

When the regulator comes knocking: what do I need to know?

Andrew Yuile
Barrister

Outline

- ▶ The regulator is looking to investigate your client. The question is, **what do you need to know?**
 - ❖ There are many possible answers, factual and legal. The answers I'll talk about today are:
 - Some historical background to coercive powers, especially compulsory questioning, which can help with steps to take in current matters
 - The particularities of the relevant legislation and regulator
 - The factual nuances of your client and the context or focus of the investigation
 - The background to the investigation, and your client's role in the whole affair; and how any agreement that might be put to the Court deals with the facts

The take homes

- ▶ Four take homes from the message to come:
 - ❖ Acts and regulators can differ substantially. So, know the regulator and the Act.
 - ❖ Regulators have extensive coercive powers, which are ever expanding. So it may be about damage control as opposed to offence.
 - ❖ The client's factual position is important - is it a corporate or an individual body? Are there other investigations going on in parallel?
 - ❖ A careful and comprehensive factual background is important not only so you understand your position, but also if you are going to convince a Court to accept an agreed penalty.

1. I need to know a bit of (recent) history

- ▶ The accusatorial principle and self incrimination have expanded in importance in recent years. How has it developed?
 - ❖ Common law, not constitutional, right
 - ❖ Principle of legality
 - ❖ Compensatory protections
 - ❖ Cases:
 - *X7*
 - *Lee No 1* and *Lee No 2*
 - *Zhao*

1. I need to know a bit of (older) history

- ▶ As a point of interest and background, this is not new
 - ❖ Very old cases in the bankruptcy and companies jurisdictions
 - ❖ Public interest in overcoming the interest of the individual in the right to silence
 - *R v M'Cooley* (1879) 5 VLR 38
 - *Hamilton v Oades* (1989) 166 CLR 486
 - *Mortimer v Brown* (1970) 122 CLR 493
 - *Rees v Kratzmann* (1965) 114 CLR 63
 - *Saraceni v Jones* (2012) 42 WAR 518
- *Why is all of this useful to know?*

2. I need to know the legislation

- ▶ The Acts pursue similar ends, but do it in slightly different ways
- ▶ **Examples and case study**
 - ❖ *Fair work (Building Industry) Act*
 - ❖ *Australian Crime Commission Act*
 - ❖ *Australian Securities and Investments Commission Act*
 - *R v OC* (2015) 90 NSWLR 134

3. I need to know the focus of the investigation and the client

- ▶ The context of the questioning is important
 - ❖ Practically speaking - how much trouble is your client in?
 - ❖ Legally - what are the factual elements of the picture?
 - Parallel civil and criminal cases?
 - Entity vs. individual?

4. I need to know the facts and be able to connect them, later down the track, to any agreed legal consequences

- ▶ Besides being able to negotiate and advise better, there is a further reason to be right across the background - and to be able to set it out clearly and properly
 - ❖ Agreement of facts and penalties
 - ❖ Confirmed possible after *Commonwealth v Dir, Fair Work Building Industry Inspectorate*
 - But, need to convince a court of the appropriateness of the orders and the factual background is key
 - Court can come looking for more if it feels the parties haven't done enough

In summary

- ▶ It is useful to know where the coercive approach came from and where you may be able to use it
- ▶ Many Acts which have removed protections against self-incrimination, meaning your role may be more about damage control
- ▶ Acts often come with replacement protections. It is vital to know and understand the particularities of the legislation and the regulator you're dealing with
- ▶ The factual nuances of who your client is and the context or focus of the investigation is important
- ▶ Careful factual background and findings are important to assist not only with your advising and negotiations, but later down the track with justifying agreed or compromised penalties to the Court, if you get there

Questions?