



DPP

Commonwealth Director of Public Prosecutions

28 July, 2005

Media Release : Stephen Vizard

The CDPP, Damian Bugg QC today explained the decision of his office to not prosecute Steve Vizard for criminal offences of insider trading.

"It has not been possible to give any explanation before now" Mr Bugg said, "because the matter was before the Federal Court".

Commentators have questioned the DPP's decision to not prosecute Vizard since the announcement on July 4 by ASIC that it was proceeding against Mr Vizard in the Federal Court for civil penalties on a Statement of Claim and agreed Statement of Facts. Some legal sources suggested that the acknowledgement by Mr Vizard of the matters alleged against him in the Federal Court was more than enough to base a case for criminal prosecution, suggesting that federal authorities had 'gone soft' and done a deal with Mr Vizard. This suggestion was vigorously rejected by ASIC Chairman, Jeff Lucy.

"There was no deal done with my Office" Mr Bugg said. "The admissions in the civil penalty proceedings and the proceedings themselves cannot be used to bolster a criminal prosecution for the same conduct by virtue of the provisions of Section 1317Q of the Corporations Act 2001. Those admissions, which are not admissible in a criminal prosecution, had not been made when we examined the evidence gathered by ASIC and determined that there was insufficient evidence on the material we had to commence a prosecution. Mr Vizard had not made any admissions at that time and in fact he had denied the allegations. The civil penalty admissions were made at a much later time and even then were unavailable from a prosecutorial viewpoint."

The conduct of an investigation into suspected breaches of corporations law is a matter for ASIC. My Office does not have an investigative power or function and, for the purpose of matters such as this, ASIC does not have a prosecution function. The understanding between ASIC and my Office is that when an investigation is being undertaken my Office is available to provide legal advice on issues such as admissibility of evidence, but the investigation role is one which ASIC undertakes independently. ASIC will sometimes obtain its own advice from counsel on the evidence and its sufficiency. When the evidence has been gathered (in the form of a brief of evidence) that will be sent by ASIC to my Office to consider and decide on the sufficiency of evidence for a prosecution. That decision is made independently of ASIC and any other office.

In considering whether there is sufficient evidence to prosecute my Office applies the same test in every matter, a test which was settled nationally more than 15 years ago and is one which has since been applied in almost identical terms by all State and Territory Directors of Public Prosecutions. That test is based on the prospects of conviction, assessed against the available and admissible evidence, and takes in to account such issues as reliability and availability of witnesses including, of course, what the witnesses will, not "might", say when called to give evidence. The evaluation or weighing of this evidence relies upon, amongst other things, witness statements, which are usually signed as an acknowledgement of accuracy, interviews with the witnesses and documentary evidence or exhibits.

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The prosecution guideline or test then applied is that a prosecution should not be commenced if there are no reasonable prospects of a conviction being secured (on the available and admissible evidence). The test is one which relies upon evidence which is available and can be weighed.

In November 2004 ASIC referred to my Office a brief of evidence concerning possible offences committed by Stephen Vizard relating to the trading in shares in three companies, Sausage Software Limited, Computershare Limited and Keycorp Limited. Shortly after referring the brief to the DPP, ASIC forwarded to the DPP a detailed opinion it had obtained from its own counsel. The DPP took this advice into account in its considerations.

One important aspect of the matter for my Office was consideration of the evidence of a crucial witness. All three suspect trades were undertaken by a company which ostensibly was unconnected with Mr Vizard, Creative Technology Investments Pty Ltd (CTI). The sole shareholder and director of this company, Gregory Lay, had been interviewed on a number of occasions by ASIC investigators who in turn had compiled a draft statement from those interviews and submitted it to Mr Lay's solicitors for him to read, alter or correct and then sign in the following format:-

"I hereby acknowledge that this statement is true and correct and I make it in the belief that a person making a false statement in the circumstances is liable to the penalties of perjury".

Evidence from this witness was crucial, for a criminal prosecution, as it would connect Mr Vizard to CTI and the trades and the timing of the trades.

Mr Lay, through his solicitors, declined ASIC's request to provide a signed statement, such signature being an acknowledgement that the document prepared by ASIC was true and correct. There were areas of the draft statement which required clarification and explanation from Mr Lay.

Prior to the referral of the brief, ASIC had advised my Office that Mr Lay's lawyer had indicated that before considering the draft witness statement his client required written confirmation from ASIC that it did not intend to take any action against his clients, including commencement of criminal proceedings. We provided confirmation of our position that what was contained in the draft statement did not expose Mr Lay to the jeopardy of being prosecuted for any possible offence.

Thereafter both my Office and ASIC attempted to gain the co operation of Mr Lay by obtaining from him an induced statement that would be used solely for the purpose of considering Mr Lay's request for a full and unlimited indemnity from prosecution from all relevant authorities for himself and his firm. Mr Lay still declined to provide a statement.

The circumstances of our dealings in this regard were such as to cause real reservations as to what Mr Lay would say if called to give evidence and, in light of the lack of any acknowledgement of the correctness, a lack of confidence that the draft statement correctly reflected what Mr Lay would say on oath and might say under cross examination.

Likewise these dealings concerning Mr Lay would have to be disclosed to the defence and would adversely impact on his credit as a witness.

The policy which my Office follows does not permit the laying of charges on what we, or others, hope that a witness might say if and when called to give evidence but rather on the evidence which is available and admissible. To do otherwise would undermine confidence in the integrity of our system. Charges should not be laid without evidence which is available and admissible to

prove the essential elements of the offence. A prosecution should not commence in the hope that critical evidence will later become available.

Some have suggested that I could have granted an indemnity to Mr Lay in any event. That is not the case, even ignoring any concerns we may have had about him as a witness, based on what had happened. To grant an indemnity to a witness, blind as to the conduct for which the witness required the indemnity, is not permitted under the legislative grant of power. Section 9(6D) of the Director of Public Prosecutions Act 1983 provides:

“The Director may, if the Director considers it appropriate to do so, give to a person an undertaking that the person will not be prosecuted (whether on indictment or summarily):

- (a) for a specified offence against a law of the Commonwealth; or
- (b) in respect of specified acts or omissions that constitute, or may constitute, an offence against a law of the Commonwealth”.

My Office informed ASIC that on the material that we had available there were no reasonable prospects of conviction. My Office also advised ASIC that if additional admissible evidence did become available then we would further consider the brief. In other words, my Office did not close its file but, rather, left open our reconsideration of the brief concerning Mr Vizard, should further admissible evidence be obtained. As indicated in the Federal Court by ASIC's counsel, the possibility of a criminal prosecution was not excluded by any dealings with Mr Vizard.

The decision of my Office that there was insufficient evidence to prosecute Mr Vizard was one with which ASIC agreed.

ASIC, in my view, quite rightly considered the need to move the matter to a conclusion. If there was no immediate and real prospect of a criminal prosecution then it had to consider the option of civil penalty proceedings. Those proceedings, because they are civil, are not a matter for my Office but rather one for ASIC.

The independent roles of our respective Offices provide a safeguard and a review process. The suggestion that we struck a "deal" with Mr Vizard is wrong.