

NZILA Conference  
14 September 2017  
Michael Heron QC

# Governmental Investigations and Inquiries



# Overview

- ▶ What is the place of insurer funded reparation payments in regulatory investigations/prosecutions?
  - ▶ Are they appropriate?
  - ▶ What effect do they have?
  - ▶ The Crown's decision making process
- ▶ What are the legal boundaries on governmental inquiries?
  - ▶ Principles
  - ▶ Law
  - ▶ Reasonableness
- ▶ How does a regulator look at whether to investigate and take proceedings?
  - ▶ Purpose of Legislation
  - ▶ Enforcement Guidelines
  - ▶ S-G's Prosecution Guidelines



## Reparation – Insurance - *Osborne v Worksafe*

- ▶ Litigation arising from the Pike River disaster
- ▶ Pike River Coal Ltd prosecuted under HSE Act, fined \$760k and ordered to pay reparation of \$3.41m (\$110,000 per victim).
- ▶ CEO Whittall also faced 12 HSE charges, pleaded NG
- ▶ August 2013 Whittall undertook to make a voluntary payment of \$3.41 million in the event prosecution offered no evidence against him. Payment was funded by the D&O insurer (premised on the saving of costs of a 16 – 20 week trial).
- ▶ In December 2013 Worksafe (MBIE) decided to offer no evidence and Judge dismissed the charges against Whittall.
- ▶ Osborne brought JR of prosecution decision not to offer evidence and DC decision to dismiss charges.



## Osborne v Worksafe – High Court

- ▶ Alleged Illegal Agreement – High Court
  - ▶ *[52] The applicants submitted that at common law an agreement to stifle a prosecution, by for example withdrawing charges in return for a payment, is an unlawful contract and is void on public policy grounds...*
  - ▶ *[54] Unsurprisingly Worksafe accepted that an agreement to stifle a prosecution would not be consistent with the Guidelines, observing that no reasonable prosecutor would enter into such an agreement.*

# Osborne v WorkSafe – High Court

[56] ... It was Worksafe's contention that the "offer" was of a voluntary payment to be received by the victims of the tragedy in the nature of reparation. It rejected the applicants' submission that there had been a "requiring or receiving" of the payment on the part of Worksafe. It emphasised that it did not enter into any binding agreement to secure the payment on behalf of the victims or at all.

[58] Despite the applicants' resolute depiction of the events as an agreement, the record reveals that the proposed payment was consistently referred to as a voluntary payment and one in the nature of reparation to the disaster victims. It was considered in that light by those whose task it was to make the Prosecution Decision.



## Osborne v WorkSafe – High Court

- ▶ *[57] The distinction between a voluntary payment as compared with one which is made as a consequence of a binding bargain appears to be a critical feature.*
- ▶ Bowen LJ – “Reparation (whether by the offender or a relative) could well be a matter that could be taken into account in a decision not to prosecute but there must be no bargain made about it.”



## Osborne v Worksafe – Court of Appeal

- ▶ The Court of Appeal's view
  - ▶ Amenability to judicial review
    - ▶ The prosecutor's decision is amenable to review.
  - ▶ Did the prosecutor follow the guidelines?
    - ▶ [77]...*Such fine questions of weighting — here the importance of reparation versus acknowledgement of responsibility — are not ones for the Court on judicial review.*
    - ▶ [79]...*Worksafe had concluded that although the case could credibly be put before a Court, success was unlikely or at least contingent on pre-trial arguments. The litigation risk was significant. That is the sort of factual and holistic assessment a prosecutor must be entitled to make.*



## Osborne v Worksafe – Court of Appeal

- ▶ Was there an illegal agreement?
  - ▶ [72] ...we consider no improper bargain was reached between Mr Whittall and Worksafe as to the payment of reparation. Mr Whittall's insurer offered a substantial reparation sum in the event the prosecution terminated. The prosecutor was entitled in law to consider that conditional reparation undertaking as part of the prosecution process (and the absence of that reparation sum in the event the prosecution proceeded on).
- ▶ The Court confirmed that decisions whether to prosecute “shall not be made a matter of private bargain”. If there was an agreement where one side promised to make payment in exchange for a promise not to prosecute, that would be unlawful.
  - ▶ [56] ...there must be no express or tacit indication by the prosecution that the consequence of the making of the offer by the defendant is that it will necessarily then be accepted as the conclusion of a bargain.



*And next  
the  
Supreme  
Court*

Leave

Leave to appeal to the Supreme Court now granted

Question

Broad question as to whether the Court of Appeal was correct

Note

Note for Insurers  
Check the scope of cover intended under policies  
Review wording as to civil penalties for example – are these intended to be covered  
Question whether reparation intended to be covered

# Governmental Inquiries

- Inquiries Act – processes and powers as set out in the Act, public and government inquiries.
- Other inquiries under State Services Act or commissioned by Chief Executive or Boards.
- All have a requirement for natural justice.

*Natural justice requires:*

1. *An evidential basis for the conclusions which are reached;*
2. *The substance of any adverse content is disclosed and that the subject of adverse content is given fair opportunity to correct or contradict it.*

*Serco New Zealand Ltd v Chief Inspector of Corrections* [2016] NZAR 1280 at [44]

*A v Attorney-General* [2013] 3 NZLR 630 (CA) at [58]

*Re Erebus Royal Commission; Air New Zealand v Mahon* [1983] NZLR 662 (PC) at [671].



# Investigations

If the public body decides to investigate a complaint, the investigation must, in public law terms, be a proper investigation.



This means that the opinion that is formed after the investigation must have a **reasonable basis**. For there to be a reasonable basis, there must have been a **reasonable** attempt at investigating the matter properly.



This includes complying with the principles of natural justice by making no adverse findings before putting the matter first to the individual concerned.

# Reasonableness

The New Zealand courts approach to “unreasonableness” is measured in terms of whether the action or decision is “beyond the limits of reason” as per Cooke J in *Webster v Auckland Harbour Board*. [\[1987\] 1 NZLR 129](#)



# Check your policies

- ▶ Statutory liability policies may only extend to an investigation or inquiry under the Act which relates to the prosecution (WorkSafe etc)
- ▶ Inquiries can have significant consequences for senior people (recent examples demonstrate this) and yet no convictions or civil findings are made.
  - ▶ CERA – State Services Inquiry
  - ▶ Ministry of Transport – State Services Inquiry
- ▶ Are you intending to cover a Royal Commission, a public inquiry, a government inquiry or a departmental inquiry into a matter?



## The Regulator's View

### Theoretical vs Actual of Enforcement Action

- ▶ Enforcement is more likely where it supports or advances the purpose of the legislation.
- ▶ The likelihood of enforcement action is increased where it is consistent with organisational enforcement guidelines and stated priorities.
- ▶ In considering criminal prosecutions, each organisation must apply the Solicitor General's Prosecution Guidelines and in particular the public interest test.

# Purpose of Legislation

*"...a broadly framed discretion should always be exercised to promote the policy and objects of the Act." **Unison Networks** Supreme Court 2008 [53]*



Public body given broad powers designed to achieve economic objectives – *"The courts in those circumstances are unlikely to intervene unless the body exercising the power has acted in bad faith, has materially misapplied the law, or has exercised the power in a way which cannot rationally be regarded as coming within the statutory purpose."* [55]



Have to read the statute as a whole to ascertain the policy and objects of the Act.



## Purpose of Legislation cont.

- ▶ FMAA/FMCA – *“to promote and facilitate the development of fair, efficient, and transparent financial markets”*
- ▶ *“to promote the confident and informed participation ... in the financial markets”*
- ▶ Additional purposes include avoidance of unnecessary compliance costs and the promotion of innovation and flexibility in financial markets.
- ▶ The FMA must act independently in exercising its powers (s9(4)).
- ▶ *Warminger* case: Warminger and FMA each withdrew appeals:
- ▶ *FMA CE Rob Everett* *“... We are satisfied that our regulatory objectives have been achieved in taking these proceedings.”*
- ▶ *“Maintaining and promoting integrity of NZ’s financial markets is a core part of FMA mandate...”*

# Enforcement Guidelines

- ▶ FMA Enforcement Policy/Regulatory Response Guidelines
- ▶ *“As a risk-based regulator, our resources are focused on conduct that we think poses the most significant risk to achieving this objective.”*
- ▶ *“We are committed to enforcement action which targets conduct that harms or presents the greatest likelihood of harm to open, transparent and efficient capital markets.”*
- ▶ *“We will not enforce every breach that comes to our attention.”*
- ▶ Civil Proceedings (s34)
- ▶ *“There is a serious contravention of the legislation. Taking action progresses the FMA’s regulatory objectives, our strategic priorities and the statutory criteria under the FMA Act.”*
- ▶ Note also the focus on “conduct” in the FMA publications and Statement of Intent

# Solicitor- General's Prosecution Guidelines

- The purpose of the Guidelines is to ensure that the principles and practices as to prosecutions in New Zealand are underpinned by core prosecution values. These values aim to achieve consistency and common standards in key decisions and trial practices.
- The Guidelines reinforce the expectation of the Law Officers and the Courts that a prosecutor will act in a manner that is fundamentally fair, detached and objective. The prosecutor should act to foster a rational trial process, not one based on emotion or prejudice.

# Solicitor-General's Prosecution Guidelines cont.

- ▶ The Test for Prosecution
  - ▶ 5.1 Prosecutions ought to be initiated or continued only where the prosecutor is satisfied that the Test for Prosecution is met.
- ▶ The Test for Prosecution is met if:
  - ▶ 5.1.1 The evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction – the Evidential Test; and
  - ▶ 5.1.2 Prosecution is required in the public interest – the Public Interest Test.
- ▶ The Public Interest Test
  - ▶ 5.5 Once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of conviction, the next consideration is whether the public interest requires a prosecution. It is not the rule that all offences for which there is sufficient evidence must be prosecuted. Prosecutors must exercise their discretion as to whether a prosecution is required in the public interest.
- ▶ Seriousness of the conduct in question is a key determinant.