

Russell Kennedy's Government CPD Series

Session 2: Investigating Corporate Entities

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Webinar housekeeping

- All attendees will be on mute and their cameras turned off for the entire webinar.
- We have BD tech support live to assist with any technical issues.
- Use the chat function for any comments/technical issues.
- Use the Q&A function for specific questions related to the webinar content - Questions will be addressed at the end of the webinar.
- There will be a post webinar survey link sent at the end of the webinar. We value attendee feedback. Presentation slides will also be sent to all attendees.
- We will also have a QR code linking to our feedback survey towards the end of the presentation so you can provide instant feedback.

Disclaimer

The information contained in this presentation is intended as general commentary and should not be regarded as legal advice. Should you require specific advice on the topics or areas discussed please contact the presenter directly.

Introduction

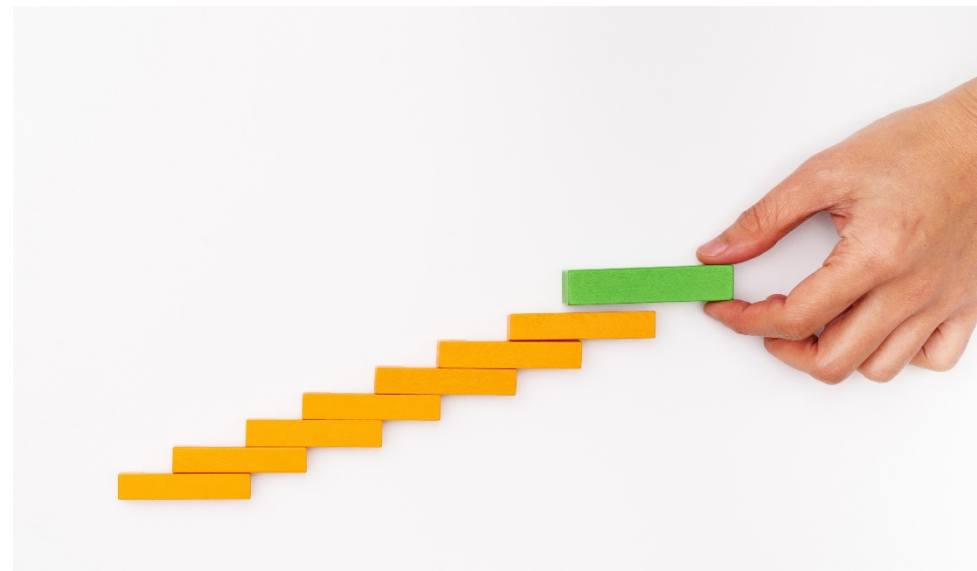


Why we're here (aside from the CPD point)

Regulators are often required to investigate and prosecute corporate entities, but knowing who to prosecute can be tricky.

Today we hope to shed light on some of these issues by:

1. Recapping some of the most common corporate structures and their legal identity.
2. Addressing issues relating to identifying the correct accused.
3. Considering the intersection of coercive powers and the admissibility of evidence.
4. Providing our top tips and takeaways for investigating corporate structures and interviews.



Common corporate structures

Many individuals operate within corporate structures, which are usually set up to avoid financial liabilities. The type of corporate structure will dictate who is legally liable for an offence.

Structure	What	Who
Business name	A business name is the name under which a person or entity trades or conducts business. If the name that a person trades under is different to their company name, they need to register it as a business name.	<ul style="list-style-type: none">• A business name does not have a legal identity and cannot be prosecuted.• It is the holder of that business name that must be prosecuted (that might be an individual or a company).
Sole trade	A sole trader may operate as an individual in their personal capacity or they may have set up a trust, be in a partnership or be operating under a company in the capacity as a sole director of that company.	<ul style="list-style-type: none">• As a sole trader you are legally responsible for all aspects of your business including any debts and losses and day-to-day business decisions .
Company	A company has members (shareholders) who own the company and directors who run it.	<ul style="list-style-type: none">• A company business structure is a separate legal entity which has the same rights as a natural person and can incur debt, sue and be sued.• Directors may be held personally liable if they breach their legal obligations.• Directors or officers are often expressly liable for offences committed by companies under various pieces of legislation.
Partnership	A partnership is a business structure made up of two or more people who distribute income or losses between themselves.	<ul style="list-style-type: none">• Each person in the partnership is liable for the offence.• If the legislation defines person to include a partnership – then the prosecution or proceeding would be brought against every partner in the partnership.
Trust	A trust is an obligation imposed on a person (a trustee) to hold property or assets for the benefit of others.	<ul style="list-style-type: none">• The trustee is legally responsible for the trust operations.• A trustee of a trust can be a company, providing some asset protection.• The trust itself is not able to be sued or prosecuted.• You must prosecute the trustee.
Incorporated associations (IA)	An IA in Victoria is a club or community group, operating not-for-profit, whose members have decided to give their organisation a formal legal structure	<ul style="list-style-type: none">• When a club or group incorporates, it becomes a 'legal person' – that is, a legal entity exists, which stays the same even if its members change.• This protects the individual members of the association from legal liabilities.• The legal entity can be prosecuted.

Untangling a trust

One of the biggest challenges when dealing with trusts is identifying the trustee. It is important when dealing with trusts, investigators endeavour to determine who the trustee is early in the investigation.

How does this look in practice?

- A regulator was investigating an offence of doing an act without first obtaining a permit.
- This person had previously applied for a permit for the same sort of act a few years earlier.
- In that earlier application for a permit, the person applying for the permit was listed as the ABC Trust.
- The previous application was accepted by the regulator (with the ABC Trust as the person applying for the permit) and the regulator subsequently focused on the ABC Trust being the entity liable for the subsequent offence.
- During the investigation, the regulator did an ASIC search for the ABC Trust and found ABC Pty Ltd with the sole director of ABC Pty Ltd being the individual the regulator knew was involved in the offence.
- The regulator issued ABC Pty Ltd with a notice to produce information. All of the documentary evidence provided referred to the Trust. There was no mention of the individual or the company. Regulator did not ask for the Trust deed and did not identify the trustee.
- By the time the investigation was finalised and we were engaged, the identity of the trustee was still not known and the statute of limitations was looming.
- A notice to produce the Trust Deed was issued asking for the Trust deed. An extension of time was requested.
- The regulator could have refused this request, which would have resulted in the person being in breach of the notice (which is an offence), however the regulator would still be left without the trust deed. So it was decided to grant the extension.
- By the time the regulator identifies the trustee, most of the offending will be statute barred.



Identifying the correct corporate accused

Our top tips:

1. Think about the way the person operates their business.
2. When documents are produced, or an investigator is looking at records held by the regulator, it is important to think critically about the possible corporate structures under which this person could be operating.
3. If a trust is involved, ask for the trust deed early.
4. Ask questions, either during the interview or when using coercive powers, about the corporate structure, remembering that a person may not understand the corporate structure they are operating under.
5. Wherever possible, an investigator should always try and obtain corroborating information, don't just rely on what they tell you.

Investigating a corporate entity

Traps, tips and evidence



Coercive powers and evidence

Individual v corporate liability

Information gathering powers such as notices to produce, or requirement to provide information letters, can be issued to any person or entity with a legal identity.

However the mind of any corporation will always be a natural persons, who may also be individually liable as a director or an officer of a company.

See, for example s 144 of the *Occupational Health and Safety Act 2004* (Vic):

If a body corporate (including a body corporate representing the Crown) contravenes a provision of this Act or the regulations and the contravention is attributable to an officer of the body corporate failing to take reasonable care, the officer is guilty of an offence and liable to...

It is important to understand the distinction between the individual in their personal capacity and the individual in their capacity to speak on behalf of the company. Importantly, often the company does not need to be convicted of the offence for the officer to be found guilty.

Coercive powers and evidence

Why is the distinction important?

Where an investigator is conducting an interview or exercising a coercive power, the distinction between individual or corporate liability is important as any error may result in the evidence being improperly obtained and inadmissible.

- Section 138 of the *Evidence Act* (Vic) provides for the exclusion of improperly or illegally obtained evidence.

Importance arises in a number of contexts:

1. Coercive powers

- The common law privilege against self-incrimination entitles a person to refuse to answer any question, or produce any document, if the answer or the production would tend to incriminate that person.
- Often also appears expressly in legislation:

See for example, s 136 of the *IBAC Act 2011* (Vic) states that:

...a person is not excused from answering a question or giving information or from producing a document or other thing on the ground that the answer, information, document or other thing may tend to incriminate the person or make the person liable to a penalty

Companies do not have the protection against self incrimination: s 178 of the Evidence Act.

A case study: distinction between individual and company

Background

- A Regulator commenced an investigation after it received a complaint that a company was employing persons in breach of the relevant Act.
- The Company comprised a sole director and secretary.
- The Regulator had information from the complainant that the sole director was the person who was engaging and employing those persons within the Company.

Coercive power

- The investigator had the power to issue a Notice to a person requiring them to give stated information and/or produce documents.
- From early on in the investigation, the investigator knew that both the Director and the Company were possibly liable for the offence.
- The Regulator issued a Notice addressed to the Proper Officer of the Company requesting documents
- The Company complied with the Notice. As the Director was the sole director of the Company, they were required to hand over the documents.
- These documents were used as evidence in a prosecution against the Director personally.

A case study in coercive powers (cont)

Director's defence

- The Director argued that all of their evidence was inadmissible because the Regulator had exercised a coercive power against the Company in order to obtain the evidence, which was then used against the Director personally.
- In doing so, it was alleged that the Regulator had acted improperly by circumventing the Director's right to refuse to give information which might tend to incriminate them.

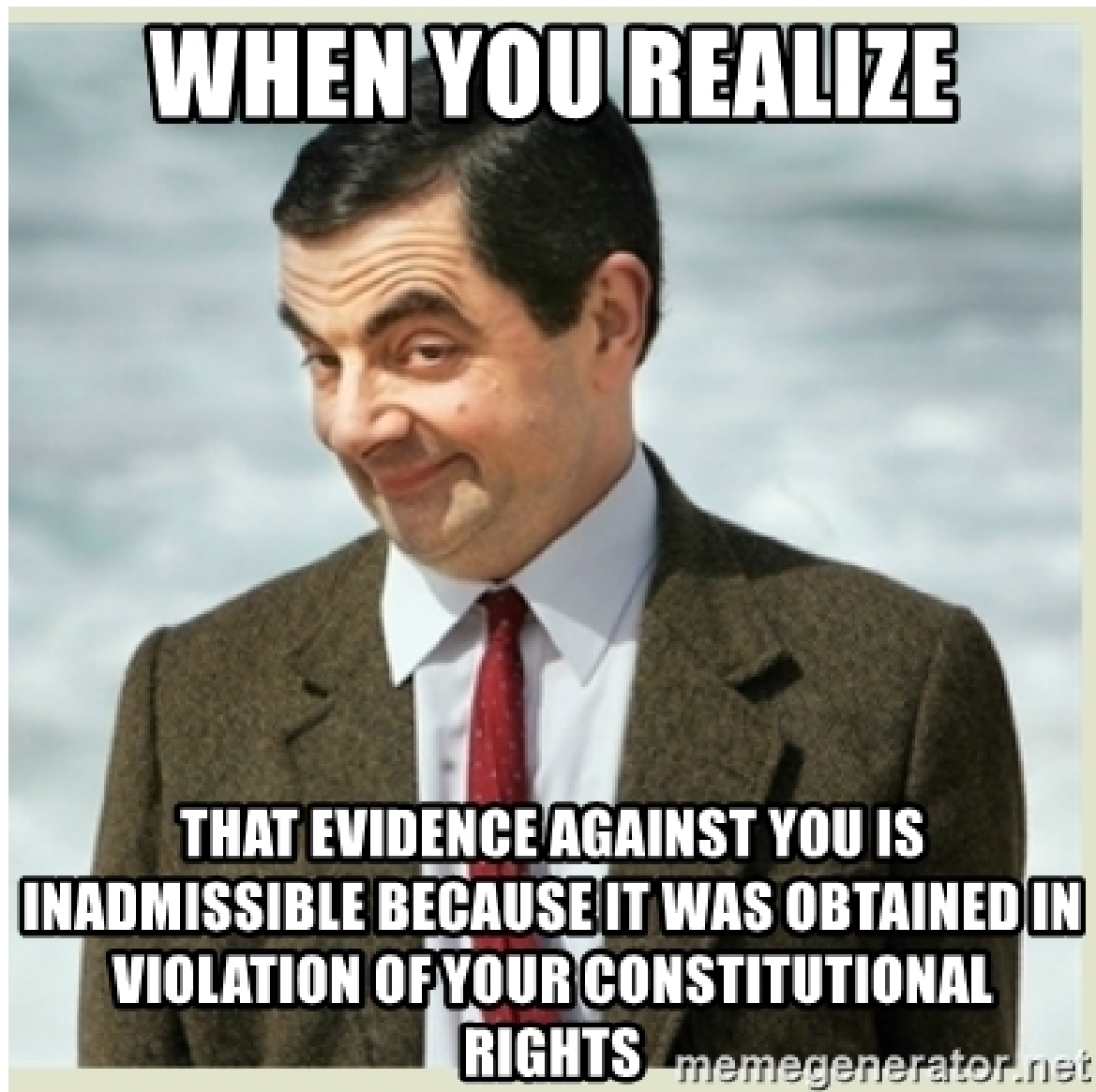
Regulator's position

- The Regulator submitted that the complaint related to the Company's conduct and therefore, it was entirely proper to issue the Notice to the Company.
- While the Director was also a suspect, the information indicated that it was the Company engaging in the offending conduct.

Outcome

- The Magistrate rejected the Defence's argument, finding:
 - that the investigator had acted properly, such that the evidence was admissible; and
 - the Notice contained all of the required warnings, including in relation to self-incrimination.

To avoid this scenario....



Take note of these tips...

Any admissions made by a person who is authorised to speak on behalf of the company are then admissible against the company.

BUT

That person may also be liable in their personal capacity, as a director or officer of the company. Liability will depend on the wording of legislation.

It does not follow that what that person said in their capacity to speak on behalf of the company is admissible against them in their personal capacity.

To ensure that any admissions made are admissible against the company and against the individual you need to ensure that that distinction is made clear.

HOW?

Give caution (and rights where applicable) twice at the start of the interview and then ask a single set of questions.

OR

Conduct two interviews



Corporate entities...

What you need to remember



Key Takeaways

Who is legally responsible? In all cases, investigators should endeavour to identify the responsible legal entity or person early in the investigation, so that you avoid running into limitation issues during the prosecution. This is particularly true where a trust is involved.

Analyse the evidence early. Ensure relevant notices are issued prior to charges being issued, or a decision being made in that regard.

Does the legislation contain a general director/office liability provision? If the answer is yes, give consideration to prosecuting not only the company but also any relevant individual,.

An individual will usually be protected by the privilege against self-incrimination. So it is important that any notices/requests for information set out the relevant legislative warnings in relation to an individual's right to refuse to comply, if doing so would tend to incriminate them. Failure to provide the relevant warnings may lead to inadmissible evidence. If the evidence suggests that the documents or information sit with the company, don't be afraid to issue the notice to the company.

Employ best practice in investigative interviews. It is important that an investigator is clear at the commencement of any interview whether they are interviewing a person as a representative of the company and/or whether the interview is being conducted to establish the person's knowledge in the commission of the offence, with a view to prosecuting them as an individual. Investigators should:

1. Give a caution in both scenarios (ie. company v individual). Consider 2 separate interviews.
2. Make clear the capacity in which the person is being asked to respond, including that there may be potential liability against them personally.
3. Ensure you are audio recording – you just might need this to defend an argument about admissibility!

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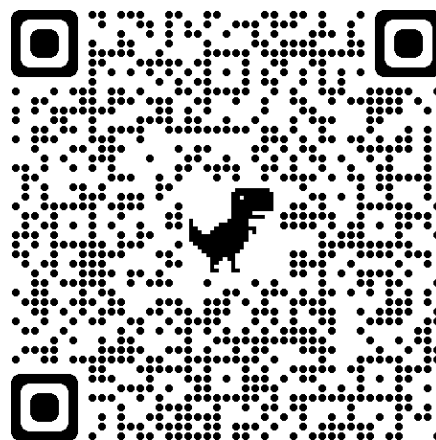
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Upcoming Victorian Government CPD Sessions

Session	Date	Presenter/s	CPD
Session 3: The Coroners' Court – The 'Golden Rules' of The Jurisdiction	<i>Friday 26 February</i>	Ben Lloyd – Russel Kennedy	1 Point <i>Substantive Law</i>
Session 4: Divesting Leasehold Interests During the Lease Term & Social and Affordable Housing	<i>Friday 05 March</i>	Michael Dowling, Shaun Burmester, Emma Dunlevie, Samantha Taylor, Kate Bartlett & Melanie Young – Russell Kennedy	1 Point <i>Substantive Law</i>
Session 5: Ethics and Professional Development	<i>Friday 19 March</i>	Anna Hinder – Guest Speaker	1 Point in <i>Ethics</i>
Session 6: Making Defensible Administrative Decisions	<i>Friday 26 March</i>	Emma Turner – Russell Kennedy	1 Point <i>Substantive Law</i>

** All session will run from 11:00 am – 12:00 pm.



Register!

Scan this QR code to register and get more information on upcoming session.



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