The DPP Perspective on Complex Criminal Trials

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1. *Introduction*

The perspective of the DPP on complex criminal trials is influenced by a variety of factors. Different factors assume importance depending on the particular point reached in the prosecution process. I firstly propose to discuss the decision to prosecute and the alternatives to prosecution. I will then include some observations on the perceived causes of the problems of delay and complexity and on suggested solutions.

2. *The Decision to Prosecute and Alternatives to Prosecution*

At the crucial stage of deciding whether to prosecute a large and complex case, the foremost influence is the *Prosecution Policy of the Commonwealth* (the *Prosecution Policy*). The *Prosecution Policy* recognises that resources available for prosecution are finite and that not all suspected criminal offences must automatically be prosecuted. A dominant policy consideration in any particular case is whether a prosecution is required in the public interest.[1] (That policy consideration presupposes that there is sufficient evidence to enable a conclusion to be reached that a prosecution has reasonable prospects of securing a conviction).[2] Many Commonwealth departments and statutory authorities have civil and administrative enforcement powers in relation to contraventions of the laws they administer. Particular conduct may constitute a breach of an authority's civil and administrative regime as well as constituting a criminal offence against Commonwealth law (or in the case of corporate offences, contraventions that are taken to be offences against Commonwealth law).

The *Prosecution Policy* guides the decision as to whether such conduct should be the subject of prosecution (either in addition or as an alternative to any available civil or administrative remedy). An administrative remedy may be primarily remedial, for example, one aimed at shielding the investing public against unscrupulous or incompetent securities dealers. In such cases, the public interest will be served by the timely imposition of an administrative remedy which has the effect of insulating the public from possible further injurious actions by an errant securities dealer. Such administrative action can be followed in an appropriate case by criminal prosecution. Where a civil/administrative remedy is essentially penal in nature, ultimately a choice will need to be made between pursuing the

1 Paragraph 2.1.
2 Paragraph 2.5.

civil/administrative penalty or instituting a criminal prosecution. In making that decision "the availability and efficacy of any alternatives to prosecution" is, inter alia, a factor to be considered.[3] As a general proposition, the more serious the contravention the more likely it will be that prosecution action is the appropriate response.[4] In the context of corporate offences, conduct involving provable fraud or dishonesty and significant pecuniary loss (or potential loss) will always be regarded as serious.

In the *Corporate Law Reform Act* (1992) the Commonwealth Government has introduced a new species of penal remedy for breaches of directors' duties. The legislation does this by providing that contraventions of certain provisions will not, of themselves, constitute criminal offences. The provisions cover directors' duties, related party transactions, financial statements and directors' reports and insolvent trading. Proof of a contravention of any of these provisions to the civil standard may result in the imposition of a civil penalty not exceeding $200,000. In addition (or as an alternative) to imposing a pecuniary penalty, the Court may prohibit a person managing a corporation for a specified period. The Court's power to impose a civil penalty is qualified. Before imposing a civil penalty, it must be satisfied, inter alia, that the contravention is a "serious one".[5]

The *Corporate Law Reform Act* provides that a person is guilty of an offence if the person's contravention of a civil penalty is accompanied by a variety of specified mental states involving dishonesty, or an intent to deceive or defraud.[6] To complete the picture, I would mention that once an application for a civil penalty has been made, prosecution action in respect of the same conduct is forever barred.[7] However, where a prosecution is instituted in respect of a criminal breach of the civil penalty provision, a civil penalty order may be made in the event of an acquittal on the criminal charge. In such event, the civil penalty order will be made on the jury being satisfied of the breach beyond reasonable doubt. By providing for the alternative of a civil penalty order following an acquittal on a criminal charge, the legislature may have had in contemplation that category of case where particular conduct is serious but the prospects of conviction, whilst reasonable, are less than assured.

In introducing the Corporate Law Reform Bill, the then Attorney-General told Parliament:

> The Bill ... provides that where a director breaches his or her duty, but is not acting with any dishonest or fraudulent intent, the director should no longer be exposed to criminal sanctions and possible jail terms. But it also says that shareholders should be protected against breaches by the substitution of appropriate civil penalties or disqualification in the case of serious breaches.

The introduction of the Bill was preceded by a Senate report on Company Directors' Duties.[8] That report noted:

> Enforcement action initiated by regulatory agencies should target individual directors or corporate bodies on a principled basis rather than on the "ad hoc" basis that currently appears to prevail. If the breach is criminal in nature, criminal penalties will follow. But it is draconian to apply similar penalties in the absence of criminality.

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3 Paragraph 2.10(j).
4 Paragraph 2.12.
5 Section 1317BA(5).
6 Section 1317FA(1).
7 Section 1317FB..
8 "Senate Standing Committee on Legal and Constitutional Affairs" (1989) *Company Director's Duties* 181.

As previously noted, a contravention of a civil penalty provision becomes a criminal offence when committed with the requisite mental state. An approach under which a contravention of a civil penalty provision, when committed with the requisite mental state, is considered for prosecution in accordance with the *Prosecution Policy*, is consistent with the comments of both the former Attorney-General and those quoted from the Senate Report. Such an approach would aim to filter out of the criminal process those cases which lack any (or any provable) criminal intent.

3. *The Effect of Large, Complex Prosecutions*

In recent years, much concern has been expressed concerning the length and complexity of large fraud and corporate prosecutions and about the ability of the criminal justice system adequately to cope with such cases.[9] The length and complexity of complex fraud trials have led to a number of undesirable consequences. Apart from the substantial delay and expense occasioned by the trials themselves, there has been a flow on effect impeding the disposition of pending criminal trials generally. These factors have lead to pressure for other remedies against those suspected of complex fraud offences. In my view, such pressure should be resisted because if acted upon in a comprehensive way, there is the potential of creating two systems of justice: the traditional criminal justice system, under which the risk of prosecution would tend to decline with the complexity (and regardless of the seriousness) of the suspected fraud and some other enforcement process with non-criminal sanctions for the most complex of suspected fraud.

4. *The Causes of Delay*

There are numerous recent examples that amply demonstrate that the criminal justice system is straining to cope with the timely and efficient disposition of lengthy complex fraud cases.[10] The causes of the failure of the present criminal justice system to deal with complex fraud prosecutions adequately can be traced to the origins and subsequent evolution of the criminal trial. Proof of complex, document based fraud is required to take place in:

> ... an adversarial criminal justice system which evolved in an old tradition, memory based, with short trials and no documents, and in which protections designed for the vulnerable, the weak and the suggestible (into which categories those accused of serious fraud tend not to fall) were extended to all accused.[11]

Not unnaturally, the prosecution and the defence will seek to utilise both the substantive and procedural laws that govern criminal trials to further what each regards as its legitimate interests. As the authors of an English text on fraud note:[12]

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9 Complex, lengthy and document intensive prosecutions may arise from conduct involving fraud on the Commonwealth or in the context of the criminal abuse of the corporate form. I have used the phrase complex fraud to denote both categories of prosecution.

10 A description of a number of cases in this category are set out by Michael Rozenes QC, Commonwealth Director of Public Prosecutions in a paper entitled "The New Procedures for the Prosecution of Complex Fraud – Will They Work", Proceedings, 28th Australian Legal Convention, Hobart, 26-30 September 1993, vol 3.

11 The Honourable Mr Justice Henry; in the foreword of *Kirk and Woodcock Serious Fraud: Investigation and Trial* (1992).

12 Arlidge, A and Parry, J, *Fraud* (1985) 294.

> There is often a tension between prosecution and defence which the court has to resolve. The prosecution feels that its best chance of achieving a conviction of the maximum number of defendants is to try them all together and subject them to a mass of evidence. If they are tried separately, then those tried may blame those who are absent. If only part of the picture is presented, then the jury are less likely to be convinced of overall fraud. For precisely corresponding reasons, defendants will want to be tried separately with as little evidence as possible called against them.

If the underlying causes of this tension are not adequately resolved prior to the trial itself, the proceedings are likely to be punctuated by constant jostling by prosecution and defence over a whole variety of issues that inevitably add to the length of the trial and do little to reduce its complexity.

Suggestions for reform of the procedures governing complex fraud trials have generally been aimed at achieving an early refinement of the prosecution's central allegations, and an indication from the defence as to what is really in issue. Major impediments to achieving this result can arise from the positions taken by the prosecution on one hand and the defence on the other. Prosecutors who have been criticised for obstinately clinging to a case of large and complex proportions have asserted that to reduce its scope would not adequately demonstrate the alleged criminality. On the other hand, the defence frequently sees its function as requiring the prosecution to prove each piece of evidence going to each element of the offences charged, often in circumstances where it transpires at trial that the defence advances no grounds for the rejection of such evidence.

At recent conferences arranged by the National Crime Authority a number of factors were identified as having an adverse influence on the effective management of complex fraud trials. Whether a complex criminal trial is conducted in the fairest and most efficient and effective manner depends upon the approach of prosecution, defence and the presiding judge. Each has a part to play in eliminating or minimising the underlying causes of delay and complexity. A number of the issues effecting delay and complexity have been identified with the position taken by the defence. I have already referred to the reluctance to admit evidence about which there is no real contest. As well, often there is a reluctance to give any indication of the defence case until all the prosecution evidence has been adduced.

For its part, the prosecution may contribute to delay and complexity by the late presentation of the indictment and by the inclusion in it of counts which are unnecessarily numerous. Delay may also be occasioned if there is not timely service on the defence of all evidence to be relied upon. The prospect of unnecessary complexity will be enhanced if the prosecution has not refined its core allegations in a way that will be comprehended by a jury. Additionally, a jury may find it difficult to identify and separate issues if presented with a multiplicity of counts, a number of which relate to some accused, whilst others relate to different accused.

The judge can influence the length of the trial, and the degree of complexity of evidence presented by ensuring that appropriate pre-trial rulings are made on questions of law, evidence and procedure. Indeed, Michael Rozenes QC considers the role of the judge to be "crucial".[13] John Nader QC has also argued strongly for "... judge management of criminal cases ... ".[14] More may be required to effectively narrow the issues than the judge simply acting as impartial referee.

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13 Above n10 at 3.

14 *Submission to the Honourable Attorney General Concerning Complex Criminal Trials* (1993).

5. *Committal Proceedings*

The reform of the committal procedures in Australian jurisdictions has required the prosecution to prepare and serve statements of witnesses and copies of documentary evidence upon which it proposes to rely. This requirement ensures that the defence obtains early disclosure of the prosecution case. Where the defence contests the prosecution case at committal, that may well lead to a further refinement of both the charges and supporting evidence that ultimately becomes the basis of the criminal trial. However, recent experience suggests that the defence in a number of significant complex corporate prosecutions has tended to waive its right to fully test the prosecution case at committal. The consequence can be that the uncontested committal becomes a less satisfactory vehicle for testing and refining the prosecution case. In these circumstances, it becomes crucial to find other mechanisms to assist in determining the real issues for trial.

6. *The Preliminary Hearing*

In practice, pre-trial hearings have come to be the norm in most jurisdictions in complex fraud prosecutions. In such hearings a presiding judge has a number of sanctions he can apply where the prosecution declines to modify a large and complex case that involves multiple defendants and a large number of charges. The judge may order separate trials, rule on the content of the indictment and in an extreme case, order a stay of the prosecution. However, there is little a judge can do to ensure an obstinate defendant cooperates in narrowing the real issues for trial. As the law stands in most Australian jurisdictions, a defendant can require the prosecution to formally prove each and every piece of evidence on which it relies. However, the position has changed in Victoria and is likely to change in the other Australian jurisdictions.

Legislative provision for preliminary hearings in complex fraud cases has been in place in the United Kingdom since 1987.[15] As well as requiring an indication of the nature of the prosecution case, the UK provisions seek to compel the provision of information about the defence case. Under the legislation, the defendant is required to set out his defence "in general terms." The formulation of the defence obligation in this way appears to have enabled compliance by way of a general denial of all elements of the prosecution case. Certainly, events in the UK since 1987 suggest that the provisions governing preparatory hearings have not been as effective as first hoped in achieving better focussed and more manageable proceedings.[16]

A further perceived shortcoming of the UK provisions is the limited sanction available where either party adopts a position at trial different to that indicated at the preparatory hearing. The sanction involves allowing the Court (or, with leave, a party) to comment on the departure from the case put at the preparatory hearing and permitting the jury to draw such inferences as appear appropriate.

The Victorian legislation[17] seeks to redress the weaknesses identified in the UK legislation. In addition to copies of witness statements (including those of experts), exhibits

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15 *Criminal Justice Act* (1987).

16 For example, note the comments by the Serious Fraud Office to the Royal Commission on Criminal Justice extracted by Mark Aronson in *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure*, Australian Institute of Judicial Administration Incorporated 1992 at 4.

17 *Crimes (Criminal Trials) Act* (1993).

and propositions of law to be relied upon, the prosecution must serve a case statement. The prosecution case statement must contain, inter alia: "A concise account of the facts and inferences sought to be drawn from those facts".[18]

The defence must respond within a fixed time. The defence response must:

(i) indicate the facts and inferences contained in the prosecution case statement with which issue is taken;

(ii) be accompanied by copies of the statements of any expert witnesses whom the defence intends to call at the trial;

(iii) reply to any proposition of law stated in the prosecution case statement;

(iv) contain a statement of any proposition of law on which the defence proposes to rely, other than any general proposition of law relevant to all cases.

The directions hearing under the Victorian legislation takes place after the presentment has been filed. Consequently, the judge who presides at the directions hearing is the trial judge. The trial judge has a wide discretion to determine questions of law, procedure and (where appropriate) fact, prior to the jury being empanelled, as well as having the power to make orders governing the provision of information by both the prosecution and defence.[19]

Where "... the Court is satisfied that there has been an unreasonable failure" by a party or his or her legal representative to comply with the legislation or orders made under it, the Court may award costs against that party or legal representative.[20]

In New South Wales, Mr J A Nader QC has made a detailed submission to the Attorney General concerning complex criminal trials.[21] The DPP supports the thrust of Mr Nader's recommendations. However, I would see benefit in the revision of appeal rights suggested by Nader. Unlike the position applying to State prosecutions, crucial decisions made in relation to Commonwealth prosecutions may be susceptible to challenge under the *Administrative Decisions (Judicial Review) Act* (Cth). Such challenges frequently add to delay and fragment the prosecution process. Mr Nader has adverted to the extension of a right of appeal to orders made at a preparatory hearing. Apart from an order staying a prosecution, the DPP believes there should be no appeal rights from preparatory hearing orders and that as with other orders made during trial, they should only be susceptible to challenge in an appeal following the conclusion of the trial.

7. *Plea Discussions*

A timely plea of guilty in any criminal prosecution saves the community considerable expense. In a large complex fraud prosecution, the savings may be very considerable indeed. As George Staple, the head of the Serious Fraud Office has noted[22] " ... by avoiding the contested trial, with all that implies in terms of expense, consumption of time and manpower, a plea of guilty is the single most effective means of shortening the process".

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18 Section 8.

19 Section 5.

20 Section 19.

21 Above n10.

22 "Serious and Complex Fraud: A New Perspective" (1993) 56 *Mod LR* 127 at 136.

The sentence indication project available in some district courts in New South Wales seeks to achieve early resolution of pending prosecutions by indicating to a requesting defendant the Court's view of penalty. If accepted by the defendant, the indicated penalty becomes the sentence of the court. Early experience of the project in the context of complex fraud prosecutions suggests that preparation for a sentence indication hearing may serve another purpose; that is, the focussing of attention by both parties (but particularly by the defence) on the real issues in the case and its likely outcome in terms of both liability and penalty. Even where the indicated sentence is rejected by the defendant, the sentence indication procedure may assist in narrowing the issues for trial.

8. *The Investigation Phase*

My comments have been confined to the prosecution phase of complex fraud cases. Clearly, the timely completion of the prosecution process is, in large measure, dependent upon there having been an efficient and focussed investigation. In order to better focus a complex fraud investigation, it makes sense to have early input from those who will ultimately have responsibility for the conduct of the prosecution. A Memorandum of Understanding between the DPP and the ASC contemplates DPP involvement at the early stage of a corporate investigation so that prosecution issues are able to be addressed at an earlier point in time than would occur under the traditional approach where the investigator submits a completed brief which is then considered by the prosecutor.

It has been argued on efficiency grounds that the investigation and prosecution functions should be combined. For example, Kim Santow has described the separation of prosecution and investigation functions as inefficient[23] and argues for both functions to be given to the Australian Securities Commission " ... in order to avoid having to fill gaps in evidence many months after the investigation, or to meet unrealistic requests for doing so".[24] Gaps in evidence must be filled. The question of filling them earlier, rather than later, can be addressed by an earlier involvement of the prosecutor in the investigation phase. As indicated above, that is occurring. The question whether requests as to evidentiary requirements is reasonable is really a value judgment made by prosecution lawyers who are ultimately responsible and accountable for the conduct of the prosecution. As Michael Levi[25] has observed in relation to requests by prosecuting Counsel to the Serious Fraud Office: "Whether (the additional) work is 'really needed' is a matter of fine judgment: the only test is to refuse to do it and see if the prosecution succeeds!"

There are, as well, substantial policy reasons for not fragmenting the responsibility for the conduct of Commonwealth trial on indictment. The *Prosecution Policy* requires a consistent approach to the prosecution of offences against Commonwealth Law.[26] The achievement of that aim would become far more difficult were decisions as to prosecuting on indictment not made by the one prosecuting authority.

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23 "The Trial of Complex Corporate Transgressions — The United Kingdom Experience and the Australian Context" (1993) 67 *Aust LJ* 278.

24 Id at 282.

25 *The Investigation, Prosecution and Trial of Serious Fraud, The Royal Commission on Criminal Justice, Study No 14* (1993).

26 Paragraph 1.4.