

# DPP

## Commonwealth Director of Public Prosecutions

### **PUBLIC SUBMISSION BY THE COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS (CDPP)**

#### **TO THE SENATE ECONOMICS REFERENCES COMMITTEE**

#### **INQUIRY INTO THE PERFORMANCE OF THE AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**

The CDPP notes that the Senate Economic Reference Committee (the Committee) is undertaking an inquiry (the Inquiry) into the performance of the Australian Securities and Investments Commission (ASIC) and that by email dated 1 July 2013, the Committee invited the CDPP to make a submission to the Inquiry.

The CDPP welcomes the opportunity to make a submission. For this purpose the CDPP notes the Inquiry's Terms of Reference (TOR) and observes that some of the matters referred to in the TOR are outside the scope of comment that the CDPP could usefully provide. The CDPP's submission is therefore confined to the following TOR:

The performance of the ASIC, with particular reference to:

- a. ASIC's enabling legislation, and whether there are any barriers preventing ASIC from fulfilling its legislative responsibilities and obligations (**no submission**);
- b. the accountability framework to which ASIC is subject, and whether this needs to be strengthened (**no submission**);
- c. the workings of ASIC's collaboration, and working relationships, with other regulators and law enforcement bodies (**See submission below**);
- d. ASIC's complaints management policies and practices (**no submission**);
- e. the protections afforded by ASIC to corporate and private whistleblowers (**no submission**); and
- f. any related matters (**no submission**).

To assist the Inquiry, the CDPP's submission is divided into the following headings:

- A. Introduction
- B. The role of the CDPP
- C. Memorandum of Understanding between ASIC and the CDPP
- D. Conclusion

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## **A. Introduction**

The Office of the Commonwealth Director of Public Prosecutions (CDPP) is an independent prosecuting service established by Parliament to prosecute alleged offences against Commonwealth law.

The CDPP was established under the *Director of Public Prosecutions Act 1983* (Cth) (the DPP Act) and began operations on 8 March 1984. The CDPP is under the control of the Director, who is appointed for a term of up to 7 years. The current Director is Robert Bromwich SC, who was appointed on 17 December 2012 for a term of 5 years.

The functions and powers of the CDPP are set out in the DPP Act.

The CDPP carries out its function on a national basis. It has offices in each of the capital cities and also in Townsville and Cairns.

## **B. The role of the CDPP**

In order to understand the CDPP's working relationship with ASIC it is first necessary to understand the role of the CDPP.

The role of the CDPP is to prosecute offences against Commonwealth law.

The State and Territory Directors of Public Prosecutions (DPP's) are responsible for the prosecution of alleged offences against State and Territory Laws. However, arrangements exist between the CDPP and the State and Territory DPP's for the conduct, where necessary and appropriate, of State/Territory prosecutions by the CDPP and for the conduct of Commonwealth prosecutions by State/Territory DPP's. These are known as joint trial arrangements.

The CDPP also conducts prosecutions for offences against the laws of Jervis Bay and Australia's external territories, other than Norfolk Island.

The CDPP recognises that the public interest is served by cooperation among Commonwealth law enforcement agencies. This is reflected in the CDPP's Strategic Directions, the foundation of which is a vision for a fair, safe and just society where the laws of the Commonwealth are respected and maintained and there is public confidence in the justice system. Examples of this cooperation are the online aids, guides and manuals and commentary on Commonwealth offences that the CDPP provides to other law enforcement agencies, including ASIC.

Cooperation is essential in Commonwealth prosecutions because the CDPP does not have an investigative function. Consequently, in most instances the CDPP can only prosecute when there has been an investigation by an investigative agency such as ASIC. The decision to initiate investigative action in relation to possible or alleged criminal conduct ordinarily rests with the agency responsible for administering the relevant legislation. The CDPP is not usually involved in such decisions, although it may be able to assist by providing legal advice on legal issues arising during the investigation.

If, as a result of an investigation, it appears that an offence has been committed, the usual practice (i.e. except in arrest matters) is for a brief of evidence, containing all the relevant evidence, to be forwarded to the CDPP, where it will be assessed by the CDPP to determine whether a prosecution should be instituted and, if so, on what charge or charges. The brief is

assessed by the CDPP in accordance with the *Prosecution Policy of the Commonwealth* (the Prosecution Policy), which contains guidelines for the making of decisions in the prosecution process. The Prosecution Policy is a public document. It is available for viewing on the CDPP's website: <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/> .

The main purpose of the Prosecution Policy is to promote consistency in the making of the various decisions which arise in the institution and conduct of prosecutions. The Prosecution Policy outlines the relevant factors and considerations which are taken into account when a prosecutor is exercising the discretions relevant to his or her role and functions. The Prosecution Policy also serves to inform the public and practitioners of the principles which guide the decisions made by the CDPP.

Under the Prosecution Policy there is a two-stage test that must be satisfied:

- there must be sufficient evidence to prosecute the case; and
- it must be evident from the facts of the case, and all the surrounding circumstances, that the prosecution would be in the public interest.

Generally, the more serious the alleged offence is, the more likely it will be that the public interest will require that a prosecution be pursued.

Once the CDPP completes its assessment of the brief of evidence, it advises the investigative agency, of the outcome.

If the CDPP recommends a charge or charges the usual course is for the investigative agency to institute the charge(s), which the CDPP then prosecutes. If the CDPP decides that the evidence is insufficient for a charge to be laid, it advises the investigative agency and provides written reasons for the decision. Where appropriate the CDPP will indicate what further evidence, if any is required to prove the alleged offence(s).

Experience has shown that the prosecutions of many of the crimes within ASIC's regulatory responsibility are complex, resource intensive and long-running. The CDPP accommodates this by maintaining specialised commercial branches in each of its major regional offices (i.e. Sydney, Melbourne, Brisbane and Perth). These commercial branches are staffed by experienced prosecutors. In the CDPP's other regional offices there are designated prosecutors with commercial prosecutions experience. In addition, the CDPP's Head Office is responsible for oversight of the CDPP's commercial prosecutions practice and policy development.

The CDPP holds regular national meetings for the heads of its commercial branches, at which current caseloads and recent developments are discussed. It also holds regular national conferences at which matters relevant commercial prosecutions are discussed and presentations on topical issues are given. This assists commercial prosecutors to develop their expertise in this crime-type.

Further, the CDPP maintains a Commercial Focus Group, whose role is to monitor recent developments in commercial prosecutions and recommend approaches to ensure national consistency within the CDPP in commercial prosecutions and a Market Matters Focus Group, whose role is to consider recent developments in the complex area of Market Matters prosecutions, which include the offences of insider trading, market manipulation and market rigging.

Additionally, the CDPP regularly participates in joint conferences and training with ASIC at which investigators and prosecutors discuss topical issues and common themes.

### **C. Memorandum of Understanding between ASIC and the CDPP**

The framework for the CDPP's working relationship with ASIC is set out in a Memorandum of Understanding (MOU).

In 1992 the CDPP entered into an MOU with ASIC's predecessor, the Australian Securities Commission (ASC).

On 1 March 2006, the CDPP entered into a new MOU with ASIC, which replaced the original MOU but retained many of the important features of the earlier MOU. It also incorporates the requirements of the Directions issued by the then Attorney-General, the Hon Michael Duffy, on 30 September 1992 (GN 40, 7/10/1992) to ASIC's predecessor, the ASC and the CDPP regarding the investigation and enforcement of serious corporate wrongdoing.

The MOU is a publically available document. To assist the Inquiry a copy is attached (**A**). The MOU records an agreement between ASIC and the CDPP on principles to facilitate the working relationship between the two agencies for the investigation and prosecution of crimes within ASIC's regulatory responsibility. The MOU covers the following topics:

1. Purpose;
2. ASIC (function);
3. CDPP (function);
4. Civil Penalty Action;
5. Prosecution Decision;
6. Liaison Arrangements: National Liaison and Regional Liaison;
7. Prosecution of Summary Regulatory Matters;
8. Counsel;
9. Other Matters.

The CDPP makes the following observations about the essential features of the MOU and provides further detail about some of the matters covered by it:

#### **1. Purpose:**

ASIC and the CDPP recognise the need for the fullest collaboration and cooperation between the two organisations at all levels to discharge their respective functions in relation to the investigation and prosecution of crimes within ASIC's regulatory responsibility.

Where a matter is not dealt with explicitly by the MOU, it is expected that both ASIC and the CDPP will discuss the matter and resolve it quickly in accordance with the principles of proper communication and cooperation.

#### **2. ASIC (function):**

ASIC is a regulatory and law enforcement agency with an investigative function. ASIC has available to it a range of remedies to discharge its law enforcement responsibilities. These include:

- Preservation remedies (e.g. injunctions);
- Recovery and remedial remedies;
- Disciplinary and protective remedies (e.g. banning orders);
- Imposition of civil penalties and infringement notices; and
- Prosecution.

These strategies are not mutually exclusive and there might be both civil and criminal proceedings arising out of the same investigation. However, civil proceedings will not be used in substitution for criminal proceedings in matters of serious corporate or financial services crime.

### **3. CDPP (function):**

The functions of the CDPP were discussed earlier in the context of the role of the CDPP. The CDPP is available to advise ASIC during the course of ASIC's investigation. This is often referred to as *pre-brief advice* because ASIC is requesting the advice prior to delivering a brief of evidence to the CDPP. The CDPP is also available to assist ASIC in the settling of search warrants.

### **4. Civil Penalty Action:**

As noted earlier, ASIC has available to it a range of remedies, including civil penalties. In order to ensure that civil proceedings will not be used in substitution for criminal proceedings in matters of serious corporate or financial services crime, ASIC will consult with the CDPP before making an application for a civil penalty order.

### **5. Prosecution Decision:**

When ASIC believes that a criminal offence may have been committed and has gathered sufficient evidence to enable it to support that view, ASIC will refer a brief of evidence to the CDPP in a timely manner. ASIC and the CDPP have agreed standards for the form and content of a completed brief of evidence.

As discussed earlier, the CDPP will assess the brief of evidence in accordance with the Prosecution Policy.

Where the CDPP decides that a charge or charges should be laid, it advises ASIC and, in the usual course, ASIC institutes the recommended charge or charges.

Where the CDPP decides that the evidence is insufficient for a charge to be laid, it advises ASIC and provides written reasons for the decision. Where appropriate the CDPP will indicate what further evidence, if any, is required to prove the offence(s).

When assessing the brief the CDPP gives appropriate weight to ASIC's view concerning the public interest in prosecuting a matter. If the CDPP considers that the public interest does not require a prosecution it advises ASIC and provides written reasons.

ASIC continues to provide support for a prosecution once a charge or charges are laid, including obtaining further evidence if required and requested by the CDPP. This process is referred to as requisitions.

## **6. Liaison Arrangements:**

ASIC and the CDPP liaise at a national, regional and case officer level (once a matter has been referred to the CDPP by ASIC).

Informal liaison is encouraged but this is complemented by formal liaison arrangements conducted at regular intervals at both the national and regional level.

### **National liaison**

Liaison at the national level currently takes place quarterly but additional meetings can be convened on an as needs basis. National liaison is attended by ASIC's Chief Legal Counsel and the CDPP's Deputy Director, Commercial, as well as other senior officers from each organisation. The national liaison meetings examine operational issues, organisational issues, expected workloads and systemic issues that may warrant law reform.

### **Regional liaison**

The frequency of liaison meetings at the regional level differs between regions, depending on the volume of ASIC work being undertaken. In general, regional liaison meetings occur monthly. The meetings are attended by appropriately senior staff from each agency. The regional liaison meetings discuss generally the progress of current investigations and prosecutions, any problems arising in the prosecution or investigation of particular matters and the regional relationship.

Also, at the conclusion of a prosecution ASIC and the CDPP oftentimes meet to review the prosecution for the purpose of identifying and discussing any issues that arose over the course of the prosecution. This process is of particular benefit to future prosecutions. In some instances the process is carried out at the national level as well.

If a particular liaison issue or matter cannot be resolved at the regional level, consideration of it can be referred to the national level.

If a particular liaison issue or matter cannot be resolved at the national level, consideration of it can be referred to the Chairman of ASIC and the Director of Public Prosecutions.

If a particular liaison issue or matter cannot be resolved between the Chairman and the Director, it can be referred to the National Steering Committee on Corporate Wrongdoing (the Steering Committee), which consists of the Secretary of the Attorney-General's Department, the Chairman of ASIC and the Director of Public Prosecutions. The functions of the Steering Committee are to oversee and report to the Attorney-General on compliance with the Attorney-General's directions and to seek to resolve by conciliation disputes referred to the Steering Committee. The Steering Committee currently meets quarterly either in person or by teleconference.

The advent of the Steering Committee is linked to the Directions issued by the then Attorney-General, the Hon Michael Duffy, on 30 September 1992 (GN 40, 7/10/1992) to ASIC's predecessor, the ASC and the CDPP regarding the investigation and enforcement of serious corporate wrongdoing. The power of the Attorney-General to issue a direction to the CDPP is contained in s8(1) of the DPP Act:

*In the performance of the Director's functions and in the exercise of the Director's powers, the Director is subject to such directions or guidelines as the Attorney-General, after consultation with the Director, gives or furnishes to the Director by instrument in writing.*

A similar power exists in relation to ASIC (see s12(1) *Australian Securities and Investments Commission Act 2001* (Cth)).

## **7. Prosecution of Summary Regulatory Matters:**

As noted earlier, the role of the CDPP is to prosecute offences against Commonwealth law. Most Commonwealth prosecutions are conducted by the CDPP. However, there are a few areas where other Commonwealth agencies conduct summary prosecutions for straight-forward regulatory offences by arrangement with the CDPP. Where this occurs the prosecuting agency observes the Prosecution Policy when conducting the prosecutions.

There is such an arrangement between the CDPP and ASIC for ASIC to conduct summary prosecutions of a number of offences under the *Corporations Act 2001* (Cth), the *National Consumer Credit Protection Act 2009* (Cth), the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Cth) and the *Business Names Registration Act 2011* (Cth).

The CDPP has a supervisory role in relation to these prosecutions and the CDPP is available to provide advice and assistance to ASIC in relation to them. The number of these prosecutions and their outcomes is monitored by the CDPP at national liaison meetings.

## **8. Counsel:**

The CDPP consults with ASIC about the appropriate counsel to be briefed in a matter. While it is the CDPP's decision whether to brief counsel and if so, which counsel, the CDPP will as far as possible, give weight to ASIC's view(s).

## **9. Other matters:**

The CDPP consults with ASIC with regard to the prosecution position to be taken in relation to bail and gives appropriate weight to ASIC's views. However, the final decision in relation to the prosecution's position rests with the CDPP.

Also, if ASIC or the CDPP wishes to release a media statement regarding prosecutions, proposed or underway, the organisation releasing the statement consults, wherever possible, the other organisation as to the terms of the statement.

The MOU is supplemented by a number of Best Practice Guidelines (BPG's), which summarise the common view of ASIC and the CDPP on particular operational matters relevant to the investigation and prosecution of crimes within ASIC's regulatory responsibility. The BPG's are not publically available documents.

**D. Conclusion:**

The CDPP and ASIC enjoy a solid and productive working relationship.

The MOU provides the framework for the relationship but it is enhanced by ongoing and effective communication between the agencies (at both the regional and national level).

13 December 2013