



Undertakings, offers of assistance and induced statements

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Immunity from Prosecution in serious cartel offences

This paper does not apply to the consideration of an application for immunity from prosecution by a person implicated in a serious cartel offence. The consideration of such applications is made in accordance with Annexure B of the *Prosecution Policy of the Commonwealth*.

Undertakings

1. Undertakings under the DPP Act

Undertakings may be given in order to secure a person's testimony in the prosecution of another person. The power to provide an undertaking under the DPP Act is as follows:

- s9(6) of the Act (use/derivative use immunity for Federal proceedings);
- s9(6B) of the Act (use/derivative use immunity preventing testimony given in proceedings under State or Territory law from use in proceedings under Commonwealth law), or
- s9(6D) of the Act (immunity from prosecution for specified Commonwealth offences, acts or omissions)

As a general rule, where undertakings are given they will be under s9(6) of the DPP Act. Undertakings will only be provided under section 9(6D) in exceptional circumstances, as an undertaking under section 9(6D) relates to the person not being prosecuted for a specified offence or acts or omissions rather than the potentially narrower undertaking under section 9(6) that particular evidence given by the witness or information obtained as a consequence will not be used in evidence against the person.

2. Who can make the decision to give an undertaking

All requests for a witness undertaking must be referred to Head Office for the Director's consideration as the power to give an undertaking has not been delegated to staff in regional offices.

3. Information to be provided in support of a recommendation to give an undertaking

The following are matters that must be addressed in any submission to Head Office recommending that a person be given an undertaking.

- (a) A summary of the relevant facts, indicating in particular the degree of involvement of the person (compared with the defendant) in the criminal activity for which the defendant has been charged.
- (b) Was the participation by the person in that criminal activity in any way prompted by the police or some other authority?
- (c) Include:
 - a statement by the person (if one has been obtained) preferably signed, even if it has been obtained in such a manner that it is inadmissible against the person (eg as a result of an inducement);

- an indication of whether the person is likely to give evidence in accordance with the statement if he or she is given an undertaking;
 - if the person will not give a statement without an undertaking, a general outline of the evidence which it is understood the person is able to give;
 - if available, a transcript of evidence, obtained, for example, as a result of an examination (which may replace a signed statement).
- (d) Other than an agreement to seek an undertaking under the Act:
- was any reward or inducement offered to the person either as a condition of the person being prepared to give evidence or otherwise? Or, in particular;
 - has the person been informed, either expressly or by implication, that he or she may avoid prosecution by testifying for the prosecution?
- (e) What is the strength of the prosecution case against the defendant *without* the evidence it is expected the person can give?
- could at least some offence/s be established without that evidence and, if so;
 - to what extent would they reflect the defendant's criminality?
- (f) What is the prospect of:
- further investigations disclosing sufficient independent evidence to remedy the weakness in the prosecution case (so that the person's evidence would not be required); and
 - the practicability of such further investigations being conducted in all the circumstances?
- (g) What is the extent to which the prosecution case is likely to be strengthened by the evidence the person can give.

The submission should cover such matters as:

- (i) the availability of corroborative evidence;
- (ii) the weight the arbiter of fact is likely to give to the person's evidence having regard to any inducement given, previous denials by the person, the present relationship between the person and the defendant etc, and
- (iii) the likely effect on the prosecution case in the event the person does not come up to proof.

Alternatively, to what extent is the nature or scope of the offending likely to be disclosed by the evidence the person can give.

- (h) What is the situation of the prospective witness:
- what offences have he or she committed?
 - is there, or is there likely to be, sufficient admissible evidence available to establish a charge or charges against the person? And, if so
 - would it be in the public interest that the person be prosecuted but for his or her preparedness to testify for the prosecution if given an undertaking under the Act?
- (i) Is there any prospect of obtaining the evidence of the person other than pursuant to an undertaking under the Act?
- (j) Particulars of:
- the general character of the person;
 - a full account of any prior criminal history;
 - details of any charges pending against the person unrelated to the criminal activity/conduct for which the defendant is being prosecuted; and
 - details of any prior occasion where the person was granted a concession (such as an undertaking under the Act) in order to secure his or her evidence for the prosecution.
- (k) Will the evidence it is expected the person can give disclose the commission of an offence against State, Territory or indeed foreign law. If so, have the relevant authorities in the relevant jurisdiction(s) been consulted about whether the person should be given an undertaking under the Act in such circumstances?
- [Evidence given pursuant to an undertaking under s9(6), as well as information etc obtained as a direct or indirect consequence of that evidence, is inadmissible in evidence against the person in any civil or criminal proceedings in a federal court or in a court of a State or Territory and may effectively prevent prosecution (assuming the constitutional validity of s9(6)).]
- (l) a recommendation whether the person should be given an undertaking under s9(6), (6B) or (6D), together with the reasons for that recommendation.
- [note: As a general rule, where undertakings are given they will be under s9(6) of the DPP Act. Undertakings will only be provided under section 9(6D) in exceptional circumstances.]
- (m) If there is:
- doubt whether the prospective prosecution witness has committed any offence, or
 - the nature of his or her involvement in the relevant criminal activity was so minor that it may be doubted whether the public interest would warrant prosecution of the person in any event

set out the reasons why it is considered a "letter of comfort" would not suffice to secure the person's testimony.

The instructions in the previous paragraph reflect the usual situation where the prospective prosecution witness was an accomplice in the criminal activity for which the defendant has been charged.

However, they also apply (with any necessary adaptations) where the prospective prosecution witness may be asked questions that could reveal his or her involvement in unrelated criminal activity. The proposal to give the person an undertaking under the Act may be to preclude the person claiming the privilege against self-incrimination.

4. Requests that the Director give "in principle" agreement for undertakings to be given in the future

Referring agencies sometimes approach the office to request that the Director give an "in principle" agreement for undertakings to be given in the future if they are required or requested, to a particular class of witness at an early stage of proceedings, before any approaches have been made to these witnesses, but where it can be reasonably be expected that the evidence of these witnesses will be essential to the prosecution of the principal target of the investigation.

Such matters should be referred to Head Office for the Director's consideration with a submission including as much of the information set out in paragraph 3 as is available.

5. Protected Testimony under the Codified Evidence Act

Section 128 of the codified evidence law enables a court to grant a certificate that confers immunity from either use or derivative use of evidence given in a criminal proceeding.

This provision operates independently of the Director's powers to give an undertaking in s9(6) (6B) or (6A).

In those States and Territories where the codified Commonwealth evidence law has been legislated, and in proceedings in a federal court, consideration should also be given to the operation of s128 of the codified evidence law.

6. Undertakings from State/Territory authorities

The effect of an undertaking pursuant to s9(6) is that it provides for what is sometimes called a use/derivative use immunity. This means that when the undertaking is given not just the evidence given in the relevant criminal proceedings, but anything derived directly or indirectly as a

consequence of the evidence given is inadmissible in any civil or criminal proceedings, whether Federal or State. See *Registrar, Court of Appeal v Craven [No 2]* (1995) 80 A Crim R 272.

A person who receives an undertaking under s9(6) in respect of the prosecution of a Commonwealth offence is:

- effectively protected from incriminating himself or herself in respect of State offences, and
- precluded from claiming the privilege against self-incrimination, even if an answer would implicate the person in the commission of some State offence.

There may be cases where it is considered likely that the witness will be less than frank in giving evidence if he or she perceives a risk of being prosecuted by State authorities for some State offence likely to be disclosed by that evidence. In a case where:

- it would be necessary for the person to testify as to his or her involvement in those State offences, and
- it is considered that the interests of justice would be best served if the State concerned forwent the opportunity of prosecuting the person for those State offences;

it may be appropriate to approach the State authorities seeking a State indemnity.

There may be occasions where there is also a need to consult the relevant State authority in connection with a proposal to give a person an undertaking under s9(6). That is because the effect of an undertaking under s9(6) is to preclude a prosecution against the person for a State offence if the person's involvement in that State offence is disclosed in the course of giving evidence and the State authority is unable to show that the evidence necessary to support the conviction was not derived from the person's protected testimony.

Consultation is required because an undertaking under s9(6) would have an obvious impact on the ability of the State authority to enforce the State criminal law.

Matters to be taken into account in deciding whether the relevant State authority should be consulted include the relative seriousness of the Commonwealth and State charges.

The responsibility for seeking an undertaking or consulting with a State or other authority rests with the regional office.

Where a person is being prosecuted for both Commonwealth and State offences it will be necessary to seek a State indemnity if the witness would disclose offences (see the joint trial agreements with State and Territory DsPP).

Offers of assistance and induced statements

7. Guidelines for Commonwealth Investigation Agencies on Offers of Assistance to Authorities

The CDPP and the AFP have prepared these guidelines to provide general assistance to investigators who interact with defendants and suspects who have offered to provide assistance in the expectation of receiving some kind of formal concession, such as an indemnity from prosecution or reduction in proposed charges.

The guidelines also relate to offers of assistance where the concession sought includes a discount on sentence under section 21E of the Crimes Act.

Investigators should be referred to these guidelines when offers of assistance are made by accomplices.

8. Proposals to treat an accomplice as a prosecution witness during an investigation

In the course of an investigation the police may identify a participant in the criminal activity under investigation as a person who, from the perspective of the police, is likely to be of more value as a witness for the prosecution than a defendant.

The *Prosecution Policy of the Commonwealth* provides that the police should always seek advice from the CDPP on the appropriateness of adopting such a course unless for some reason it is not practicable to do so.

The Director (in his absence, the First Deputy Director) must be informed, if necessary by telephone, where:

- the police seek advice from a regional office in relation to treating an accomplice as a prosecution witness, and
- on the information available to the regional office there is reason to doubt that an undertaking under the Act would be granted were a formal application to be made having regard to the criteria set out in paragraph 6.6 of the *Prosecution Policy of the Commonwealth*, or
- the course of action proposed by the police could otherwise be regarded as potentially contentious.

9. Proposals by defence that the defendant be treated as a prosecution witness after charges are laid

Where defence approach the CDPP in relation to an offer for the defendant to be treated as a prosecution witness after charges have been laid, the CDPP should refer to matter to the investigation agency for the taking an induced interview or statement. The investigation agency should then make an assessment and provide a recommendation to the CDPP on whether, from the perspective of the investigation agency, the person is likely to be of more value as a witness for the prosecution than a defendant.

10. Precedent for an induced statement

The following is a precedent for an induced statement in relation to a witness, who is or is likely to be considered for the granting of an undertaking under the *Director of Public Prosecutions Act 1983*. The jurat is in the form specified by Rule 11 of Part 3 of the *Local Courts (Criminal and Applications Procedure) Rule 2003* (NSW).

The wording of the jurat will need to be varied if the statement is to be used in a jurisdiction other than New South Wales. The specific applicability of the wording of the reverse caution should be considered in each individual case and may need to be varied due to the circumstances of the particular witness.

1. This statement made by me accurately sets out the evidence that I would be prepared, if necessary, to give in court as a witness.
2. The statement is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I will be liable to prosecution if I have wilfully stated in it anything that I know to be false or do not believe to be true.
3. This statement is made on the basis that it will be used to support an application (if necessary) for an indemnity from prosecution for any offences disclosed from the Commonwealth Director of Public Prosecutions and other prosecuting authorities in Australia for the purpose of me giving evidence in criminal proceedings in Australia. Further this statement is also made on the basis that apart from the circumstances referred to in paragraph 2 above it will not be used in evidence in any criminal proceedings against me.

4. I also acknowledge that no assurances or guarantees have been given in relation to the grant of such an indemnity.

11. Letters of comfort

Occasionally a potential witness may be reluctant to testify or speak to investigators. A letter of comfort is a mechanism that may be used to facilitate a person's co-operation with investigators with a view to obtaining a statement and having that person testify in the prosecution.

A letter of comfort is a representation by the Office that, based on the information then available, the Office does not propose to prosecute a person for conduct related to a proposed or already instituted prosecution against others.

The issuing of a letter of comfort does not involve the exercise of any statutory function or power under the Act. It is advice that the person will not be prosecuted because on the information available the person has not committed any offence related to the conduct that is the subject of the prosecution.

It is inappropriate to issue a letter of comfort where there is information that the person has committed an offence involving matters linked with the prosecution. In that case, the ordinary principles and practices for the giving of undertakings should be applied.

A proposal to issue a letter of comfort need not be referred to Head Office. The forming of an opinion that a person has not committed an offence is part of the day to day work of lawyers in the Office, and no statutory function or power is involved.

The Deputy Director of a regional office is the appropriate level to sign letters of comfort.

A letter of comfort should not amount to a de facto undertaking and should not be expressed in terms of any of the undertakings under the Act.

The form of individual letters might differ depending on the particular matter, but an example of the matters that should be covered follows.

The letter should advise the recipient that:

- the writer has been informed that he/she [the recipient] is to be called to give evidence at the trial of [name of accused] who has been charged with the offence of [description of offence];
- the trial is listed to commence on [date];

- the writer has been provided with a copy of his/her [the recipient's] statement/recorded interview made by him/her and signed on [date] containing the evidence that it is anticipated he/she will give;
- a copy of that statement/recorded interview is attached to the letter;
- on the basis that the evidence in this statement/recorded interview is true and that it fully discloses his/her involvement, this office does not intend to prosecute him/her in relation to his/her involvement as set out in that statement/recorded interview;
- this assurance does not apply to any proceedings in respect of the falsity of any evidence that he/she may give in Court.

Any doubts about a proposed letter of comfort may be referred to the Legal Division in Head Office.