Introduction: Complex Corporate Fraud Trials

Few areas of criminal justice have proved as intractable as the prosecution of complex frauds, and the difficulties have not been eased by the experience to date in trying to handle the many allegations of corporate crime generated by the excesses of the 1980s. To promote further debate and awareness of the issues involved, the Institute invited a number of leading experts to share their views at a public seminar held in Sydney last August. The fruits of that seminar are set out in this issue of our journal.

The opening paper by Roman Tomasic incisively questions whether the debate about complex trials has adequately addressed the role of criminal law in the social control of corporate crime. Drawing on questionnaires and interviews with directors, judges, enforcement officials, prosecutors and defence lawyers, Tomasic argues that too much emphasis has been put on the criminal process and far too little on civil remedies or penalties. Accusing Australian lawyers of "narrow legalism", he advocates a broader contextual analysis: "[f]ine tuning our judicial processes for the management of complex criminal trials may provide only marginal advances which will only delay the need to come to terms with more fundamental approaches ... " A broader contextual analysis requires recognition of "the dominance of a civil law culture in which there is little incentive to seek to enforce criminal sanctions within the *Corporations Law* and a strong view upon the part of the business community and professional advisers that it is generally inappropriate to seek to enforce most breaches of this body of law through traditional criminal law mechanisms." Account must also be taken of the relative ease of proof and other advantages of the civil process. Tomasic does not go so far as to say that the criminal law is redundant or useless but, even so, not all will agree with the minimalist role for the criminal law favoured by the directors and corporate lawyers whose views have been canvassed and accepted by him. Some may feel inclined to reply that the views of potential defendants are nakedly self-interested and no more persuasive than the "civil" or "harmless" self-perceptions rife among rapists, burglars, drug traffickers, receivers, car thieves, and money launderers.

The second paper is by Kathleen Farrell, who has played a leading role in the enforcement work of the ASC. This paper provides a timely account of the ASC perspective on strategic and practical hurdles confronting those seeking to enforce commonwealth and state laws against corporate fraud. Farrell highlights the critical relationship between trial procedures and efficient investigation by the agency, and stresses the need for national laws governing the definition of offences and the procedures and rules of evidence to be applied. In her view, criminal enforcement of the *Corporations Law* through the state courts results in counterproductive or pointless inconsistencies (for example, there is no common paper committal scheme) and lack of proper accountability. Reflections are offered on the civil penalties regime under Part 9.4B of the *Corporations Law*, one criticism being that management banning orders cannot be used as an initial response in serious cases where it is necessary to preserve the option of criminal prosecution. Many other practical insights are offered, including a comment on the obstacles that can still arise in obtaining evidence expeditiously from overseas or from other states.

Grahame Delaney, Principal Adviser, Corporate Prosecutions, for the Commonwealth Director of Public Prosecutions, reviews the range of factors which shape the exercise of prosecutorial discretion in complex fraud trials. One highlight is the clarification of the respective roles of criminal prosecution and civil remedies or penalties, as contemplated and as controlled by the Prosecution Policy of the Commonwealth. Another is the stand taken against allowing the problems of complex trials to undermine the principle of equal application of the criminal law; we should firmly resist the prospect of creating two differential systems of justice, namely the traditional criminal justice system and an alternative system under which serious complex cases are dealt with by means of noncriminal sanctions. In guarding against that danger of inequality, a more interventionist approach by trial judges is seen as essential to the management of complex trials. Delaney also lends his support to the wider use of pre-trial hearings and plea discussions. In his view, however, there is no need to combine the functions of investigation and prosecution, as under the Serious Fraud Office model adopted in England and New Zealand; the recent initiatives taken to improve the co-ordination between the ASC and the Commonwealth DPP are taken to be sufficient.

The next paper, by John Nader, QC, looks back on the Nader Submission in 1993 to the New South Wales Attorney General. In that Submission, Nader advanced an extensive set of recommendations based on an assessment of recent reforms in other jurisdictions, especially Victoria and England. The Submission was concerned not only with fraud trials but complex trials in general. One key recommendation was that a judge should be permitted to be active in promoting cooperation at the Preparatory Hearing without risk of disqualification. That recommendation reflects the high weight placed by Nader on the "moral authority" of the trial judge in trying to meet the challenge of managing complex trials. Other focal points in the paper include the need to give more consideration to the position of jurors and the need to simplify the statutory framework of the criminal law.

Three commentaries rigourously explore the key issues discussed in the papers above. The contribution by Mark Aronson, author of the major AIJA study, *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure* (1992), is an instructive critique of many of the proposals in the Nader Submission (eg on committal proceedings), with many insights which heed previous attempts at statutory reform in New South Wales and elsewhere. Kim Santow, formerly a leading corporate lawyer and now a Judge of the NSW Supreme Court, reacts to the Nader Submission and comparative material, including the Runciman Report, by re-assessing the main concerns (eg, inadequate disclosure of the prosecution's case; extent to which facts in statement of prosecution's case should be admitted if not denied at pre-trial stage; time-wasting by defence counsel) and what needs to be done in order to achieve responsive change. Finally, Stephen Mason sums up the more significant lessons which emerge from his extensive experience at the Australian Law Reform Commission (especially in relation to evidence, collective investments and customs regulation); a dominant theme of his paper is the need for statutory reform to be principled rather than merely pragmatic, a position that leads him to question the current trend to use civil penalties as a way of by-passing or reducing the problems associated with complex criminal trials.

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