence?
- (k) If identity is likely to be an issue, how cogent and reliable is the evidence of those who purport to identify the defendant?
- (l) Where two or more defendants are charged together, is there a reasonable prospect of the proceedings being severed? If so, is the case sufficiently proved against each defendant should separate trials be ordered?

This list is not exhaustive, and of course the matters to be considered will depend upon the circumstances of each individual case, but it is introduced to indicate that, particularly in borderline cases, the prosecutor must be prepared to look beneath the surface of the statements.

- 2.8 Having satisfied himself or herself that the evidence is sufficient to justify the institution or continuation of a prosecution, the prosecutor must then consider whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued. It is not the rule that all offences brought to the attention of the authorities must be prosecuted.
- 2.9 The factors which can properly be taken into account in deciding whether the public interest requires a prosecution will vary from case to case. While many public interest factors militate against a decision to proceed with a prosecution, there are public interest factors which operate in favour of proceeding with a prosecution (for example, the seriousness of the offence, the need for deterrence). In this regard, generally speaking the more serious the offence the less likely it will be that the public interest will not require that a prosecution be pursued.
- 2.10 Factors which may arise for consideration in determining whether the public interest requires a prosecution include the following non-exhaustive matters:
  - (a) the seriousness or, conversely, the relative triviality of the alleged offence or that it is of a 'technical' nature only;
  - (b) mitigating or aggravating circumstances impacting on the appropriateness or otherwise of the prosecution;
  - (c) the youth, age, intelligence, physical health, mental health or special vulnerability of the alleged offender, a witness or victim;
  - (d) the alleged offender's antecedents and background;
  - (e) the passage of time since the alleged offence when taken into account with the circumstances of the alleged offence and when the offence was discovered;
  - (f) the degree of culpability of the alleged offender in connection with the offence;

- (g) the effect on community harmony and public confidence in the administration of justice;
- (h) the obsolescence or obscurity of the law;
- (i) whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute;
- (j) the availability and efficacy of any alternatives to prosecution;
- (k) the prevalence of the alleged offence and the need for deterrence, both personal and general;
- (l) whether the consequences of any resulting conviction would be unduly harsh and oppressive;
- (m) whether the alleged offence is of considerable public concern;
- (n) any entitlement of the Commonwealth or other person or body to criminal compensation, reparation or forfeiture if prosecution action is taken;
- (o) the attitude of the victim of the alleged offence to a prosecution;
- (p) the actual or potential harm, occasioned to an individual;
- (q) the likely length and expense of a trial;
- (r) whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;
- (s) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the Court;
- (t) whether the alleged offence is triable only on indictment;
- (u) the necessity to maintain public confidence in the rule of law and the administration of justice through the institutions of democratic governance including the Parliament and the Courts;
- (v) the need to give effect to regulatory or punitive imperatives;
- (w) the efficacy, as an alternative to prosecution, of any disciplinary proceedings that have been found proven against the alleged offender to the extent that they encompass the alleged offence; and
- (x) the adequacy in achieving any regulatory or punitive imperatives, of relevant civil penalty proceedings, either pending or completed, and whether these proceedings may result, or have resulted, in the imposition of a financial penalty.

The applicability of and weight to be given to these and other factors will depend on the particular circumstances of each case.

- 2.11 As a matter of practical reality the proper decision in many cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution. Although there may be mitigating factors present in a particular case, often the proper decision will be to proceed with a prosecution and for those factors to be put to the Court at sentence in mitigation. Nevertheless, where the alleged offence is not so serious as plainly to require prosecution the prosecutor should always apply his or her mind to whether the public interest requires a prosecution to be pursued.
- 2.12 In the case of some offences, the legislation provides an enforcement mechanism which is an alternative to prosecution. Examples are the customs prosecution procedure under the *Customs Act 1901* and the administrative penalties that can be levied under various taxation Acts. The fact that a mechanism of this kind is available does not necessarily mean that criminal proceedings should not be instituted. The alleged offence may be of such gravity that prosecution is the appropriate response. However, in accordance with paragraph 2.10(j) above, the availability of an alternative enforcement mechanism is a relevant factor to be taken into account in determining whether the public interest requires a prosecution.
- 2.13 A decision whether or not to prosecute must clearly not be influenced by:
- (a) the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;
  - (b) personal feelings concerning the alleged offender or the victim;
  - (c) possible political advantage, disadvantage or embarrassment to the Government or any political group or party; or



(d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

2.14 A prosecution should only proceed in accordance with this Policy. A matter which does not meet these requirements, for example, a matter which tests the law but which does not have a reasonable prospect of conviction, should not be proceeded with.

### Prosecution of juveniles

2.15 The welfare of the juvenile must be considered when prosecutorial discretion is exercised in relation to an offence alleged to have been committed by a juvenile. Prosecution of a juvenile should always be regarded as a severe step, and generally speaking a much stronger case can be made for methods of disposal which fall short of prosecution unless the seriousness of the alleged offence or the circumstances of the juvenile concerned dictate otherwise. In this regard, ordinarily the public interest will not require the prosecution of a juvenile who is a first offender in circumstances where the alleged offence is not serious.

2.16 In deciding whether or not the public interest warrants the prosecution of a juvenile regard should be had to such of the factors set out in paragraph 2.10 as appear to be relevant, but particularly to:

- (a) the seriousness of the alleged offence;
- (b) the age and apparent maturity and mental capacity of the juvenile;
- (c) the available alternatives to prosecution, such as a caution, and their efficacy;
- (d) the sentencing options available to the relevant Childrens Court if the matter were to be prosecuted;
- (e) the juvenile's family circumstances, particularly whether the parents of the juvenile appear able and prepared to exercise effective discipline and control over the juvenile;
- (f) the juvenile's antecedents, including the circumstances of any previous caution the juvenile may have been given, and whether they are such as to indicate that a less formal disposal of the present matter would be inappropriate; and
- (g) whether a prosecution would be likely to have an unduly harsh effect on the juvenile or be inappropriate, having regard to such matters as the vulnerability of the juvenile and his or her family circumstances.

2.17 Under no circumstances should a juvenile be prosecuted solely to secure access to the welfare powers of the Court.

2.18 The practice of the DPP is for any decision to proceed with a prosecution in respect of a juvenile to be made by a senior lawyer.

### Choice of charges

2.19 In many cases the evidence will disclose an offence against several different laws. Care must therefore be taken to choose a charge or charges which 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.

2.20 In the ordinary course the charge or charges laid or proceeded with will be the most serious disclosed by the evidence. Nevertheless, when account is taken of such matters as the strength of the available evidence, the probable lines of defence to a particular charge, and the considerations set out later in this Policy under Mode of Trial, it may be appropriate to lay or proceed with a charge which is not the most serious revealed by the evidence.

2.21 Under no circumstances should charges be laid with the intention of providing scope for subsequent charge negotiation.

2.22 A decision concerning a choice of charge may arise where the available evidence will support a charge under both a provision of a specific Act and an offence of general application, such as under the Criminal Code. The

decision in relation to which offence should be charged in this circumstance is made in accordance with paragraphs 2.19 and 2.20.

- 2.23 A number of judgments have highlighted the need for restraint in laying conspiracy charges. Whenever possible, substantive charges should be laid. However, there are occasions when a conspiracy charge is the only one which is adequate and appropriate on the available evidence. Where it is proposed to lay or proceed with conspiracy charges against a number of defendants jointly, those responsible for making the necessary decision must guard against the risk of the joint trial being unduly complex or lengthy, or otherwise causing unfairness to defendants.

### Consent to prosecution

- 2.24 A small number of Commonwealth Acts provide that a prosecution for an offence under the Act cannot be commenced or, if commenced, cannot proceed except with the consent of the responsible Minister or some specified officer. There are a variety of reasons for the inclusion of such consent requirements in legislation, but all are basically intended to ensure that prosecutions are not brought in inappropriate circumstances.
- 2.25 The Director has been authorised to give consent to prosecutions for offences under a number of Acts. In appropriate cases the power to give consent has been delegated to senior DPP lawyers where that course has been available.
- 2.26 Often the reason for the requirement for consent is a factor which will ordinarily be taken into account in deciding whether to prosecute. For example, consent may be required to ensure that mitigating factors are taken into account or to prevent prosecutions in trivial matters. In such cases the question of consent is really bound up in the decision whether to prosecute. In some cases the consent provision will have been included as it was not possible to define the offence so precisely that it covered the mischief aimed at and no more. Other cases may involve a use of the criminal law in sensitive or controversial areas, or must take account of important considerations of public policy. In appropriate cases the decision whether to consent to a prosecution is made after consultation with a relevant department or agency.
- 2.27 Mention should be made of those prosecutions which require the consent of a Minister or some officer other than the Director or a DPP lawyer. Although there are unlikely to be any differences of view between the person authorised to give consent and the DPP on a question whether a prosecution is required in the public interest, it is clearly desirable that there be prior consultation with the DPP where there appear to be difficult questions of fact or law involved.

## 3. THE INSTITUTION AND CONDUCT OF COMMONWEALTH PROSECUTIONS

- 3.1 As a general rule any person has the right at common law to institute a prosecution for a breach of the criminal law. That right is recognised in section 13 of the *Crimes Act 1914* (Cth). Nevertheless, while that is the position in law, in practice all but a very small number of Commonwealth prosecutions are instituted by Commonwealth officers.
- 3.2 The decision to initiate investigative action in relation to possible or alleged criminal conduct ordinarily rests with the department or agency responsible for administering the relevant legislation. The DPP is not usually involved in such decisions, although it may be called upon to provide legal advice. The DPP may be consulted where, for example, there is doubt whether alleged misconduct constitutes a breach of Commonwealth law.
- 3.3 The DPP does not investigate allegations that offences have been committed. Investigations are carried out by the Australian Federal Police (AFP) or another Government investigation agency or agency with

investigative capabilities (“investigative agency”). The DPP may provide advice to the investigative agency on legal issues during the investigation.

- 3.4 If as a result of the investigation an offence appears to have been committed the established practice (subject to the exceptions referred to in paragraphs 3.5 and 3.6 below) is for a brief of evidence to be forwarded to the DPP where it will be examined to determine whether a prosecution should be instituted and, if so, on what charge or charges. Although an AFP or other Commonwealth officer has authority to make the initial decision to prosecute, the Director has the responsibility under the Act to determine whether a prosecution, once commenced, should proceed. It is therefore generally desirable wherever practicable that matters be referred to the DPP prior to the institution of a prosecution.
- 3.5 Inevitably cases will arise where it will be necessary and appropriate that a prosecution be instituted by way of arrest and charge without an opportunity for consultation with the DPP. However, in cases where difficult questions of fact or law are likely to arise it is most desirable that there be consultation on those issues before the arrest provided the exigencies of the situation permit. The decision to arrest is a decision of the investigating official.
- 3.6 Most Commonwealth prosecutions are conducted by the DPP. However, there are a few areas where Commonwealth agencies conduct summary prosecutions for straight- forward regulatory offences by arrangement with the DPP. This policy will be observed by those agencies in the conduct of such prosecutions and the DPP will be consulted when difficult questions of fact or law arise.
- 3.7 If an investigation has disclosed sufficient evidence for prosecution but the department or agency concerned considers that the public interest does not require prosecution, or requires some action other than prosecution, the DPP should still be consulted in any matter which involves alleged offences of particular seriousness. The DPP should also be consulted whenever a department or agency has any doubt about what course of action is most appropriate in the public interest. The decision to refer a matter for prosecution is a matter for the investigative agency concerned.
- 3.8 In deciding whether or not a prosecution is to be instituted or continued and, if so, on what charge or charges, any views put forward by the AFP, or the department or agency responsible for the administration of the law in question, are carefully taken into account. Ultimately, however, the decision is to be made by the DPP having regard to the considerations set out earlier.
- 3.9 Pursuant to section 6(1) of the Act the Director may either institute summary or committal proceedings in the Director's own name or carry on such proceedings that have been instituted by another. In virtually all cases the DPP in fact carries on proceedings in which an AFP or other Commonwealth officer is the informant or complainant as the case may be. Only in exceptional cases will summary or committal proceedings be instituted in the Director's own name.
- 3.10 The Act does not in fact require that a prosecution, once commenced, must be carried on by the Director. Nevertheless, it is most unusual for that not to happen in the case of a prosecution instituted by an AFP or other Commonwealth officer, except in the limited circumstances mentioned above. The Director possesses sufficient statutory powers to assume control of prosecutions sought to be carried on by others.
- 3.11 Mention should be made of a prosecution for a Commonwealth offence instituted by a State or Territory public officer. While ordinarily Commonwealth prosecutions should be carried on or, if necessary, taken over by the Director, there are exceptions to that general rule. If a person has been charged with both State/Territory and Commonwealth offences it may be appropriate for the matter to remain with the State/Territory authorities. That will require consideration of:
  - (a) the relative seriousness of the State/Territory and Commonwealth charges;
  - (b) the degree of inconvenience or prejudice to either the defendant or the prosecution if the prosecution is split; and

- (c) if the charges are to proceed on indictment, any arrangements between the Director and the relevant State/Territory authorities making provision for a joint trial on an indictment containing both Commonwealth and State/Territory counts.

There may also be cases where the balance of convenience dictates that a prosecution for a Commonwealth offence should remain with State/Territory authorities notwithstanding that no State/Territory charge is involved, for example, where a prosecution relates to a minor Commonwealth offence brought in a remote locality and it would be impracticable for a DPP lawyer to attend.

## 4. CONTROL OF PROSECUTIONS FOR A COMMONWEALTH OFFENCE

### Introduction

- 4.1 Under the Act the Director is given a supervisory role as to the prosecution of offences against Commonwealth law, and is empowered to intervene **at any stage** of a prosecution for a Commonwealth offence instituted by another. In particular, pursuant to section 9(5) of the Act the Director may take over a proceeding instituted by another person for commitment or for summary conviction. Having taken over the proceeding the Director may continue it as the informant or decline to carry it on further. This provision encapsulates in a statutory form one of the main purposes in establishing the DPP - that the decision whether and how a prosecution proceeds should be made by the DPP independently of those who were responsible for the investigation.

### Discontinuance of a prosecution instituted by a Commonwealth officer

- 4.2 This section is concerned with discontinuing a proceeding for either summary conviction or committal for trial. The discontinuance of a proceeding on indictment is dealt with later in this Policy.
- 4.3 The final decision whether or not a prosecution proceeds rests with the DPP. Consistent with the objective of ensuring that only fit and proper cases are brought before the Courts, the DPP will discontinue a prosecution if appropriate.
- 4.4 Where a prosecution is instituted by an AFP or other Commonwealth officer in circumstances where there was no prior consultation with the DPP, that decision should be reviewed as soon as practicable after the case has been referred to the DPP.
- 4.5 However, it is important that cases should be kept under continuous review whether or not there was consultation with the DPP prior to the institution of the prosecution. New evidence or information may become available which makes it no longer appropriate for the prosecution to proceed.
- 4.6 Whenever the DPP is contemplating discontinuing a prosecution the practice is for the DPP to first consult the AFP or responsible department or agency. In this regard, the independence of the DPP in the prosecution process does not mean that those who investigated the matter should be excluded from the decision-making process. Indeed, where the DPP is contemplating discontinuing a prosecution close liaison is vital to the maintenance of a harmonious relationship between the Office and the relevant Commonwealth agency. Of course, the extent of that consultation will depend on the circumstances of the case in question, and in particular on the reasons why the DPP is contemplating discontinuing the prosecution. If it is considered the available evidence is insufficient, it can be expected the AFP or responsible department or agency will accept the DPP's assessment of the evidence, and the consultation will be largely confined to the prospects of obtaining additional evidence. On the other hand, the AFP or responsible department or agency can legitimately expect to have its views taken into account if discontinuance on public interest grounds is contemplated. The more finely balanced the factors involved,

the greater is the need for discussion. In determining the public interest the views of the victim may also be taken into consideration if those views are available and if it is appropriate to take those views into account.

### Intervention in a private prosecution

- 4.7 In a formal sense all prosecutions in the summary Courts are private prosecutions, even if the informant holds an official position. For the purposes of the following paragraphs a private prosecution means any prosecution where the informant is a private individual as distinct from a police officer or some other official acting in the course of a public office or duty.
- 4.8 The right of a private individual to institute a prosecution for a breach of the law has been said to be "a valuable constitutional safeguard against inertia or partiality on the part of authority" (per Lord Wilberforce in *Gouriet -v- Union of Post Office Workers* [1978] AC 435 at 477). Nevertheless, the right is open to abuse and to the intrusion of improper personal or other motives. Further, there may be considerations of public policy why a private prosecution, although instituted in good faith, should not proceed, or at the least should not be allowed to remain in private hands. The power under section 9(5) of the Act therefore constitutes an important safeguard against resort to this right in what may be broadly described as inappropriate circumstances.
- 4.9 The question whether the power under section 9(5) should be exercised to take over a private prosecution will usually arise at the instance of one or other of the parties to the prosecution, although clearly the Director may determine of his or her own motion that a private prosecution should not be allowed to proceed. Alternatively, some public authority, such as a government department or agency, may be concerned that to proceed with the prosecution would be contrary to the public interest and refer the matter to the Director.
- 4.10 Where a question arises whether the power under section 9(5) should be exercised to intervene in a private prosecution, and the private prosecutor has indicated that he or she is opposed to such a course, the private prosecutor will be permitted to retain conduct of the prosecution unless one or more of the following applies:
- (a) there is insufficient evidence to justify the continuation of the prosecution, that is to say, there is no reasonable prospect of a conviction being secured on the available evidence;
  - (b) there are reasonable grounds for suspecting that the decision to prosecute was actuated by improper personal or other motives, or otherwise constitutes an abuse of the prosecution process such that, even if the prosecution were to proceed it would not be appropriate to allow it to remain in the hands of the private prosecutor;
  - (c) to proceed with the prosecution would be contrary to the public interest - law enforcement is necessarily a discretionary process, and sometimes it is appropriate for subjective considerations of public policy, such as the preservation of order or the maintenance of international relations, to take precedence over strict law enforcement considerations;
  - (d) the nature of the alleged offence, or the issues to be determined, are such that, even if the prosecution were to proceed, it would not be in the interests of justice for the prosecution to remain in private hands;
  - (e) the nature of the charges do not disclose an offence under any Commonwealth law; or
  - (f) the Court in which the private prosecutor has commenced proceedings has no jurisdiction.
- 4.11 A private individual may institute a prosecution in circumstances where he or she disagrees with a previous decision of the DPP. If, upon reviewing the case, it is considered the decision not to proceed with a prosecution was the proper one in all the circumstances, the appropriate course may be to take over the private prosecution with a view to discontinuing it.
- 4.12 In some cases the reason for intervening in the private prosecution will necessarily result in its discontinuance once the Director has assumed responsibility for it. In this regard, once the decision is made

to take over responsibility for a private prosecution the same criteria should be applied at all stages of the proceeding as would be applied in any other prosecution being conducted by the DPP.

- 4.13 If it is considered that it may be appropriate to intervene in a private prosecution, it may be necessary for the DPP to request police assistance with enquiries before a final decision can be made whether or not to do so, and if so, whether or not to continue the prosecution. In addition, pursuant to section 12 of the Act, the person who instituted or is carrying on the private prosecution can be required to furnish to the Director a full report of the circumstances of the matter the subject of the proceeding together with other relevant information or material.

## 5. VICTIMS OF CRIME

- 5.1 It is important in all prosecution action that victims are treated with respect for their dignity.
- 5.2 In the context of this Policy, a victim of crime is an identified individual who has suffered harm as the direct result of an offence or offences committed against Commonwealth law or prosecuted by Commonwealth authorities. 'Harm' includes physical or mental injury, emotional suffering or economic loss.
- 5.3 This Policy provides for the views of any victims where those views are available, and where it is appropriate, to be considered and taken into account when deciding whether it is in the public interest to:
- (a) commence a prosecution;
  - (b) discontinue a prosecution;
  - (c) agree to a plea negotiation; or
  - (d) decline to proceed with a prosecution after a committal.
- 5.4 The DPP will also comply with the DPP's *Victims of Crime Policy* in its dealings with victims.

## 6. SOME OTHER DECISIONS IN THE PROSECUTION PROCESS

### Undertakings under section 9(6), 9(6B) or 9(6D) of the DPP Act

- 6.1 This section is concerned with the broad considerations involved in deciding whether to give an accomplice an undertaking under the Act in order to secure that person's testimony for the prosecution.
- 6.2 A decision whether to call an accomplice to give evidence for the prosecution frequently presents conflicting considerations calling for the exercise of careful judgment in the light of all the available evidence. Inevitably, however, there will be instances where there is a weakness in the prosecution evidence that makes it desirable, or even imperative, to call an accomplice for the prosecution if that accomplice appears to be the only available source of the evidence needed to strengthen the weakness.
- 6.3 In conjunction with the question whether to call an accomplice the question may arise whether that accomplice should also be prosecuted. In this regard, unless the accomplice has been dealt with in respect of his or her own participation in the criminal activity the subject of the charge against the defendant, he or she will be in a position to claim the privilege against self-incrimination in respect of the very matter the prosecution wishes to adduce into evidence. Where, however, an accomplice has been given an undertaking under the Act that undertaking will override what would otherwise be an allowable claim of privilege.
- 6.4 As a general rule an accomplice should be prosecuted irrespective of whether he or she is to be called as a witness, subject of course to the usual evidentiary and public interest considerations being satisfied. Upon pleading guilty the accomplice who is prepared to co-operate in the prosecution of another can expect to receive a reduction in the sentence that would otherwise have been appropriate. Such a reduction may be substantial. However, this course may not be practicable in all cases.

- 6.5 In principle it is desirable that the criminal justice system should operate without the need to grant any concessions to persons who participated in alleged offences in order to secure their evidence in the prosecution of others (for example, by granting them immunity from prosecution). However, it has long been recognised that in some cases granting an immunity from prosecution may be appropriate in the interests of justice.
- 6.6 An undertaking under the Act will only be given<sup>1</sup> provided the following conditions are met:
- (a) the evidence that the accomplice can give is considered necessary to secure the conviction of the defendant or is essential to fully disclose the nature and scope of the offending and that evidence is not available from other sources. In this regard, the stronger the case without the evidence the accomplice can give, the less appropriate it will be to grant an undertaking to the accomplice; and
  - (b) the accomplice can reasonably be regarded as significantly less culpable than the defendant.
- 6.7 The central issue in deciding whether to give an accomplice an undertaking under the Act is whether it is in the overall interests of justice that the opportunity to prosecute the accomplice in respect of his or her own involvement in the crime in question should be foregone in order to secure that person's testimony in the prosecution of another. In determining where the balance lies, account should be taken of the following matters:
- (a) the degree of involvement of the accomplice in the criminal activity in question compared with that of the defendant;
  - (b) the strength of the prosecution evidence against the defendant without the evidence it is expected the accomplice can give and, if some charge or charges could be established against the defendant without the accomplice's evidence, the extent to which those charges would reflect the defendant's criminality;
  - (c) the extent to which the prosecution's evidence is likely to be strengthened if the accomplice testifies - apart from taking into account such matters as the availability of corroborative evidence, and the weight that the arbiter of fact is likely to give to the accomplice's testimony, it will also be necessary to consider the likely effect on the prosecution case if the accomplice does not come up to proof;
  - (d) the need to assess whether the prosecution's evidence is likely to be strengthened if an accomplice testifies, which requires the prosecution to consider a range of factors, including examination of corroborative evidence; assessment of the weight the fact finder will place on the evidence; and an assessment of whether the evidence itself is cogent, complete and truthful;
  - (e) the likelihood of any weakness in the prosecution case being strengthened other than by relying on the evidence the accomplice can give (for example, the likelihood of further investigations disclosing sufficient independent evidence to remedy the weakness);
  - (f) whether there is or is likely to be sufficient admissible evidence to substantiate charges against the accomplice, and whether it would be in the public interest that the accomplice be prosecuted but for his or her preparedness to testify for the prosecution if given an undertaking under the Act; and
  - (g) whether, if the accomplice were to be prosecuted and then testify, there is a real basis for believing that his or her personal safety would be at risk while serving any term of imprisonment.
- 6.8 Where an accomplice receives any concession from the prosecution in order to secure his or her evidence, for example, whether as to choice of charge, or the grant of an undertaking under the Act, the terms of the agreement or understanding between the prosecution and the accomplice should be disclosed to the Court and to the defence.
- 6.9 In the course of an investigation the investigative agency may identify a participant in the criminal activity under investigation as a person who is likely to be of more value as a prosecution witness than as a defendant. Thereafter the investigation may be directed to constructing a case against the remaining participants based on the evidence it is expected this person will give. Unless for some reason it is not practicable to do so, the investigative agency should always seek advice from the DPP as to the

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<sup>1</sup> This general position is subject to some qualifications as set out in Annexures B, D and E.  
PROSECUTION POLICY OF THE COMMONWEALTH



appropriateness of such a course. This will minimise the potential for an otherwise meritorious prosecution being abandoned as a consequence of the Director deciding that it would not be in the interests of justice to grant the accomplice an undertaking under the Act in order to secure his or her testimony.

- 6.10 Annexure B to this Policy and the Memorandum of Understanding between the Australian Competition and Consumer Commission and DPP make provision with respect to the circumstances in which the DPP will consider applications for immunity in respect of the offences in sections 45AF and 45AG of the Competition and Consumer Act 2010 (including a relevant ancillary liability offence). Annexure B and the Memorandum of Understanding deal with applications for immunity by the first participant in the cartel activity to seek immunity. Subsequent applications for immunity will be dealt with in accordance with this Policy.
- 6.11 Annexure D to this Policy makes provision with respect to the circumstances in which the DPP will consider immunity in respect of an accomplice who has been prosecuted and where it is not proposed that person be prosecuted further, and also deals with the use of Section 128 of the *Uniform Evidence Act* (or a statutory equivalent).
- 6.12 Annexure E to this Policy makes provision with respect to the circumstances in which the DPP will consider applications for immunity in respect of offences in Part 7.10 of the *Corporations Act 2001* (and related and ancillary offences). Annexure E deals with applications for immunity by the first participant in the offending conduct to seek immunity. Subsequent applications for immunity will be dealt with in accordance with this Policy.

### Mode of trial

- 6.13 Where an indictable offence can be determined by a Court of summary jurisdiction the prosecution plays a major role in the decision as to mode of trial; indeed, under some Acts the request or the consent of the prosecution is a pre-condition to summary disposition.
- 6.14 In determining whether or not a case is appropriate for trial on indictment regard should be had to:
- (a) the nature of the case, and whether the circumstances make the alleged offence one of a serious character;
  - (b) any implied legislative preference for a particular mode of trial;
  - (c) the adequacy of sentencing options and available penalties if the case were determined summarily;
  - (d) any delay, cost and adverse effect upon witnesses likely to be occasioned by proceeding on indictment;
  - (e) in situations where a particular type of criminal activity is widespread, the desirability of a speedy resolution of some prosecutions by proceeding summarily in order to deter similar breaches;
  - (f) the greater publicity, and accordingly the greater deterrent effect, of a conviction obtained on indictment;

as well as such of the criteria relevant to the decision whether to prosecute as appear to be significant.

- 6.15 The prosecution's attitude on the question of mode of trial should be made and communicated to the defendant and the Court at the earliest possible stage.

### Charge negotiation

- 6.16 Charge negotiation involves negotiations between the defence and the prosecution in relation to the charges to be proceeded with. Such negotiations may result in the defendant pleading guilty to fewer than all of the charges he or she is facing, or to a lesser charge or charges, with the remaining charges either not being proceeded with or taken into account without proceeding to conviction.
- 6.17 The considerations in this section in relation to charge negotiations should be read with reference to the general principle in paragraph 2.21 that under no circumstances should charges be laid with the intention of providing scope for subsequent charge negotiations.



6.18 Charge negotiation is to be distinguished from private consultations with the trial judge as to the sentence the judge would be likely to impose in the event of the defendant pleading guilty to a criminal charge. As to such consultations the Full Court of the Supreme Court of Victoria in *R -v- Marshall* [1981] VR 725 at 732 said:

Anything which suggests an arrangement in private between a judge and counsel in relation to the plea to be made or the sentence to be imposed must be studiously avoided. It is objectionable because it does not take place in public, it excludes the person most vitally concerned, namely the defendant, it is embarrassing to the Crown and it puts the judge in a false position which can only serve to weaken public confidence in the administration of justice.

6.19 Negotiations between the defence and the prosecution are to be encouraged, may occur at any stage of the progress of a matter through the Courts and may be initiated by the prosecution. Negotiations between defence and the prosecution as to charge or charges and plea can be consistent with the requirements of justice subject to the following constraints:

- (i) the charges to be proceeded with should bear a reasonable relationship to the nature of the criminal conduct of the defendant;
- (ii) those charges provide an adequate basis for an appropriate sentence in all the circumstances of the case; and
- (iii) there is evidence to support the charges.

6.20 Any decision whether or not to agree to a charge negotiation proposal must take into account all the circumstances of the case and other relevant considerations including:

- (a) whether the defendant is willing to co-operate in the investigation or prosecution of others, or the extent to which the defendant has done so;
- (b) whether the sentence that is likely to be imposed if the charges are varied as proposed (taking into account such matters as whether the defendant is already serving a term of imprisonment) would be appropriate for the criminal conduct involved;
- (c) the desirability of prompt and certain dispatch of the case;
- (d) the defendant's antecedents;
- (e) the strength of the prosecution case;
- (f) the likelihood of adverse consequences to witnesses;
- (g) whether it will save a witness, particularly a victim or other vulnerable witness from the stress of testifying in a trial;
- (h) in cases where there has been a financial loss to the Commonwealth or any person, whether the defendant has made restitution or arrangements for restitution;
- (i) the need to avoid delay in the dispatch of other pending cases;
- (j) the time and expense involved in a trial and any appeal proceedings;
- (k) the views of the referring department or agency; and
- (l) the views of the victim, where those views are available and if it is appropriate to take those views into account.

6.21 The prosecution should not agree to a charge negotiation proposal initiated by the defence if the defendant continues to assert his or her innocence with respect to a charge or charges to which the defendant has offered to plead guilty.

6.22 Where the relevant legislation permits an indictable offence to be dealt with summarily, a proposal by the defence that a plea be accepted to a lesser number of charges or a lesser charge or charges may involve a request that the proposed charges be dealt with summarily and that the prosecution either consent to or not oppose (as the legislation requires) summary disposition of the matter. Alternatively, the defence may indicate that the defendant will plead guilty to an existing charge or charges if the matter is dealt with summarily. While the decision of the prosecution in respect of such a request should be determined having

regard to the above considerations, reference should also be made to the considerations set out earlier under Mode of Trial.

- 6.23 A proposal by the defence that a plea be accepted to a lesser number of charges or a lesser charge or charges may include a request that the prosecution not oppose a defence submission to the Court at sentence that the penalty fall within a nominated range. Alternatively, the defence may indicate that the defendant will plead guilty to an existing charge or charges if the prosecution will not oppose such a submission. The prosecution may consider agreeing to such a request provided the penalty or range of sentence nominated is considered to be within acceptable limits to a proper exercise of the sentencing discretion.

### **Declining to proceed further after commitment**

- 6.24 After the defendant has been committed for trial the question may arise, either on the initiative of the DPP lawyer involved in the prosecution or as a result of an application by the defence, whether the defendant should be indicted, or, if an indictment has already been presented, whether the trial on that indictment should proceed. In this regard, pursuant to section 9(4) of the Act the Director may decline to proceed further in the prosecution of a person under commitment or who has been indicted.
- 6.25 Notwithstanding that a committal order has been obtained, events may have occurred after the committal that make it no longer appropriate for the prosecution to proceed. Alternatively, the strength of the prosecution case may have to be reassessed having regard to the course of the committal proceedings. Where a question arises as to the exercise of the power under section 9(4), it is determined on the basis of the criteria governing the decision to prosecute set out earlier in this Policy. In the normal course the AFP or relevant department or agency is consulted before any decision is made. In determining the public interest the views of the victim may also be taken into consideration if those views are available and if it is appropriate to take those views into account.
- 6.26 A defence application that the Director decline to proceed further in the prosecution may be based on the fact that the offence charged is a relatively minor one and does not warrant the time and expense involved in a trial on indictment. Such an application is most unlikely to receive favourable consideration if the alleged offence is one that could have been determined summarily but the defendant refused to consent to the matter being dealt with in that way.
- 6.27 Where a decision has been made not to proceed with a trial on indictment, that decision will not be reversed unless:
- (a) significant fresh evidence has been produced that was not previously available for consideration;
  - (b) the decision was obtained by fraud; or
  - (c) the decision was based on a mistake of fact;
- and in all the circumstances it is in the interests of justice that the decision be reversed.
- 6.28 Where a trial has ended with the disagreement of the jury consideration should always be given to whether the circumstances require a retrial, and whether a second jury is likely to be in a better position to reach a verdict. The seriousness of the alleged offence and the cost to the community and the defendant should be taken into account. If it is decided to proceed with a retrial and the second jury also disagrees, it will only be in rare and exceptional circumstances that the defendant will be required to stand trial a third time.
- 6.29 Special mention should be made of no bill applications addressed to the Attorney- General. Shortly after the establishment of the Office the then Attorney-General indicated that such applications should be determined by the Director and further stated that he would consider such applications addressed to him following an earlier refusal by the Director only in exceptional circumstances, and only after consultation with the Director. This practice has been invariably followed.

## Ex-officio indictment

- 6.30 Pursuant to section 6(2D) of the Act the Director "may institute a prosecution of a person for an indictable offence against the laws of the Commonwealth in respect of which the person has not been examined or committed for trial".
- 6.31 The holding of committal proceedings, and the committal of the defendant for trial, are not by law obligatory steps in the prosecution of an indictable offence. For example, committal hearings are no longer held in Tasmania and Western Australia, although the prosecution in those States is required to meet stringent pre-trial disclosure obligations. In other jurisdictions, committals have taken on a less substantial, paper form. Nevertheless in practice almost all prosecutions on indictment are preceded by a committal of the defendant for trial. The following paragraphs set out the criteria applied by the DPP in determining whether the circumstances of a particular case are such as to justify a departure from the usual course.
- 6.32 A decision to indict in the absence of prior committal proceedings will only be justified if any disadvantage to the defendant that may thereby ensue will nevertheless not be such as to deny the defendant a fair trial. Further, such a decision will only be justified if there are strong and powerful grounds for so doing. Needless to say, an ex-officio indictment should not be presented in the absence of committal proceedings unless the usual evidentiary and public interest considerations are satisfied.
- 6.33 It should be noted that where an ex-officio indictment is presented in the absence of committal proceedings the defendant will be provided with disclosure in accordance with the Statement on Prosecution Disclosure.
- 6.34 On the other hand, a decision to indict notwithstanding the defendant was discharged at the committal proceedings will not constitute as great a departure from accepted practice. The result of committal proceedings has never been regarded as binding on those who have the authority to indict. The magistrate may have erred in discharging the defendant, and in such a case the filing of an ex-officio indictment may be the only feasible way that that error can be corrected. Nevertheless, a decision to indict following a discharge at the committal proceedings should never be taken lightly. An ex-officio indictment should not be presented in such cases unless it can be confidently asserted that the magistrate erred in declining to commit, or fresh evidence has since become available and it can be confidently asserted that, if that evidence had been available at the time of the committal proceedings, the magistrate would have committed the defendant for trial.

## Prosecution appeals against sentence

- 6.35 The prosecution right to appeal against sentence should be exercised with appropriate restraint. In deciding whether to appeal, consideration is to be given as to whether there is a reasonable prospect that the appeal will be successful. Factors which may be considered include whether:
- (a) the sentence is manifestly inadequate;
  - (b) the sentence reveals an inconsistency in sentencing standards;
  - (c) the sentence proceeded on the basis of a material error of law or fact requiring appellate correction;
  - (d) the sentence is substantially and unnecessarily inconsistent with other relevant sentences;
  - (e) an appeal to a Court of Appeal would enable the Court to lay down some general principles for the governance and guidance of sentencers;
  - (f) an appeal will enable the Court to establish and maintain adequate standards of punishment for crime;
  - (g) an appeal will ensure, so far as the subject matter permits, uniformity in sentencing; and whether
  - (h) an appeal will enable an appellate Court to correct an error of legal principle.
- 6.36 A prosecution appeal against sentence should also be instituted promptly, even where no time limit is imposed by the relevant legislation. Undue delay by the prosecution in the institution of an appeal may render oppressive the substitution of an increased sentence, and the appeal Courts have indicated on numerous occasions that in such cases they will not intervene although the prosecution's appeal is otherwise meritorious.

## **7. MENTAL HEALTH OF THE ALLEGED OFFENDER**

- 7.1 Issues concerning the mental health of the alleged offender may arise in considering the commencement and conduct of a prosecution. This Policy provides that in determining whether the public interest requires a prosecution, factors which may arise for consideration include the intelligence, mental health or special vulnerability of the alleged offender. Where these factors arise for consideration, other factors that may also arise for consideration in determining whether the public interest requires a prosecution include the seriousness or relative triviality of the alleged offence, the need for general and/or specific deterrence and whether the alleged offence is of considerable public concern.
- 7.2 The issue of unfitness to be tried is usually raised with the Court by the defence. However, the issue can also be raised by the defendant personally or the prosecution. In the unusual circumstances where there is an obvious fitness issue and it is not raised by the defence then it should be raised by the prosecution.

## **8. PROSECUTION DISCLOSURE**

- 8.1 The Statement on Prosecution Disclosure is a publicly available document produced by the DPP concerning prosecution disclosure. The requirements imposed by the Statement on Prosecution Disclosure will be complied with, subject to any laws which are applicable in the prosecution of Commonwealth offences, by the DPP in conjunction with investigative agencies in prosecutions conducted by the DPP.

## ANNEXURES

### **Annexure A: Note on prosecutions for the bribery of foreign public officials under Division 70 of the Criminal Code**

At paragraph 2.13 the *Prosecution Policy of the Commonwealth* states that a decision whether or not to prosecute must clearly not be influenced by:

- (a) the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;
- (b) personal feelings concerning the alleged offender or the victim;
- (c) possible political advantage or disadvantage to the Government or any political group or party; or
- (d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

The Director of Public Prosecutions has issued the following to prosecutors to clarify this in relation to prosecutions for foreign bribery.

#### **1. Assessing matters involving allegations of foreign bribery contrary to section 70.2 of the Criminal Code**

When deciding whether to prosecute a person for bribing a foreign public official under Division 70 of the Criminal Code, the prosecutor must not be influenced by:

- considerations of national economic interest;
- the potential effect upon relations with another State; or
- the identity of the natural or legal persons involved.

This is because the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which Australia implemented in 1999, provides at Article 5 that:

“Article 5 – Enforcement

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.”

## Annexure B: Immunity from Prosecution in Serious Cartel Offences

### 1. Preface

- 1.1 This document outlines the policy of the office of the Commonwealth Director of Public Prosecutions (DPP) in considering an application for immunity from prosecution by a party implicated in a serious cartel offence who meets the criteria for conditional immunity under the *ACCC immunity and cooperation policy for cartel conduct* (Immunity and Cooperation Policy). A serious cartel offence refers to the offences in sections 45AF and 45AG of the *Competition and Consumer Act 2010* (CCA) and the corresponding offences in the State and Territory Competition Codes.
- 1.2 This policy is based on a recognition by Government that, in respect of serious cartel offences, it is in the public interest to offer immunity from prosecution to a party who is willing to be the first to break ranks with other cartel participants by exposing the illegal conduct and fully cooperating with the Australian Competition and Consumer Commission (ACCC) and the DPP.
- 1.3 Following a recommendation from the ACCC, the DPP will decide whether to grant conditional immunity from prosecution by applying the same criteria as contained in the ACCC's Immunity and Cooperation Policy. The decision of the DPP whether to grant conditional criminal immunity will be generally communicated to the applicant at the same time as the ACCC's decision whether to grant conditional civil immunity.
- 1.4 Where the DPP considers that the applicant meets the criteria set out in this Annexure, as a first step the DPP will ordinarily provide a letter of comfort to the applicant. Prior to the commencement of any criminal prosecution, the Director will determine whether to grant a written undertaking under section 9(6D) of the *Director of Public Prosecutions Act 1983* (DPP Act) granting criminal immunity in respect of the disclosed cartel conduct. Both the letter of comfort and any subsequent undertaking will be subject to conditions and on-going obligations on the applicant throughout the period of the ACCC investigation until the conclusion of any criminal proceedings against other cartel participants.
- 1.5 This policy is to be read in conjunction with the Memorandum of Understanding between the DPP and the ACCC regarding Serious Cartel Conduct.

### 2. Roles of the ACCC and the DPP

- 2.1 The DPP is an independent statutory agency established under the DPP Act and is responsible for prosecuting offences against Commonwealth laws.
- 2.2 The DPP is not an investigative agency and does not investigate criminal offences. The decision to investigate an alleged offence under the CCA and refer the matter to the DPP for prosecution is made by the ACCC. The DPP may however provide advice to the ACCC on legal and related issues during investigations.
- 2.3 The ACCC is an independent Commonwealth statutory authority established under the CCA. The ACCC is responsible for investigating alleged contraventions of the CCA including contraventions of the serious cartel provisions. Where it is alleged that a party has contravened a civil provision of the CCA the ACCC is also responsible for deciding whether to commence court proceedings.
- 2.4 Applications for immunity are made to the ACCC. Subject to the conditions set out in paragraph 3.1 below, the ACCC may make a recommendation to the DPP to grant immunity from prosecution to a party implicated in a serious cartel offence who meets the criteria for conditional immunity under the ACCC's Immunity and Cooperation Policy.
- 2.5 Only the Director can grant a party immunity from prosecution. A letter of comfort issued by the DPP or an undertaking provided by the Director under section 9(6D) of the DPP Act can only operate in accordance with its terms and the DPP Act.

### 3. Obtaining Immunity

#### *ACCC's criteria for conditional immunity*

- 3.1 The ACCC's Immunity and Cooperation Policy outlines a number of mandatory conditions that must be satisfied before conditional immunity will be granted, namely that the corporation or individual seeking immunity:
- (i) admits it is engaging in, or has engaged in, cartel conduct, whether as a principal or in an ancillary capacity, and that the conduct may contravene the CCA
  - (ii) is the first party to apply for immunity in respect of the cartel under the ACCC's Immunity and Cooperation Policy;
  - (iii) has not coerced others to participate in the cartel;
  - (iv) has either ceased involvement in the cartel or undertakes to the ACCC that they will cease their involvement in the cartel;
  - (v) (for corporations only) makes admissions that are a truly corporate act (as opposed to isolated confessions of individual representatives);
  - (vi) has provided full, frank and truthful disclosure, and has cooperated fully and expeditiously while making the application, including taking all reasonable steps to procure the assistance and cooperation of witnesses and to provide sufficient evidence to substantiate its admissions in paragraph (i) above, and agrees to continue to do so on a proactive basis throughout the ACCC's investigation and any ensuing court proceedings;
  - (vii) has entered into a cooperation agreement, and
  - (viii) has maintained, and agrees to continue to maintain, confidentiality regarding its status as an immunity applicant, details of the investigation and any ensuing civil or criminal proceedings unless otherwise required by law or with the written consent of the ACCC.
- 3.2 Generally, the ACCC will not grant immunity if, at the time an application is received, the ACCC is already in possession of evidence that is likely to establish at least one contravention of the CCA (whether civil or criminal), arising from the cartel conduct.
- 3.3 The party seeking immunity must satisfy the above conditions for conditional immunity to remain in place and to be eligible for final immunity.

#### *DPP's criteria for granting immunity from prosecution*

- 3.4 Where the ACCC is of the view that a party satisfies the conditions for conditional immunity it may make a recommendation to the DPP that immunity from prosecution be granted to that party. This recommendation will provide as much information as possible in relation to the criteria listed in paragraph 3.1.
- 3.5 The DPP will exercise an independent discretion when considering a recommendation by the ACCC.
- 3.6 Where the ACCC advises the DPP that a party meets the ACCC's criteria for conditional immunity contained in the ACCC's Immunity and Cooperation Policy, and the CDPP is so satisfied, a two-step process will apply. First, the DPP will issue the party with a "letter of comfort". The letter of comfort will be to the effect that the Director intends to grant criminal immunity to the party in relation to the disclosed cartel conduct in the event that a prosecution is commenced against anyone in relation to that cartel conduct. Second, prior to the commencement of any prosecution, the Director will determine whether to grant a written undertaking pursuant to section 9(6D) of the DPP Act granting criminal immunity in respect of the disclosed cartel conduct.
- 3.7 Both the letter of comfort and any subsequent undertaking under the DPP Act will be subject to the party complying with certain conditions throughout the period of the ACCC investigation and until the conclusion of any criminal proceedings against other cartel participants. Those conditions will be specified in the relevant letter of comfort or undertaking under the DPP Act and will include that:

- 3.7.1 the party must comply with a cooperation agreement entered into with the ACCC, including by providing on-going full cooperation during the ACCC investigation; and in respect of an individual that:
- 3.7.2 they will appear as a witness for the prosecution as and where requested in any proceedings against the other cartel participants; and
- 3.7.3 any evidence they are called upon to give will be given truthfully, accurately and withholding nothing of relevance.
- 3.8 The decision of the DPP whether to issue a letter of comfort will be generally communicated to the party at the same time as the ACCC's decision whether to grant conditional immunity.
- 3.9 Any undertaking provided by the Director under section 9(6D) of the DPP Act will remain in place unless revoked and therefore an undertaking granting final immunity is not required.

#### **4. Derivative immunity**

- 4.1 The ACCC's Immunity and Cooperation Policy provides that where a corporate party qualifies for conditional immunity by the ACCC, it may seek derivative immunity, in the same form as its conditional immunity, for all related corporate entities and/or current and former directors, officers and employees who request immunity, admit their involvement in the cartel conduct, and who undertake to and do provide full disclosure and co-operation to the ACCC.
- 4.2 Similarly, if a corporate party qualifies for immunity from prosecution by the DPP, it may seek derivative immunity, in the same form as its immunity from prosecution, for all related corporate entities and/or current and former directors, officers and employees who request immunity, admit their involvement in the cartel conduct, and who undertake to and do provide full disclosure and co-operation to the ACCC and the DPP.
- 4.3 Where the ACCC recommends to the DPP that a corporate party should be granted immunity from prosecution the ACCC will also make a recommendation to the DPP in relation to granting immunity from prosecution to parties who meet the criteria for derivative immunity contained in the ACCC's Immunity and Cooperation Policy. This recommendation will set out all relevant information in relation to a grant of immunity for these parties. The DPP will exercise an independent discretion when deciding whether to grant immunity pursuant to the criteria for derivative immunity.
- 4.4 Where the ACCC advises the DPP that a party meets the criteria for derivative immunity contained in the ACCC's Immunity and Cooperation Policy and the CDPP is so satisfied, as a first step it will ordinarily provide a letter of comfort to the party. Prior to the commencement of any criminal prosecution, the Director will determine whether to grant a written undertaking pursuant to section 9(6D) of the DPP Act granting criminal immunity subject to fulfilment of ongoing obligations and conditions.
- 4.5 The DPP's decision to issue a letter of comfort will be generally communicated to the party at the same time as the ACCC's decision whether to grant conditional derivative immunity.

#### **5. Revocation of Immunity**

- 5.1 The DPP may withdraw a letter of comfort or the Director may revoke a written undertaking provided under section 9(6D) of the DPP Act at any time during the investigation and prior to the conclusion of criminal proceedings if:
  - 5.1.1 the ACCC makes a recommendation to withdraw the letter of comfort or revoke the undertaking, and the DPP or Director, exercising an independent discretion, agrees with that recommendation; or
  - 5.1.2 the DPP or Director believes on reasonable grounds that:
    - (i) the recipient of the letter of comfort or undertaking has provided information to the DPP that is false or misleading in a relevant matter; and/or



- (ii) the recipient of the letter of comfort or undertaking has not fulfilled any condition(s) of the letter of comfort or undertaking.

5.2 The DPP will notify the recipient in writing if a letter of comfort is to be withdrawn or an undertaking is to be revoked, and the recipient will be afforded a reasonable opportunity to make representations.

## **6. Disclosure issues**

6.1 The DPP has a published policy in relation to the prosecution's obligation to disclose relevant material to the defendant. Reference should be made to that policy.

6.2 Where a party is granted immunity from prosecution, the terms of the undertaking between the DPP and the party will be disclosed to the court in accordance with the *Disclosure Policy of the Commonwealth*.

## **7. Prosecution Policy of the Commonwealth**

7.1 Items 1 to 6 of this Annexure only apply to parties who are first to disclose cartel conduct (i.e. "first in the door" applicants) and who, in all other respects, meet the criteria for conditional immunity under the ACCC's Immunity and Cooperation Policy. A party that is not eligible for conditional immunity under the ACCC's Immunity and Cooperation Policy (for example, a party cooperating under Section H of the ACCC's Immunity and Cooperation Policy) may nevertheless apply for an undertaking under section 9(6D) of the DPP Act but the application will be determined by the Director in accordance with Chapter 6 of the *Prosecution Policy of the Commonwealth*.

Sarah McNaughton SC  
Commonwealth Director of Public Prosecutions August 2019

## Annexure C: Work Health and Safety Undertakings

Part 11 of the *Work Health and Safety Act* provides for WHS undertakings that may be accepted by Comcare. Section 222 provides:

- (1) Subject to this section, no proceedings for a contravention or alleged contravention of this Act may be brought against a person if a WHS undertaking is in effect in relation to that contravention.
- (2) No proceedings may be brought for a contravention or alleged contravention of the Act against a person who has made a WHS undertaking in relation to that contravention and has completely discharged the WHS undertaking.
- (3) The regulator may accept a WHS undertaking in relation to a contravention or alleged contravention before proceedings in relation to that contravention have been finalised.
- (4) If the regulator accepts a WHS undertaking before the proceedings are finalised, the regulator must take all reasonable steps to have the proceedings discontinued as soon as possible.

When a proposed WHS undertaking is accepted before a prosecution is finalised, Comcare must take all reasonable steps to have the proceedings discontinued. Accordingly, where Comcare decides to accept a WHS undertaking and a prosecution is being conducted in relation to the matter, they will request, in writing, that the Director discontinue the prosecution. In considering whether to discontinue the prosecution on public interest grounds, the Director will have particular regard to following factors in paragraph 2.10:

- (j) the availability and efficacy of any alternatives to prosecution; and
- (v) the need to give effect to regulatory or punitive imperatives

\*Note: Annexure C “Work Health & Safety Undertakings” was issued 1 January 2012.

## Annexure D - Note on the provision of Undertakings under section 9(6), 9(6B) or 9(6D) of the DPP Act

Paragraph 6.1 of the *Prosecution Policy* states that section 6 of the *Prosecution Policy* is concerned with the broad considerations involved in deciding whether to give an accomplice an undertaking under the Act in order to secure that person's testimony for the prosecution. Paragraph 6.3 states that in conjunction with the question whether to call an accomplice the question may arise whether the accomplice should also be prosecuted.

Paragraph 6.6 sets out two conditions that must be met before an undertaking will be given. The first, in sub-paragraph 6.6(a) is that the evidence that the accomplice can give is considered necessary to secure the conviction of the defendant or is essential to fully disclose the nature and scope of the offending and that evidence is not available from other sources. In this regard, the stronger the case without the evidence the accomplice can give, the less appropriate it will be to grant an undertaking to the accomplice. The second, in sub-paragraph 6.6 (b) is that an undertaking under the Act will only be given provided the accomplice can reasonably be regarded as significantly less culpable than the defendant.

Paragraph 6.7 states that the central issue in deciding whether to give an accomplice an undertaking under the Act is whether it is in the overall interests of justice that the opportunity to prosecute the accomplice in respect of his or her own involvement in the crime in question should be foregone in order to secure that person's testimony in the prosecution of another.

The Commonwealth Director of Public Prosecutions has issued this Annexure to clarify the provision of an undertaking to an accomplice whose evidence is required against an alleged co-offender/s and who has been prosecuted and it is not proposed be prosecuted further. This situation is not addressed in the *Prosecution Policy*.

In this situation, it may be that in giving evidence the person will incriminate themselves in relation to criminality for which he or she has not been prosecuted and for which it is not proposed the person be prosecuted, enabling an allowable claim of privilege to be made. Such a person may not be reasonably regarded as significantly less culpable than the alleged co-offender/s and in this situation consideration should be given to the central issue of the overall interests of justice as to whether an undertaking should be provided. Taking into consideration all of the circumstances involved and the matters set out in paragraph 6.7, the provision of an undertaking in such a situation may be in the overall interests of justice and is not precluded by paragraph 6.6(b) of the *Prosecution Policy*.

Section 128 of the *Uniform Evidence Act* (or a statutory equivalent) sets out the process which the court is to undertake when a witness objects to giving evidence, or evidence on a particular point, on the grounds of self-incrimination and permits the magistrate/judge to grant a certificate to the witness. The certificate, in effect, requires the witness to give the evidence, but ensures the evidence they give cannot be used against them in a criminal prosecution. If the Court determines there are reasonable grounds for the objection, the Court must inform the witness that the witness need not give the evidence unless required by the Court to do so, and that the Court will provide a certificate to the witness if they give the evidence either willingly or if the court requires the witness to give the evidence.

In cases where a witnesses' statement gives rise to a potential issue with self-incrimination in the witness giving evidence, consideration should be given to whether an undertaking pursuant to the *DPP Act* should be provided rather than reliance being placed on the court granting a section 128 certificate (or other statutory equivalent). The use of section 128 of the *Uniform Evidence Act* or another legislative provision enabling a court to provide a certificate where a witness has been compelled to answer an incriminating question should generally be limited to cases where the privilege against self-incrimination arises unexpectedly.

\*Note: Annexure D was issued February 2016.

## Annexure E – Immunity from Prosecution for Self-reported offences against Part 7.10 of the Corporations Act 2001

### 1. Preface

- 1.1 This document outlines the policy of the office of the Commonwealth Director of Public Prosecutions (**DPP**), in considering an application for immunity from prosecution by an individual who may be implicated in a contravention of a provision in Part 7.10 of the *Corporations Act 2001* and who meets the criteria for immunity under the *Immunity Policy* of the Australian Securities and Investments Commission (**ASIC**). Corporate entities are not eligible for immunity under this Policy.
- 1.2 This policy is based on a recognition by Government that, in respect of breaches of Part 7.10 of the *Corporations Act 2001*, it may be in the public interest to offer immunity from prosecution to an individual who is willing to self-report potentially illegal conduct committed by that individual and other persons, and fully cooperate with ASIC and the DPP.
- 1.3 Following a recommendation from ASIC, the DPP will decide whether to grant immunity from prosecution by applying the same criteria as contained in ASIC's *Immunity Policy*. The decision of the DPP whether to grant immunity will generally be communicated to the applicant at the same time as ASIC's decision whether to grant immunity from civil penalty proceedings, where applicable.
- 1.4 Where the DPP considers that the applicant meets the criteria set out in this Annexure, as a first step the DPP will ordinarily provide a letter of comfort to the applicant. Prior to, or soon after the commencement of any criminal prosecution, the Director will provide a written undertaking under s 9 of the *Director of Public Prosecutions Act 1983 (DPP Act)*. The undertaking would relate to the offence or offences against a provision in Part 7.10 of the *Corporations Act 2001*. It may also extend to other Commonwealth offences connected with the Part 7.10 offence or offences, such as ancillary offences under Part 2.4 of the *Criminal Code (Cth)*, breach of directors' duties under the *Corporations Act 2001*, and money laundering or false accounting offences under the *Criminal Code (Cth)*. Both the letter of comfort and any subsequent undertaking will be subject to conditions and ongoing obligations on the applicant throughout the period of ASIC's investigation until the conclusion of any prosecution conducted by the DPP in relation to the disclosed conduct.
- 1.5 A letter of comfort issued by the DPP, or an undertaking issued by the Director, is necessarily limited to prosecutions commenced by the DPP. To the extent that the disclosed conduct may also constitute an offence against a State or Territory law, the decision whether or not to commence a prosecution in respect of that conduct rests with the relevant State or Territory prosecution authority.
- 1.6 This policy is to be read in conjunction with the Memorandum of Understanding between the DPP and ASIC.

### 2. Roles of ASIC and the DPP

- 2.1 The DPP is an independent statutory agency established under the DPP Act and is responsible for prosecuting offences against Commonwealth laws. The Office of the DPP is headed by the Director of Public Prosecutions (**Director**).
- 2.2 The DPP is not an investigative agency and does not investigate criminal offences. The decision to investigate an alleged offence under the laws administered by ASIC and refer the matter to the DPP for prosecution is made by ASIC. The DPP may however provide advice to ASIC on legal and related issues during investigations.
- 2.3 ASIC is an independent Commonwealth statutory authority established under the *Australian Securities and Investments Commission Act 2001 (ASIC Act)*. ASIC is responsible for investigating alleged contraventions of the *Corporations Act 2001* and other Commonwealth legislation. Where it is alleged that an individual has contravened a civil penalty provision of that legislation ASIC is also responsible for deciding whether to commence court proceedings.
- 2.4 Applications for immunity are made to ASIC. Subject to the conditions set out in paragraph 3.1 below, ASIC may make a recommendation to the DPP for a decision whether to grant immunity from prosecution to an individual implicated in an offence who meets the criteria for immunity from civil penalty proceedings under ASIC's *Immunity Policy*.

- 2.5 Only the Director can grant an individual immunity from prosecution for an alleged criminal offence against the laws of the Commonwealth. A letter of comfort issued by the DPP or an undertaking provided by the Director under s 9 of the *DPP Act* can only operate in accordance with its terms and the *DPP Act*.

### 3. Obtaining Immunity

#### *ASIC's criteria for civil immunity*

- 3.1 *ASIC's Immunity Policy* outlines a number of mandatory conditions that must be satisfied before immunity from civil penalty proceedings will be granted, namely that the individual seeking immunity:

- is or has been involved in conduct that may contravene a provision or provisions in Part 7.10 of the *Corporations Act 2001* (**misconduct**);
- is one of two or more persons who were (or, if the misconduct is ongoing, are) involved in the misconduct;
- has not coerced any other persons to engage, participate or be involved in the misconduct;
- disclosed the misconduct to ASIC before ASIC had commenced an investigation in respect of that misconduct;
- admits that he or she has participated, or is participating, in the misconduct;
- is the first individual to apply for immunity in respect of the misconduct;
- was not the instigator of the misconduct;
- has either ceased his or her involvement in the misconduct or is prepared to immediately cease engaging in the misconduct, if the misconduct is ongoing;
- has provided full, frank and truthful disclosure, and has cooperated fully and expeditiously while making the application, and undertakes to continue to do so, throughout ASIC's investigation and any ensuing court proceedings.

- 3.2 The individual seeking immunity must satisfy the above conditions for immunity from civil penalty proceedings to remain in place and to be eligible for final immunity from civil penalty proceedings.

#### *DPP's criteria for granting an undertaking under s 9 of the DPP Act*

- 3.3 Where ASIC is of the view that an individual satisfies the conditions for immunity it may make a recommendation to the DPP for a decision by the DPP whether an undertaking be granted to that individual. This recommendation will provide as much information as possible in relation to the criteria listed in paragraph 3.1.

- 3.4 The DPP will exercise an independent discretion when considering a recommendation by ASIC.

- 3.5 Where the DPP is satisfied that an individual meets the criteria for immunity contained in *ASIC's Immunity Policy*, a two-step process will apply. First, the DPP will issue the individual with a "letter of comfort". The letter of comfort will be to the effect that the Director intends to grant the individual an undertaking under section 9 of the *DPP Act* in relation to the disclosed misconduct in the event that a prosecution is commenced by the DPP against anyone in relation to that misconduct. Second, prior to, or soon after, the commencement of any prosecution by the DPP, the Director will provide a written undertaking pursuant to section 9 of the *DPP Act*. The undertaking may relate to the contravention of a provision in Part 7.10 of the *Corporations Act 2001*. It may also relate to other Commonwealth offences connected with the Part 7.10 contravention, such as ancillary offences under Part 2.4 of the *Criminal Code* (Cth), breach of directors' duties under the *Corporations Act 2001*, and money laundering or false accounting offences under the *Criminal Code* (Cth).

- 3.6 Both the letter of comfort and any subsequent undertaking under the *DPP Act* will be subject to the individual complying with certain conditions throughout the period of ASIC's investigation and until the conclusion of any criminal proceedings against other participants in the disclosed misconduct. Those conditions will be specified in the relevant letter of comfort or undertaking under the *DPP Act*. They will include that:

- s/he will provide ongoing full cooperation during ASIC's investigation;

- s/he will appear as a witness for the prosecution as and where requested in any proceedings against the other participants; and
- any evidence s/he is called upon to give will be given truthfully, accurately and withholding nothing of relevance.

3.7 The decision of the DPP whether to issue a letter of comfort will be generally communicated to the individual at the same time as ASIC's decision whether to grant civil penalty immunity, where applicable.

3.8 Any undertaking provided by the Director under s 9 of the DPP Act will remain in place unless revoked and therefore an undertaking granting final immunity is not required.

#### **4. Revocation of Immunity**

4.1 The DPP may withdraw a letter of comfort or the Director may revoke a written undertaking provided under section 9 of the DPP Act at any time during the investigation and prior to the conclusion of criminal proceedings if:

4.1.1 ASIC makes a recommendation to withdraw the letter of comfort or revoke the undertaking, and the DPP or Director, exercising an independent discretion, agrees with that recommendation; or

4.1.2 the DPP or Director believes on reasonable grounds that:

- (i) the recipient of the letter of comfort or undertaking has provided information to the DPP that is false or misleading in a relevant matter; and/or
- (ii) the recipient of the letter of comfort or undertaking has not fulfilled any condition(s) of the letter of comfort or undertaking.

4.2 The DPP will notify the recipient in writing if a letter of comfort is to be withdrawn or an undertaking is to be revoked, and the recipient will be afforded a reasonable opportunity to make representations.

#### **5. Disclosure issues**

5.1 The DPP has published the *Statement on Disclosure* which explains in detail the prosecution's obligation to disclose relevant material to the defendant. Potential applicants for immunity from civil penalty proceedings under ASIC's *Immunity Policy* and for criminal immunity under this Annexure should read that Statement before contacting ASIC or the DPP.

5.2 For example, where the Director grants an individual an undertaking under s 9 of the DPP Act and the DPP intends to call that individual to give evidence as a witness in a related prosecution, the DPP will be required to disclose, amongst other things:

- (i) the terms of the undertaking between the Director and the individual; and
- (ii) any information provided to ASIC or the DPP by the individual for the purpose of seeking immunity, subject to the information being relevant to the prosecution and any claim by ASIC or the DPP for public interest immunity or legal professional privilege.

#### **6. Prosecution Policy of the Commonwealth**

6.1 Paragraphs 1 to 5 of this Annexure only apply to individuals who disclose misconduct to ASIC before ASIC has commenced an investigation into the misconduct and who, in all other respects, meet the criteria for immunity from civil penalty proceedings under ASIC's *Immunity Policy*. An individual who is not eligible for immunity under ASIC's *Immunity Policy* may nevertheless apply for an undertaking under s 9 of the DPP Act but the application will be determined by the Director in accordance with Chapter 6 of the *Prosecution Policy of the Commonwealth*. Such an application will be considered following consultation with ASIC.

Sarah McNaughton SC  
Commonwealth Director of Public Prosecutions

24 February 2021