

DRUG OFFENCES IN THE LOCAL COURT

**Brett Thomas
Macedone Legal**

22nd AUGUST 2014

INTRODUCTION;

An extensive analysis of the Drug Misuse and Trafficking Act 1985 across all jurisdictions would be a mammoth task and that ignores the fact that the law relating to drug matters and our criminal justice system also has a very large Commonwealth component.

It is for that reason, in keeping with the theme of today's seminar, that my comments are confined to certain aspects of drug matters in the Local Court.

Any examination of statistics will show that a large amount of drug matters are dealt with in the Local Court every year and it is important that practitioners are aware of some of the more relevant issues and how, from a practical view, your clients interests can be well looked after.

That is why I am intending to focus on some particular aspects rather than trying to cover everything.

The sentencing of offenders for matters involving possession is probably one of the areas that the Local Court deals with most and is the type of thing that many less experienced practitioners will have to deal with.

Matters involving supply and in particular what we called deemed supply is also a common area and one that can sometimes cause confusion and uncertainty.

But first lets navigate the DMTA with a quick run through how the Act is set up and some of the more important provisions. For this I have been assisted and want to thank Christopher Daniele, a PLT student from UTS (via Wollongong) for the work done by him on this part of the paper.

NAVIGATING THE DMTA

The majority of NSW drug offences can be located in the first two Divisions of Part 2 of the Act, and are categorised into summary and indictable offences. Division 1 deals with summary offences such as possession and use. These are matters dealt with in the Local Court, and the penalties for these offences are outlined by s21 of the Act. (20 penalty units and/or 2 years imprisonment).

The summary offences outlined in Division 1 include:

- [s10](#) - Possession of prohibited drugs.
- s11 – Possession of equipment for administration.
- s11A – Offences relating to waterpipes.
- s11B – Possession of tablet press.
- s11C - Possession of instructions for manufacture of prohibited drugs.
- [s12](#) - Use of prohibited drugs.
- [s13](#) - Administration of prohibited drugs to others.
- [s14](#) - Permitting another to administer prohibited drugs.
- s15 - Forgery or fraudulent alteration of a prescription.
- s16, 17, 18 - Attempt to obtain a prohibited drug or obtain a prescription by a false representation.
- s19, 20 – Aiding and abetting the commission of the above offences in or outside of NSW.

Division 2 deals with more serious offences such as manufacture and supply of prohibited drugs or plants. These are usually dealt with by the District Court. However pursuant to s30 and s31 of the Act, offences involving lower quantities of prohibited plants or drugs can be dealt with summarily by the Local Court.

The indictable offences outlined in Division 2 include:

- [s23](#), 23A - Cultivation, supply and possession of prohibited plants.
 - [s24](#), 24A, 24B - Manufacturing prohibited drugs and possession of precursor.
 - [s25](#), 25A, 25B - Supply of a prohibited drugs including on an ongoing basis.
 - s26 – Conspire to commit an offence under this Division.
 - s27, 28 - Aiding and abetting the commission of the above offences in or out of NSW.

Further offences are found in Part 2B and 2C of the Act:

- Part 2B - Includes all offences related to drug premises. For example, s36V, presence of prohibited drugs or plants on premises, or the organising of a drug premises under s36Z.
- Part 2C – Includes all offences relating to psychoactive substances as identified by s36ZD and s36ZE. These offences are of their supply or manufacture (s36ZF), and also the advertisement of their use or supply (s36ZG).

The remainder of the Act includes the following:

- Part 1 which contains important definitions, for example the term “use” (s5) and also outlines the connection between this Act and other similar Acts that cover prohibited substances (s8 and 8A).
- Part 2A which deals with the operation of medically supervised injecting centres.

- Part 3 and Part 3A which deals with the destruction of prohibited drugs.

I have not mentioned section 29 of the Act as that deserves its own section and I deal with that below.

POSSESSION AND SENTENCING

Before you can proceed to sentencing on any charge relating to possession then you need to ensure that the elements of possession have been satisfied.

Offences for possession arise from section 10 of the DMTA and no definition of possession is provided in the Act.

Note that section 7 re deemed possession is not meant to be a definition section but merely an extension of the common law definition of possession. It is meant to clarify that deemed possession extends to joint possession.

Possession for the purposes of the DMTA has both a mental and physical element.

As a starting point it should be recognized that one has something in their possession when, to one's own knowledge, you have something physically in your custody or under physical control (as per Lord Diplock in **DPP –v- Brooks[1974]2WLR899 at 902**).

The mental element required is for proof that your client knew of the existence of the drug in their physical custody or control and the physical element is the need for the prosecution to prove exclusive physical control of the drug/s.

Cases such as **Kural –v- R (1987)162 CLR 502** and **Pereira –v- DPP (1988) 35 A Crim R 382** can provide assistance on the mental element.

Practitioners should also be familiar with what is known as the “Filipetti” argument.

This arises when the case against your client is based on your client having exclusive possession and the prosecution must negate possession on the part of any other person.

It usually arises when drugs are found in a house or car and you are able to defend the charge on the basis that the prosecution have not been able or are not able to prove exclusive possession.

Whilst it is possible to have joint possession (several persons in concert have and exercise exclusive possession as against the rest of the world) it is necessary for the prosecution to prove that the intention of each alleged offender is to share the exclusive physical control of the drug/s.

This can be a huge area and could be the subject of a separate paper.

Before dealing with sentencing mention should be made of two things that are relevant even to the commencement of proceedings for possession.

The first is **sections 36A to 36S of the DMTA** which deals with the licensing and operation of a medically supervised injecting centre and section 36N which provides for an exemption from criminal liability for users of the centre whilst at the centre. The trial of the centre has been extended a number of times and should continue.

The exemption provisions for the centre should provide the basis for similar exemptions in relation to the supply or use of cannabis for medical reasons or pain management. This debate has started and there will be, if not this year then next year, legislation in the NSW Parliament in relation to this issue.

At the moment it is something that you can use to otherwise mitigate penalty in relation to cannabis matters. Though it is important to ensure that you provide the Court with medical evidence of your client's condition and evidence of how the cannabis assists in pain relief or pain management. The days of just bald statements from the bar table, unsupported by evidence are long gone.

The second issue is the **Cannabis Cautioning Scheme (CCS)** which allows for the formal caution of adults for minor cannabis matters. It commenced as a trial in 2000 and continues. It did not involve any amendment to the DMTA and its basis is grounded in Government policy rather than legislation.

The eligibility criteria include;

- *possession of no more than half the small quantity (i.e. 15 grams)
- *cannabis is for personal use
- *must admit to the possession
- *identity of the person is confirmed
- *no other criminal offence when detected
- *no prior conviction for drug offences
- *cannot have had more than 2 cautions on prior occasions (including section 10).
- *need to consent to the caution and sign up for the caution.

Cautions can be withdrawn and replaced with court action and so it follows that court action can be withdrawn and replaced with a caution. This may require written representations to Police if your client meets the eligibility criteria and, for some reason, has not been given the benefit of the CCS.

Courts can probably take judicial notice of the fact that many persons coming before them are people who have had no other contact with the criminal justice system.

If your client has no previous criminal record, especially for drug matters and they are charged with possession of a relative small amount of drug then your approach to sentencing should begin with a consideration of the use of the provisions of section 10 of the Crimes (Sentencing) Act 1999. Such submissions would not be a surprise to the Court and some will even

tell you that is what they are thinking of doing. If they do and that is what you were going to ask for then there is no difficulty in then sitting down. If you have prepared properly then that will also include having explained to your client the possibility of this occurring.

The use of section 10 for these type of matters is not unusual though not always. There are a variety of circumstances where the Court may not be with you on a section 10 submission.

Whilst not exhaustive a list could include;

- *the quantity involved (i.e. too much, too many)
- *manner of detection (i.e. everybody knows the dogs are used at music festivals but not on incoming Virgin flights)
- *the extent to which the offender tries to hide the drug
- *the type of drug involved (i.e. cocaine is more serious than cannabis and heroin is more serious again)
- *your clients previous record for matters of this kind
- *your client having previously obtained the benefit of section 10

Never assume that section 10 will be the outcome. Know who you are appearing before and what they are like, or what they like and don't like. A plea done without "knowing your Bench" is a plea done without proper preparation and not in your clients interests. If you don't know find out. Ask a fellow practitioner or sit in the back of the Court and observe before taking your place at the Bar table.

SUPPLYING (AND DEEMED SUPPLY S.29)

Supplying prohibited drugs is a far more serious offence than possessing for your own personal use and the consequences are also far more serious.

Whilst the statistics may show some, section 10 for a supply matter in the Local Court would be unusual.

Sections 30 and 31 of the Act are used to determine whether more serious offences, including supply, are able to be dealt with in the Local Court or not.

Section 30 allows matters “*where the court is satisfied on the balance of probabilities that the....amount of the prohibited drug...is not more than the small quantity applicable*” to be dealt with summarily unless the prosecution elects otherwise (as per Table 2 offences under the Criminal Procedure Act) and section 31 allows matters where they are not more than the indictable quantity to be dealt with summarily unless the prosecution or accused elects otherwise (as per Table 1 offences under the Criminal Procedure Act).

For section 30 matters the maximum penalties are 50 penalty units and/or 2 years and for section 31 matters the maximum penalties are 100 penalty units and/or 2 years.

To determine the applicable quantity you need to refer to Schedule 1 of the Act. This lists all prohibited drugs (and plants) and the various applicable quantities i.e. small, indictable, commercial, large commercial and DDU.

This will determine whether your client will be able to have the matter heard and determined in the Local Court or will be required to go to the District Court.

There are huge advantages to your client in having the matter finalised in the Local Court. Not the least of which is the reduced penalties that apply. You also have the automatic right of appeal to the District Court against any finding of guilt (if you have pleaded not guilty and been found guilty) and against the severity of any sentence imposed.

Section 30 matters can only be taken to the District Court if the prosecution elect whereas your client has the right to make an election in section 31 matters. There would have to be exceptionally good reasons for your client to elect if it is possible to have the matter heard and determined in the Local Court. I have never done it and I cannot really imagine a situation where you would do it.

You should familiarize yourself with Schedule 1 as it is the cornerstone to determining the type of matter and as a consequence the level of seriousness.

SECTION 29

Schedule 1 also includes reference (in Column 1) to “*traffickable quantity*” and this is a term which you should be familiar with if practicing in this area or dealing with these types of matters. The difference between being above or below the *traffickable quantity* of a particular type of prohibited drug can mean the difference between your client being charged with supply or not.

The use to which the traffickable quantity is put becomes apparent when you read section 29 of the Act (the deemed supply provision).

Section 29 provides that a person who has in their possession more than (or not less than) the traffickable quantity shall be deemed to have that drug in their possession for supply unless;

*the person proves that they had the drug in their possession otherwise than for supply, or

* for certain drugs the person proves that they obtained possession on and in accordance with the prescription of a doctor, dentist or vet.

It should be remembered that section 29 is not an offence creating section. It is a provision to assist in proving supply matters by deeming certain things and then the onus shifts to the defendant to prove certain circumstances on the balance of probabilities.

The deemed supply provision can only apply when the defendant is in possession and therefore does not apply to attempt to supply or conspiracy to supply.

A defendant proving they had the drug in their possession otherwise than for supply usually means proving they had it in their possession for their own personal use.

The absence of related indicia (plastic bags, scales, money, foil, list of customers and the extent to which are extended credit, clip sealed bags etc.) can be helpful in defending such matters.

It is also not unusual for the prosecution themselves to determine that even though a person has in their possession more than the traffickable quantity a supply charge relying on section 29 is not either needed or appropriate.

The circumstances of cases can vary greatly.

I have a matter at the moment where Police at the Splendour in the Grass Festival at Byron Bay decided that 3.2 grams of ecstasy (10 tablets) was for personal use and have not preferred a supply charge. This in circumstances where the traffickable quantity for ecstasy is 0.75 grams and the indictable quantity is 1.25grams.

It is not unusual for the approach in ecstasy matters to vary greatly. There does not appear to be any consistency as to when a certain amount of ecstasy tablets can constitute supply or when the prosecution rely on section 29 to try and prove supply.

THE DEFINITION OF SUPPLY

I thought it important to raise this issue as the definition is a wide one and can encompass a huge amount of different circumstances.

Supply is defined in section 3 to include;

*sell

*distribute

*agreeing to supply

*offering to supply

*keeping or having in possession for supply

*sending for supply

*forwarding for supply

*delivering for supply

*receiving for supply

*authorizing, directing, causing, suffering, permitting or attempting any of those things listed above

Supply offences can also occur when a person “*knowingly takes part in the supply*”. “*Take part in*” is defined in section 6 of the Act and is also very extensive. It includes taking part in or participating in any step or causes any step to be taken, in the process of supply or provides or arranges finance for any step or suffers or permits any step in premises.

In addition to the extended definition in section 3, supply also retains its normal meaning. That is, supply also means provides them, furnishes them or makes them available.

A lengthy dissertation on the law as it relates to supply could be the subject of a separate paper. Being aware of the extended and wide definition is a good starting point.

I have also used the extensive definition in sentencing for possess matters by arguing that the offender is aware of how extensive the definition is (because I have explained it to them) and they appreciate how lucky they are in avoiding a supply charge in circumstances where they could be before the court for a more serious offence.

I did however want to make mention of one aspect of the law as it relates to supply as it can arise often, in relation to ecstasy matters in particular.

You should be aware of what is known as the Carey defence. This comes from **R –v- Carey (1990)20 NSWLR292.**

In Carey it was held that if a person receives possession of a drug/s from another on condition that the person holds the drug/s for return to the person who gave the drug/s to them, then the person in possession of the drug will not be guilty of supplying that drug/s by reason of their possession of it.

Such a situation/defence can arise in the Local Court and in some cases could be the subject of representations to the Police/DPP with a request for any supply charge to be withdrawn.

I was able to convince the DPP that a person carrying 13 ecstasy tablets into Big Day Out at Homebush a couple of years ago was as a result of him being the person silly enough to agree to carry them all in on the condition they would be returned to others once they entered. Our representations to the DPP were supported by statements from some of the other “owners” but not all.

Not only did the DPP accept a plea of guilty to possess by Longley LCM at Burwood was prepared to extend to my client the benefits of Section 10. One of the basis was that my client was the one left “carrying the can” as opposed to carrying the drugs.

CONCLUSION

At first glance the DMTA may look unwieldy but once you work your way through it becomes easier to follow.

I have sought to highlight what I think are some of the more important and widely used provisions and also provided some hints from a practical point of view.

It is widely the subject of use/consideration/analysis/reading/interpretation in the Local Court every day. Though the vast majority of matters are usually probably dealt with without any reference to the Act or related authorities it is important that you are familiar with the main provisions and how it applies in certain matters.

It will ensure that your client's interests, whatever they may be, are well protected.

BRETT THOMAS

MACEDONE LEGAL

21st AUGUST 2014.

brett@macedonelegal.com.au