

Preparing the Plea

Wherever possible defence counsel should take instructions at an early time. Those instructions should be as detailed as circumstances permit and should cover the facts and circumstances of the offending and the identification of any mitigatory information that may be available. In taking instructions it is important to remember that your client is unlikely to be aware of what is and is not relevant let alone important. It is therefore necessary for you to carefully probe to obtain the information necessary for the proper presentation of the plea. You will wish to explore with the client the areas of information that are likely to assist. You will need detailed instructions both as to the offence and as to the offender.

The information you obtain at this time will be used by you in providing advice to the client as to whether or not a plea of guilty should be entered and, if so, as to which charge or charges.

The information will also lead you to other avenues of investigation for the purposes of presentation of the plea. For example, as a consequence of your discussions with your client, you may identify matters that require the gathering of further information such as: employment details from an employer and the likely consequences for that employment of the plea; the identity of referees; the need for any psychiatric or psychological assessment of your client; further information from others regarding the family and home circumstances of your client and so on.

For defence counsel, if a psychological or psychiatric assessment is to be made of your client that should be attended to at an early time. When the report of the psychologist or psychiatrist is obtained you should ensure that it deals with all of the issues you regard as necessary for the proper presentation of the plea. You will also need to ensure that you fully understand what is being said by the expert and, if there be doubt, you should contact the expert for clarification.

Having determined that a plea of guilty will be entered to an identified charge or charges it is necessary to prepare for the plea. As a matter of practicality the preparation of the plea and the information provided to the court in respect of the offence and offender will vary depending upon the circumstances.

Obviously a plea to a minor offence will not usually require the detailed preparation and presentation that will be involved in an offence of a more serious kind. It is important that you tailor your plea to the circumstances of the particular matter and that you bear in mind what is appropriate for the nature of the offence.

When preparing for a plea, depending upon the nature of the offence, there are likely to be many things for both the prosecutor and counsel for the defence to consider.

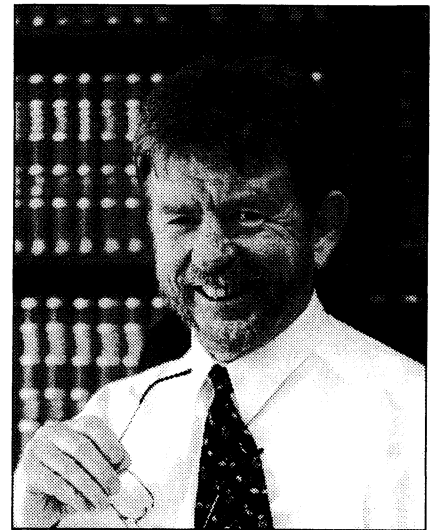
A convenient summary of some matters to be considered is to be found in sections 5 and 6 of the *Sentencing Act*.

You may wish to use those sections as the source of a checklist for topics that are likely to be necessary to address. Each counsel will need to determine how he or she is going to deal with these matters in advance.

As a general proposition counsel should be conversant with the provisions of the legislation creating the offence along with the requirements of the *Sentencing Act* and other relevant principles relating to the sentencing of offenders for offences of the kind then before the court.

Consideration should be given to the need to address the principles of sentencing found in those locations. Issues such as the need for general and specific deterrence, the totality principle, the need for parity in sentencing with co-accused and the like need to be considered in each case.

It is important that both counsel be familiar with the facts that are to be



Hon Justice Riley

presented to the court and the surrounding circumstances of the offence. Counsel should be in a position to inform the court of relevant provisions within the legislation creating the offence including the maximum penalty and any provisions of the *Sentencing Act* or any other legislation that may have an impact upon the capacity of the court to deal with the matter. Both counsel should be aware of the sentencing options open to the court and be in a position to discuss those with the court should that become necessary.

Counsel need to have in mind the dispositions that they regard as appropriate and submissions should be addressed and guided by a "case strategy". Defence counsel, in particular, should be aware of the likely and appropriate disposition of the matter.

As I indicated on an earlier occasion the accused should be made aware of the likely disposition. In making submissions to the court it is inadvisable for counsel to call upon the sentencing judge or magistrate to impose what must be an inappropriate sentence. To do so is to detract from other submissions that you make in favour of your client because those submissions must flow from an unrealistic assessment of the criminality or culpability involved.

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If the matter is a serious matter then you should face up to it. The plea of guilty acknowledges that an offence of a particular level of seriousness has been committed and if that offence is incorrectly characterised as "serious" then you, as counsel, should acknowledge it to be so.

The court relies upon both prosecution and defence counsel at all times but this is particularly so in the making of a plea in mitigation. The court will accept a lot of information from the bar table based upon the unchallenged assertions of counsel.

It follows that counsel must take great care in presenting information to the court to ensure that the court is not misled or left under a misapprehension as to the circumstances of the offence or the offender or as to the impact of any legislative or other authority upon the matter at hand.

PIL, from previous page

assessment, either against the purchaser or the solicitor, for the levy payable.

Perhaps the greatest risk arises from ignorance.

No material was distributed by the administering department to solicitors, or their industry associations, prior to the amendments being proclaimed.

Conclusion

While the conveyancing process may be a convenient point for government to 'snag' levies not otherwise paid, it is, to say the least, unfair to use the process without giving solicitors full and frank information about their role, what they need to do to discharge it, and some protection to cover the increased risk the role entails.

The new measure may be part of an outsourcing trend, an indication of government seizing upon the conveyancing process, and the solicitors who facilitate it, to discharge its own functions, but without first educating solicitors.

Without the benefit of the compliance powers granting by legislation, and also the protections afforded in the exercise of them, solicitors should, at the very least, be educated about any 'compliance roles' put upon them.

- 1 By omnibus legislation, the *Agriculture, Fisheries and Forestry Legislation Amendment Act (No. 2) 1999*, which scheduled amendments to a number of statutes about primary production, including PILCCA. Schedule 2, containing the PILCCA amendments amended, by s 2 and 9 the definitions of buying agent and selling agent.
- 2 When it has not already been paid at another stage in the life of a beast, e.g. under s 7(2), a receiver or processor can pay it when the beast is sent to abattoir.
- 3 *Baker v Campbell* (1983) 153 CLR at 126, *Balabel v Air India* (1988) 2 All ER 246, *Crown Court Ex Parte Baines* (1987) 3 All ER 1025
- 4 *O'Reilly v State Bank of Victoria* (1983) 153 CLR 1
- 5 *Packer v FCT* (1985) 1 QR 275

News Brief

Federal Attorney-General Daryl Williams says the Protective Security Coordination Centre's Watch Office will be a permanent facility as part of Australia's response to the new security environment.

The Howard Government has allocated \$14.4 million over four years to make the Office continuously active. ①

The Martin Kriewaldt Address

Guest Speaker: Prof Rosalind Atherton,
Dean of Law, Macquarie University

Darwin lunch: 16 October, Christos Restaurant
Alice Springs lunch: 18 October, the Hanuman Restaurant

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