



Appearing in Collateral and Contempt Proceedings

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Introduction

1. Certain proceedings are so closely linked to the Office’s primary function of prosecuting Commonwealth offences that it is appropriate for the CDPP to have a role in them, including:

- assisting members of the AFP and other investigators in appearing before justices, magistrates and the members of the Administrative Appeals Tribunal for the purpose of obtaining search, surveillance device, telephone interception or stored communications warrants;
- acting for agencies in any collateral proceedings such as challenges to the issuing of search warrants and applications for judicial review (namely ADJR and s39B *Judiciary Act 1903* proceedings);
- instituting contempt proceedings; and
- representing a chief of staff or service chief of the Defence Force in respect of appeals to the Defence Force Discipline Appeal Tribunal.

2. The costs issue must not be overlooked when the CDPP is acting for an agency in court proceedings. Although the CDPP does not charge agencies for professional costs, it must be made clear that the agency is liable to pay the other party’s costs if the court so orders. The costs issue must be clarified before any agreement to act for an agency is made.

Statutory Basis for Appearing in Collateral Proceedings

3. The three sources of power for these appearances are:

- an implied incidental power derived from the different express functions and powers under the Act;
- an express incidental function in s6(1)(n) of the Act; and
- section 9(11) of the Act which empowers the CDPP to act as counsel or solicitor (or both) for an authority of the Commonwealth where that authority is a party to a proceeding in respect of a matter that is connected with the performance or possible performance of one of the Director’s functions.

4. The Director’s implied incidental power was considered in *Director of Public Prosecutions v ABC* (1987) 7 NSWLR 588 at 596-7. The NSW Court of Criminal Appeal held that where the CDPP had instituted a prosecution for a Commonwealth offence, it had a right to bring proceedings for contempt to ensure the integrity of the administration of justice. [In that case the Director did not need to rely on the express incidental power in s6(1)(n), although s6(1)(n) would also have been a sufficient basis for doing so].

5. The power in s9(11) of the Act was enacted to clarify any doubts that may have existed about the Office's ability to advise and represent a Commonwealth agency such as the AFP in civil proceedings which are connected with a prosecution.

Appearing on the Return of a Subpoena

6. When a subpoena is served on an investigation agency in connection with a prosecution the agency normally obtains separate legal representation. This is the preferred approach of the CDPP as appearing in relation to subpoenas can easily divert resources from the prosecution being conducted and there is the potential for conflict to arise between the agency's views on the subpoena and the CDPP's responsibility as the prosecuting agency.

7. The decision of *State of Western Australia v Salmat Document Management Solutions & Ors* [2005] WASC 232 has also cast doubt on the power of the CDPP to act for third parties on return of subpoenas. In this decision, McKechnie J held that the incidental power in section 6(n) of the *Director of Public Prosecutions Act 1983* does not give the CDPP the power to act in these circumstances. His Honour held that there is no nexus between the witness and the proceedings to make a grant of power necessary because there will be cases where the interests of the CDPP and those of the witness do not coincide and the CDPP has power in any event to intervene in the matter to protect the prosecution's interests.

8. Consultation is required between agencies and the CDPP in relation to subpoenas, including when agencies are making initial assessments of the material involved.

9. It is vitally important that the agency or legal representative who acts in relation to the subpoena advises the CDPP that a subpoena has been served, what, if any, material has been provided to the defence in response to the subpoena and whether any additional evidence has come to light as a result of searches carried in relation to the subpoena. This may be important in providing further evidence for the prosecution or the prosecution meeting disclosure obligations. This issue is addressed in the AFP/ CDPP Memorandum of Understanding. Prosecutors should be active in ensuring that agencies and legal representatives keep these considerations in mind.

Appearing in Civil Proceedings

10. The source of power for the CDPP's appearing for agencies in certain civil proceedings is s9(11) of the Act.

11. The power to act in civil proceedings is most frequently exercised on behalf of the AFP. Guidelines on when the CDPP should represent the AFP in civil proceedings appear in the AFP/CDPP Memorandum of Understanding.

Instituting Contempt Proceedings

12. The CDPP has a function of instituting and/or carrying on contempt proceedings in the following circumstances:

- where the conduct is in the nature of contempt and is an offence under Commonwealth law, such as s60 of the *Royal Commissions Act 1902*;
- relying on either the implied incidental function or s6(1)(n) of the Act, where the contempt prejudices the administration of justice in a particular case in which this Office is involved; and
- where a person has failed to obey a sentence or order of the Family Court of Australia under s112AD of the *Family Law Act 1975*, contrary to s112AH of that Act.

13. The function in respect of proceedings under s112AH of the *Family Law Act 1975* was conferred on the CDPP in 1990 at a time when the Australian Government Solicitor (AGS) traditionally carried on such proceedings on behalf of the Attorney-General.

14. The Office takes the view that the AGS remains the proper authority for the institution and/or carrying on of such proceedings. Therefore officers should refer such matters to the appropriate office of the AGS.

15. The CDPP does **not** have a function in relation to the following contempts, even though the Office may have been involved in the proceedings:

- the disclosure of jury deliberations following upon a case prosecuted by the Office;
- criminal contempts arising out of proceedings in which the Office is not involved, even though the proceedings took place in a federal court, (eg, an improper approach to a judge in Family Court proceedings);
- ‘contempt in the face of the court’ even though the court is a federal court (on one view these are civil contempts and they can be initiated by the court on its own motion – we have had an appeal from a decision of the Federal Magistrates Court in relation to a finding of contempt where the respondent was named as the Attorney-General and the matter was referred to AGS); and
- civil contempt (which involves disobedience of court orders, undertakings or processes) [unless the Office was involved in the matter out of which the alleged civil contempt arose].