

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

4 – 6 June 2013

Question: BET 173-178

Topic: the Commonwealth v. Mark Richard McKenzie, Fleming Hood Nielsen and Roberto Gerald Catena

Written: 14 June 2013

Senator JOHNSTON asked:

173. What was the total cost incurred by the Commonwealth in preparation of the prosecution of all of the charges against all of these defendants?

As this question was directed to ASIC it would appear to relate to investigation costs. The CDPP is not able to provide information about investigations costs.

ASIC's response: ASIC expended \$79,138.71 in external running costs for this matter being costs incurred in relation to external legal and forensic costs and related travel expenses. The only other costs expended were for the salaries of the ASIC staff involved in the investigation.

174. The decision of Magistrate W.J.G O'Day on 25 May 2011 was not the subject of an appeal or an exofficio indictment, why not?

- a. Was a legal opinion obtained from a senior practitioner/counsel with respect to the likely success of such indictment and continuation?
- b. Were there other reasons or considerations for the decision not to proceed further against Mr McKenzie, following the decision of Magistrate O'Day and if so what were they?

It was not open to the CDPP to appeal Magistrate O'Day's decision to discharge the defendant, Mr McKenzie, at committal.

The factors relevant to an exercise of the CDPP's function to present ex-officio indictments are set out at paragraphs [6.28] – [6.32] of the *Prosecution Policy of the Commonwealth* (the Prosecution Policy).

Relevantly, paragraph [6.32] of the Prosecution Policy states:

“... 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 confidently be 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.”

- a. No. The decision not to present an ex-officio indictment was made at a senior level within the Office of the CDPP.

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- b. The Office of the CDPP undertook a review of all of the available evidence, including the evidence presented at the committal and the magistrate's ruling, and formed a view in accordance with the Prosecution Policy not to present an ex-officio indictment.

175. With respect to the prosecutions against Mr Nielsen and Mr Catena, was a senior practitioner/counsel from the independent bar briefed for any hearings, direction hearings, mentions or trials and if so what were the fees for such proceeding in each event/hearing and what was the duration of each of the hearings, direction hearings, mentions or trials including the cost of the judge and support staff?

Senior counsel was briefed by the CDPP to make various court appearances in the prosecution of Mr Nielsen and Mr Catena. Details of those appearances and their duration are:

	Date	Proceeding	Duration
1.	6-7 March 2012	Directions hearing (argument)	2 days
2.	15 October 2012	Voluntary Criminal Case Conference	1 hour (approx.)
3.	30 November 2012	Directions hearing (argument)	28 minutes
4.	1 February 2013	Directions hearing (argument)	1 hour 39 minutes
5.	11 February 2013	Directions hearing (ruling)	24 minutes
6.	25 February 2013	Directions hearing (argument)	55 minutes
7.	27 February 2013 – 19 March 2013	Trial	15 days

The fees charged by senior counsel for each of these attendances varied depending on the nature of the retainer. The total of the fees incurred for these attendances was \$43,990.

The CDPP is not able to provide information about the costs involved for judges and support staff.

176. Was this prosecution subject to evaluation against the criteria set out in "Prosecution policy of the Commonwealth"?
- a. If the answer is yes, upon what basis did the prosecution proceed with the matter pursuant to such policy?
- b. Further to this if there was sufficient evidence, which evidence was sufficient and if the prosecution was in the public interest specify which criteria was used for this public interest test?

Yes.

- a. The criteria governing the decision to prosecute are set out in the Prosecution Policy at paragraphs [2.1] – [2.14]. Those criteria were applied to the evidence relating to each of Mr

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Catena, Mr Nielsen and Mr Hebbard and in each instance a decision was made to institute a prosecution.

- b. The case against each of Mr Catena, Mr Nielsen and Mr Hebbard was assessed on the basis of all of the available evidence and on the basis of that evidence it was determined that there was sufficient evidence to justify the institution of a prosecution in relation to each of them.

Once it was determined that there was sufficient evidence to justify the institution of a prosecution, consideration was given to whether the public interest required a prosecution to be pursued. Paragraph [2.10] of the Prosecution Policy identifies a non-exhaustive list of matters that may arise for consideration in determining with the public interest requires a prosecution.

In the circumstances of each of Mr Catena, Mr Nielsen and Mr Hebbard it was determined that the public interest did require a prosecution to be pursued.

177. Who made the decision as to a reasonable prospect of conviction against Mr Catena and Mr Nielsen in light of the judgement in McKenzie and the very detailed no bill submissions made by Mr Catena's lawyer?

The matters referred to in Mr Catena's lawyer's No Bill submission were considered within the Office of the CDPP and referred to the Director, Mr Robert Bromwich SC, who determined that the prosecution of Mr Catena should continue. The ruling of Magistrate O'Day to discharge Mr McKenzie at committal was a matter taken into account.

178. Given a hung jury in respect to a number of the charges against Nelson and Catena and the subsequent discontinuance of those proceeding was legal practitioner/counsel's opinion sought in respect to the discontinuance?

- a. If so, from whom and at what cost?

The CDPP sought and received advice from prosecution trial counsel, Mr Sam Vandongen SC and Mr Paul Yovich. The CDPP did not incur a cost for this advice.