

The decision to plead

It is very easy for counsel to regard a plea in mitigation as "just another plea". This is likely to be so if the nature of your practice involves the making of many pleas in relation to offences that are commonplace before the courts eg for traffic offences in the Magistrates Court. It is necessary for counsel for the prosecution and for the accused to remember that each plea is important and the presentation of that plea should not be a mechanical exercise following some worn out formula.

For defence counsel the importance to your client of the plea is obvious. It is your client who will wear the consequences of any failure on your part to place before the court all relevant material in the most effective way.

Whilst there will be a significant difference between your preparation for, and presentation of, material in support of a plea to a minor traffic offence when compared with one of the more serious offences under the *Criminal Code*, it is necessary to bear in mind that each involves an exercise of advocacy skills. Effective advocacy is important at all levels of the criminal justice system.

The first matter for consideration is whether there will be a plea of guilty and, if so, to what offence. At that time it will also be necessary to determine whether the factual basis of the plea can be agreed.

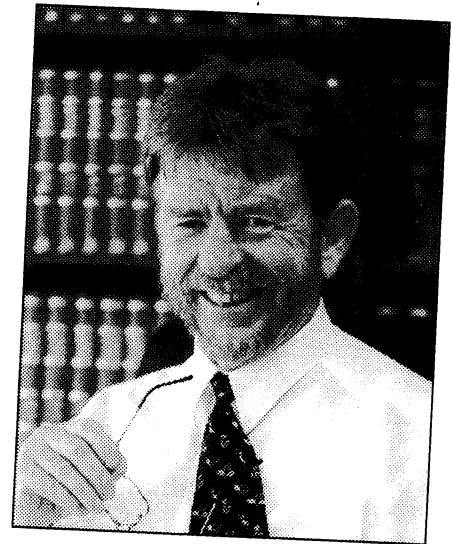
The decision whether or not to plead guilty is one for the accused alone. It is not for counsel. Counsel for the defence is duty bound to advise the accused of the benefits of entering a plea including the fact that such a plea is regarded as a mitigating factor by the courts in the sentencing process. Where necessary the advocate is entitled to address all aspects of the case and provide advice in strong terms that the accused is unlikely to escape conviction and of the benefits of a plea in the particular case. However in the end the accused must be allowed complete freedom of choice as to the plea he or she wishes to make.

In circumstances where an accused person denies having committed the offence charged but nonetheless insists upon pleading guilty to it, counsel may continue to represent the

accused person but only after advising the accused of the consequences of such a course of action. In particular the accused should be informed that submissions in mitigation will necessarily have to be presented on the basis that the accused is guilty of the offence charged. It is obviously not possible to have the client plead guilty and then present submissions inconsistent with that plea. If your client denies having committed the offence but insists upon entering a plea of guilty it is prudent for you to obtain written instructions from the client, if that be possible, that a plea of guilty is to be entered.

In the event that a plea of guilty is to be entered defence counsel should endeavour to settle with the prosecutor the facts that are to be placed before the court by agreement. If agreement can be reached this is to the advantage of all and especially the accused. It enables both counsel to have better control of the plea and to make submissions that they can confidently assume will not be contradicted by the other side. For counsel for the defence it allows for better control and presentation of the plea in mitigation on behalf of the client. It avoids nasty surprises.

Included in the matters that should be agreed with the prosecution prior to the entry of a plea of guilty is the criminal history of your client, the terms of any victim impact statement to be provided to the court and any other information of a negative kind upon which the prosecutor proposes to rely. In the event that you are unable to wholly agree matters with the Crown you should endeavour to identify with precision the areas of dispute and to limit those areas so that your plea in mitigation in relation to other areas may proceed without fear of contradiction.



Hon Justice Riley

When agreed facts are to be presented to the court it is important that both prosecution and defence counsel take care to ensure that the negotiation process does not produce a set of facts that does not make sense or is inconsistent with the plea to be entered. It should be remembered that the sentencing judge is not obliged to accept and act upon the facts as agreed by the parties. In *Chow v DPP (NSW)* (1992) 28 NSWLR 593 Kirby P (as he then was) observed:

The foregoing rules do not oblige a sentencing judge passively, and unquestioningly, to accept facts as the basis for sentencing which are presented by the prosecution and/or the accused. The judge's sentencing discretion is to be exercised in the public interest. Even where the prosecution and the accused are agreed, they cannot fetter the judge's performance of the judicial function by their plea bargaining ... A statement of agreed facts may appear to the sentencing judge to be inadequate for sentencing purposes. The judge may feel the need for further material, for example, by way of pre-sentence report to assist in the performance of the sentencing function. The parties cannot forbid the judge to seek such assistance.

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If the agreed facts disclose a more serious offence than that to which the accused has pleaded guilty then both counsel, and in particular the prosecutor, should be in a position to justify the acceptance of the plea in fact made. Whilst it is not for the court to determine the charge presented or the plea thereto, it is for the court to determine the appropriate sentence.

In providing your client with advice to plead guilty it is obviously important that you do not raise unrealistic expectations as to the likely outcome of the proceedings. If a custodial penalty is likely then the client should be aware of that fact.

If you raise unrealistic expectations in your client then the repercussions of your actions will be visited upon you when the sentence is handed down. ①

More CLEs

The Continuing Legal Education Seminars are well-attended but members are urged to ensure they register before turning up.

Confirmed numbers is necessary to the provision of materials and seating.

The next CLE in September is on Unfair Dismissal with Merran Short and Michael Grove. See the complete program on the back page. ①

Upcoming audits under Financial Transaction Reports Act 1988 by AUSTRAC

The Australian Transaction Reports and Analysis Centre (AUSTRAC) was established under the *Financial Transaction Reports Act 1988 Cth (FTR Act)*. The object of the *FTR Act* is to facilitate the administration and enforcement of taxation and other laws. AUSTRAC's mission is to make a valued contribution towards a financial environment hostile to money laundering, major crime and tax evasion.

An article covering solicitor obligations under the *FTR Act* recently appeared in the June 2002 issue of *Balance* to remind Solicitors of these obligations.

Under sections 27D and 27E of the *FTR Act*, AUSTRAC may conduct inspections of a solicitor's premises for the purpose of monitoring compliance with section 15A. It also should be noted section 31 of the *FTR Act* states it is an offence to structure transactions for the sole or dominant purpose of avoiding a significant cash transaction report.

AUSTRAC will shortly be commencing random audits of Solicitors to assess compliance with *FTR Act* reporting obligations within all States of Australia. This audit will cover transactions across both Trust and general accounts.

The prime documents that the AUSTRAC audit teams will need to inspect are:

- Receipt Book
- Bank Deposit Slips
- Cash Book
- together with any other documentation available to determine the cash component of a transaction.

For further information regarding solicitor obligations, or for any other information, please do not hesitate to contact the AUSTRAC Help Desk on 1800 021 037, 02 9950 0827 or by e-mail on help_desk@austrac.gov.au.

There is also extensive information, including a copy of the *FTR Act*, available on our Internet site at www.austrac.gov.au ①

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