Corporate Crime: Complex Criminal Trials — A Commentary

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1. *Introduction*

This is a commentary on four splendid papers published in this issue which represent the views of the ASC regulator and enforcer (Kathleen Farrell), the DPP (Grahame Delaney), the sociologist (Roman Tomasic) and the experienced trial lawyer and judge John Nader, QC in advocating the reforms in his Report.[1]

I will use the Nader Report, since it provides a connecting link with the themes of each of these papers, as the "point de départ" for a discussion of some key issues. I will also draw on the just published Runciman Report[2] and of course Mark Aronson's[3] earlier monumental study for the AIJA .

2. *Overview of Nader's Report and Speech*

A. The Nader Report is a comprehensive set of practical recommendations for trial procedures whose brevity also has the virtue of clarity. It is written from the viewpoint of someone with a depth of experience. There is a clear preference for reforms enabling trial simplification. Much of their general thrust I support, but in several critical areas I would take serious issue where they go too far or need refinement. It is, for example, always necessary to ensure that in preventing time wasting defence tactics, the rules do not encroach upon the right of the defendant to have his or her case put to best advantage. Mark Aronson, in his commentary gives several examples of this. It would be ironical if these reforms were to lead to the ultimate in time wasting — miscarried trials. The Report's lack of detailed justification is likely to evoke the response, from those of opposing views, that the Report is essentially a series of conclusions, presupposing a common starting point not shared by those who treat civil rights as paramount. That justification can be found elsewhere — for example in Mark Aronson's AIJA study and more recently in Runciman.

B. Thus there is a need to refine some of the recommendations where these go beyond the use of normal judicial suasion typical of a well managed trial. Indeed Nader himself acknowledges this is the most effective means, when in his paper he says "the moral authority of the trial judge will remain the major influence towards persuading counsel for accused persons to advise them that a fair measure of cooperation will not be to their detriment in the long

1 *Submission to the Honourable Attorney General Concerning Complex Criminal Trials* (1993).
2 *The Royal Commission on Criminal Justice Report* Cm 2263 (1993).
3 *Managing Complex Criminal Trials: Reform of the Rules of Evidence* (1992).

run". Yet he advocates measures *some* of which may contribute to "the unfair pressure to make a concession" about which he correctly warns. The process of refinement also requires that some of the policy alternatives be explicitly dealt with from within the reform position taken.

C. There is a need particularly in the case of complex *corporate* fraud to deal with the closely related issues of:

(a) investigation and the admissibility of compulsorily obtained information from the accused under ASC Law;

(b) (i) the filter between prosecutor and trial[4]

(ii) regulator agreed settlements as in the United States and recommended also by the Runciman Report for a small proportion of often highly complex cases that warrant this where there is no serious dishonesty. (The facts of the *Blue Arrow* trial itself are a good example, involving as they did no real criminality, but a misleading appearance of a fully taken up underwritten issue, when the underwriters in fact took most of the issue).

(c) institutional arrangements for better coordinating investigation and prosecution; and

(d) the penalty regime, civil and criminal.

D. The Victorian *Crimes (Criminal Trials) Act*, but modified in several critical respects, is a good basis to deal purely with the trial reforms — accompanied as it is by necessary amendments to the *Evidence Act* to cater for voluminous and complex evidence. This should be on a national, uniform basis, as Kathleen Farrell rightly contends in her comprehensive, forthright paper.[5] Rules of court, as Nader suggests, may then provide any *detailed* regulation within such a statutory framework but should not constitute the framework itself. Consistent with this there could also be scope for *modification* of the statute, by rules of court. These latter might be subject to disallowance by the Attorney General who could discuss these in Standing Committee of Attorneys General (SCAG). This will best ensure uniformity, if done under the aegis of SCAG. There could be an understanding that Chief Justices of the states will circulate any proposed rules of court and any changes thereto so as to maintain uniformity *so far as possible.* (Clearly there will be some unavoidable local differences, but as few as possible.)

E. Kathleen Farrell is clearly right in highlighting the need in paper committals for ASC records of interview to be admissible given that they are sworn; at present only affidavits or statements (which need not be sworn) may be used. Also she rightly emphasises the need for a uniform form of jurat, usable in any state. This is to avoid delay and difficulty in having to resign statements as you will not usually know in which state the trial will be brought. What is the point of a uniform Corporations Law if the trial outcomes remain disuniform?

F. The Nader Report precedes the Runciman Royal Commission Report just published. This latter report contains important material which does debate the policy issues. For example, Runciman meets the argument that defence disclosure is unfair, inter alia, by making the distinction between earlier disclosure to judge and prosecutor and later disclosure

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4 See comments in my paper: Santow, G F K, "The Trial of Complex Corporate Transgressions — The United Kingdom Experience and the Australian Context" (1993) 67 *ALJ* 265 277–280.

5 See this edition of *Curr Iss Crim Just.*

to the jury, only after the prosecution's case is completed, in case it alters. I refer to this later in seeking to refine that aspect of the Nader proposals.

G. In the context of corporate fraud, in particular, the Nader Report does not deal with the crucial linkage between investigative powers and a manageable trial. This particularly relates to the right to silence and the admissibility of compulsorily obtained answers from the accused. In the case of corporate fraud, that power of investigation resides with the ASC. Amendment of its powers requires Commonwealth concurrence in accordance with the agreement setting up the Corporations scheme.

H. The split between ASC investigation and DPP prosecutions, in complex corporate transgressions, means there is no one body to whom responsibility for the whole process can be sheeted home. That inevitably will create continued serious difficulty in preparing cases adequately for trial. Grahame Delaney's paper in this issue refers to this as a question of efficiency met by cooperation earlier in the process between DPP and ASC. However in quoting Michael Levi ("the only test is to refuse to do the investigation and see if the prosecution succeeds") he highlights the very problem of division of responsibility. There has to be an integrated process of investigation and prosecution by one body, albeit in separate divisions, to whom responsibility for failure can be sheeted home. Otherwise each side can blame the other. Also, if the ASC has this role, it is less likely to be in conflict with the DPP's apparent preference for the *Crimes Act* offences. This is when, as Kathleen Farrell argues, the *Corporations Law* should, in the main, be the legislative source for the prosecution, though not for minor offences which are really theft which happened to be against a corporation. Contrast the UK Serious Fraud Office where the one body does both, using case controllers and outside counsel to ensure objectivity.

I. The Nader Report deals with plea bargaining in a court context. But the related question of the ASC using something akin to the US style "Wells" submission is not dealt with.[6] There are now the tentative beginnings of this, where, perhaps unduly narrowly, no dishonesty or criminality is involved. This is to achieve a negotiated outcome before trial, as used by the SEC in the United States. It may result in exclusion from securities markets of an individual or corporate group or conditions being laid down for future participation. The *Blue Arrow* case in the UK was aborted after 35 million pounds costs and over a year in court.[7] It is a good example where such a course would almost certainly have achieved a better outcome. The Runciman Report correctly identified this need, in recommending a similar facility.[8]

> 63. In some cases of fraud and related offences, it can be argued that the public interest would be best served not by prosecution but by regulatory action. Such action would need to be capable of ensuring that any person found guilty by the appropriate regulatory tribunal lost the ability to operate in the market in which he or she was regulated and where requisite made reparation or restitution to the victims. We understand that discussions are taking place between those involved, particularly the SFO and the Securities and Investments Board, about mechanisms which might lead to more such cases being handled by the regulator with the agreement of the prosecuting authority, and we welcome this development. We doubt whether more than a very small proportion of cases will in practice be more appropriately dealt with by regulators. Where the offence is of a technical nature, there has been no specific loss or risk to any member of the public (or if there has, where restitution can be made), and the predominant issue relates to the

6 See further, Australian Securities Commission *Policy Statement No 52* (1993).

7 See Santow, above n4 at 269–269.

8 Above n2 paras 63–64.

> protection of the integrity of markets rather than to serious dishonesty as such, then it may be that regulatory action is both appropriate and sufficient. Indeed, it may also be that in such cases regulatory action will be quicker, cheaper and more likely to succeed. But serious criminal offences must continue to be prosecuted as such, and if regulatory rather than criminal penalties are to be imposed for lesser offences, they must be sufficiently severe that it could not be alleged that so-called "white-collar crime" was being more leniently handled than other equivalent offences.
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> 64. We believe, however, that even if there are only a handful of cases per year which would pass the necessary criteria for the imposition of regulatory rather than criminal penalties, the arrangements should be in place to enable them to be dealt with by the regulators. In particular, we would like it to be possible, given the necessary close cooperation between the prosecuting and regulatory authorities, for the decision to prosecute and the choice of charge to take into account the defendant's readiness to accept a sufficiently severe regulatory penalty in exchange for dropping the prosecution or reducing the charge. This would require the defendant's agreement to the regulatory penalty and, if he or she were to be prosecuted on a lesser charge, to pleading guilty to that charge.

J. In the context of complex corporate transgressions there is also the question of civil penalties and their potential value as a parallel system. This is for appropriate cases not involving criminality or where, *very exceptionally,* the case is intrinsically too complex for a jury to try, even with these reforms.[9]

The awesome time-scale of the trial, the multiplicity of issues, the distance between evidence, speeches and retirement and not least the two prolonged periods of absence by the jury (amounting to 126 days) could be regarded as combining to destroy a basic assumption. This assumption is that a jury determines guilt or innocence upon evidence which they are able as humans both to comprehend and remember, and upon which they have been addressed at a time when the parties can reasonably expect the speeches to make an impression upon the deliberation.

Remember, by virtue of Section 80 of the Constitution and the Commonwealth's legislative involvement in the *Corporations Law*, a jury for criminal cases is mandatory. But a fully parallel system of civil penalties should in certain circumstances allow a prosecution for civil penalties and for the jury not to be used. This might be where:

(a) the relevant breach does not involve dishonesty, intent to deceive, fraud or theft; or

(b) the judge determines that a criminal trial with a jury would carry a substantial risk of being unmanageable in the circumstances (this being open to the judge to determine at the pre-trial stage, or at any later time), so that a civil penalty prosecution would be substituted, with such directions (eg on standard of proof), as the judge may make to ensure that the accused is not unfairly prejudiced.

This should strike an appropriate balance between fairness to the accused and a manageable trial.

K. As Roman Tomasic elaborates, there is now a climate for civil penalties met in part only by recent amendments to the *Corporations Law*. There is however also a strong contrary view that they can be merely a blind to conceal lower standard of proof, albeit floating upward with the gravity of the offence. The argument is that a civil penalty is an

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9 See Lord Justice Mann in *The Queen v Cohen and others* (28 July 1992) Court of Appeal, Criminal Division 30F31.

oxymoron — it is really criminal. But this is to commit the fallacy of the undistributed middle — to assume something is either criminal or civil, with nothing in between. We are, after all, well familiar with the notion of aggravated or penal damages and with the civil penalties of the *Trade Practices Act*, recently substantially increased. The *Corporate Law Reform Act* 1993, well summarised by Grahame Delaney, is a useful start. It could well extend to provide a parallel regime for most of the *Corporations Law* offences subject to (a) above under J. Thus, for example, insider trading is generally no different in quality to directors' duties, related party transactions, financial statements and director's reports, and insolvent trading, where civil penalties do apply though each can, in different instances involve criminality or not, depending on the circumstances. Remember this regime does also preserve parallel criminal offences, but only where there is dishonesty or an intent to deceive or defraud, thus largely meeting that earlier mentioned concern and allowing the prosecution to make that election. One could also contemplate a judicial power to intervene if a jury trial would be likely to be unmanageable (see (b) above, under J).

L. That still however allows a prosecutor to choose the civil penalty, where criminality exists, and thus be precluded from bringing a criminal prosecution. That would be more justified, if the court had an explicit ability to award a higher civil penalty than $200,000 where the seriousness of the breach so justifies, like treble damages in US antitrust or the US *Remedies Act* of 1990.[10] The right to award punitive damages is too indeterminate though preserved by s1317JC of the *Corporations Law*.[11]

M. In regard to the right to silence I recommend we should adopt the Serious Fraud Office's power in the United Kingdom contained in Section 2 of the *Criminal Justice Act* 1987. It was recently confirmed by the Runciman Report as both fair and necessary. That Section permits the compulsorily obtained answers obtained from the accused in corporate fraud, to be used against the accused, but only should the accused give evidence which is contradictory to those answers. This surely is a modest enough proposal given that the answers, if false, are already subject to the sanction for perjury.

N. There is also a strong case for making those who occupy a fiduciary position in a corporation, such as a director or other officer:

(i) not only compellable as at present to give answers pertaining to their fiduciary duties and obligations as director or officer, but also

(ii) for those answers then being admissible in any subsequent prosecution based on a breach of those duties or obligations or otherwise pertaining to the conduct of the affairs of the relevant corporate group with which they are associated.

A similar position should pertain to a licensed dealer in relation to conduct arising in the course of that activity, by amending licence conditions accordingly.

O. There is no logical reason for distinguishing between the obligation of fiduciaries, such as a solicitor, from being compelled to give admissible answers pertaining to monies controlled by that solicitor and the obligations of fiduciaries like directors and officers in relation to their corporations and the monies they control.

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10 See Santow, above n4 at 278.

11 See, but only in the defamation context, where punitive damages are by statute expressly limited to being compensatory, the discussion in the High Court in *Carson* (1993) 67 ALJR 634.

P. Finaly, I commend the reader to the critique of the *Victorian Crimes (Criminal Trials) Act* 199? contained in the yet unpublished paper of Mr Justice Vincent of the Victorian Supreme Court, "The High Court v the Trial Judge". He warns that, while some action is necessary to simplify the process, the effect of a number of its provisions is to equate criminal trials with civil ones. Thus it places obligations falling in practice more onerously on the accused and imposing punishment for exercising what has hitherto been accepted as the accused's basic rights. For example, refusing to admit elements of the offence or the prosecutor's stated opinion pre-trial and then failing seriously to contest them, is treated as evidence of lack of remorse, affecting sentence.

3. *Specific comments on recommended prosecution and defence disclosure in the Report and generally*

A. Recommendations VIII, XII and XIII of the Nader Report require the prosecutor to file a "Case Statement" and the accused a "Defence Response". These are crucial elements of the UK system. This itself is now the subject of recommendations to make further refinements in the Runciman Report, having regard to the practical difficulties identified.[12]

B. Applying these to the Nader recommendations, there clearly needs to be reasonable limits on the prosecutor's obligation of disclosure in the proposed "Case Statement". There is the clear risk that too wide an obligation to disclose may even force abandonment of the prosecution — for example in order not to endanger the life of an informant. In the UK, the prosecutor's obligation is to disclose every matter known through its investigation which may be helpful to the defendant's case. This includes unused material by the prosecution such as draft witness statements and other documents, often of only tangential, if any, relevance. The prosecutor must also disclose information that may be inappropriate for disclosure by reason of public interest immunity or other reasons of sensitivity. This is subject to the limitations laid down by the Court of Appeal in *Johnson, Davis and Rowe*.[13] Runciman recommends that in relation to that information at least, the prosecution should be able to apply for a ruling of the court to enable the court to decide if disclosure is warranted, using an ex parte application. Subject to this very necessary safeguard, whose counterpart we should adopt here, the obligation to disclose should be defined, as recommended by Runciman, "to all material relevant to the offence, or the offender or to the surrounding circumstances of the case, whether or not the prosecution intend to rely upon that material".

C. There needs to be a reasonable yet effective set of sanctions and incentives to deal with the situation where the defence specifically takes issue with allegations or statements of fact in the prosecution's case in its Defence Response and then fails seriously to contest the matter. That incentive should include Nader's recommendation of use of *discounted* sentences for reducing the number of active issues at trial (recommendation XVIII). But I agree with Nader that we should not include the Aronson sanction of a more *severe* sentence based on the failure so to cooperate indicating lack of remorse. Even if fair, how do you ever establish the extent to which the defendant was responsible for this, as distinct from the defendant's legal adviser? Or how do you do so without intruding into legal professional privilege, or unreasonably interfering in the defendant's own right to defend himself or herself as best advised? How do you safely identify lack of serious contest-

12 See paras 33–73 at 91–100.

13 *The Times*, 19 January 1993.

ation? Will this in any event not *encourage* unnecessary contestation just to avoid this sanction and hence prolong trials? See also G below and 2. P above.

D. Where the defence refuses to lodge its Defence Response or simply indulges in a global denial, there should be the sanction of contempt of court where there is no reasonable excuse, such as absence of legal representation.[14] Nader does not expressly deal with contempt of court, as a sanction. However this should not apply to the other proposed recommendations concerning the defence — which in any event need reconsideration such as enforcing limits on cross-examination based on prior obligatory estimates, as correctly criticised by Mark Aronson .

E. Any defence disclosed to the prosecution in advance of the trial should not be disclosed to the jury until that defence, or an alternative, is advanced at trial, *after* the prosecutors case. This recognises the potential for the prosecution's case when made to alter or its elaboration to justify a different Defence Response, in light of the prosecutor's detailed supporting evidence.[15] Runciman gives the example of premature disclosure of a defence of self-defence when the prosecutor in fact leads no evidence that a blow was in fact struck.

F. It follows that any introductory speech by the trial judge to the jury, as recommended by Nader in recommendation XVII would have to avoid the defence being so disclosed prematurely, except with the consent of the defence. That is consistent with Runciman's proposal in that behalf, where the trial judge opens the case for the jury at the outset, with a very simple jury explanation of the issues, reduced in length by the likely use of particularised indictments.[16]

G. The Nader Report[17] deems admitted by the defence any fact which is not denied in the Defence Response. That recommendation should not be adopted. It would effectively force a determined and astute defence to deny individually and specifically *every* material allegation of fact from the prosecutor's Case Statement, again likely to prolong, not shorten, trials in practice. Clearly facts which are blindingly self-evident won't be denied — thus Nader's argument that the defence would not risk losing credibility in this manner is dubious. A less astute defence may suffer an incorrect verdict, by the deemed admission. The recommendation prevents a global denial but not a repeated individual denial of each fact. The only constraints will be costs, including the threat in recommendation XX based on the Victorian Crimes (Criminal Trials) Bill 1993, clause 18, and the inability to qualify for a discounted sentence for reducing the number of active issues at trial under recommendation XVIII. That recommendation XIII has no counterpart in Runciman is self-defeating and should not be adopted.

H. In relation to costs, where legal aid is given, possibly in a lump sum at the outset, there will be some inhibition on unnecessary point-taking. However, an affluent defendant can take every tactical advantage without fear of running out of the means to fund the defence. Such a defendant — in contrast to a poorer one — may have little fear in the proposed — and potentially oppressive — cost orders, under recommendation XX (taken from clause 18 of the Victorian Bill). Recommendation XX makes the accused but not the accused's legal representative liable for the extra costs as a result of "unreasonable failure" to admit

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14 Runciman, above n2 para 61 at 115.

15 Id para 62 at 98.

16 Id para 7 at 120.

17 Above n1 recommendation XIII at 40.

any facts or "identify adequately the real issues in the trial". However, the legal representative can be liable for breach of the Act or any order made under it except where "the legal practitioner was acting on the specific instructions of the client". This is an exception which Nader would remove, quite unfairly and incorrectly in my opinion. The legal representative cannot control the instructing process in relation to the admission of facts. But the recommendation for such cost orders should in any event be reconsidered in light of the difficulty of a court trying to substitute its own judgment for the defence's, in determining how the defence should be conducted. Certainly it would be unreasonable and impractical to try and apportion responsibility in those circumstances, between defence and adviser, quite apart from the intrusion into legal professional privilege which such an enquiry would entail.

I. Runciman makes the less oppressive but still radical recommendation in paragraph 180, to deal with what the judge determines to be time wasting tactics by counsel where the case has unreasonably exceeded its estimated length, allowing the judge to make an order reducing Counsel's fees, though subject to a right of appeal. This also risks unreasonable interfering with the conduct of the defence case. Far better to use the judge's normal power of suasion in a well conducted trial to achieve reasonable management of the trial, than rely on powers of compulsion.

J. Recommendation XVI states that a departure by the defendant from his or her stated position may be commented on by the trial judge to the jury. The prosecution will also be allowed to reopen its case with explanation to the jury of the need for this permitted for prosecutor and judge. However, United Kingdom practice and experience, as evidenced by the Serious Fraud Office's submission to the Runciman Commission, demonstrates that this sanction is often of little practical effect. That said, the recommendation is still worthwhile.

K. The other recommendations will need careful refining in any translation into actual requirements. Recommendation XXV, giving express power to the judge to curtail cross-examination, may well be better left to judicial discretion, rather than again using legislation to require judicial intrusion into the conduct of the defence. The other detailed refinements and modifications in Mark Aronson's paper should also be adopted. However that said, there should now be a sense of urgency in getting well thought out reform translated into uniform legislation.

4. *The Way Forward*

The practical recommendations of Nader, but only when refined, modified and supplemented, should be the subject of a uniform approach by all the States and the Commonwealth. There should be a small steering committee assisted by a recognised expert such as Professor Aronson and ideally an eminent, experienced, possibly retired judge to achieve this, with the Attorneys General directing and coordinating the process. The reforms which result should separately but with some urgency, encompass the matters in 1 above, relating to the *Corporations Law*. However the other trial reforms should not be held up on that account. The critical aim should be to deal with the unmanageable trial in a more fundamental way than hitherto proposed, whilst preserving basic fairness for the accused. The recent Victorian changes are a starting point, but pose some serious problems to which I have referred.