Some Comments on the Nader Report on Complex Criminal Trials

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There has been a lot of talk recently on how to reduce the cost of criminal trials, particularly complex criminal trials, without diminishing their fairness. England's landmarks are Lord Roskill's *Fraud Trials Committee Report*,[1] Sir Cyril Philips' *Royal Commission on Criminal Procedure*,[2] and Lord Runciman's *Royal Commission on Criminal Justice*.[3] In the last couple of years, Australia has produced the Proceedings of the National Crime Authority Conference on *The Presentation of Complex Corporate Prosecutions to Juries*,[4] the Proceedings of the same body's Conference the following year on *National Complex White Collar Crime*,[5] my Report to the Australian Institute of Judicial Administration on *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure*,[6] and Greenleaf and Mowbray's companion Report to the same Institute on *Information Technology in Complex Criminal Trials*.[7] The Standing Committee of Attorneys General convened a special meeting to consider the issues in August 1992, and undertook to take legislative and administrative action, although not on a uniform basis. So far, only Victoria has legislated.[8] The New South Wales Attorney General commissioned Mr John Nader QC to report to him on the issues, and it is the Nader Report[9] upon which I have been asked to comment here.

I preface my comments with two observations. First, they are made with some diffidence, because on the whole, I support, indeed recognise, most of Nader's recommendations. But at several places, I am either puzzled by his lack of detail or lack of argument or both. Second, many of Nader's suggestions are so lightly sketched that it would be premature to pursue matters of detail arising from his Report.[10] Instead, I will address myself to the principal issues of principle, and to some of the main practical problems as I see them.

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1 1986, London.
2 1981, London, Cmnd 8092.
3 1993, London, Cm 2263.
4 1991, Melbourne.
5 1992, Melbourne.
6 1992, Melbourne.
7 1993, Melbourne.
8 *Crimes (Criminal Trials) Act* 1993.
9 Nader, QC, J A, *Submission to the Honourable Attorney General Concerning Complex Criminal Trials*, (1993).
10 Nader acknowledges (at 6) that his sources have been "largely omitted", an omission he attempts to justify by reference to time constraints, and a sense that only "obfuscation" results from a submission "overloaded with academic reference". What he wants, he maintains, is a useful "guide to practical reform" but this is optimistic given the absence of full arguments for his proposals.

1. *Committals*

I am frankly astonished that Nader has dared to make more drastic proposals than were so soundly defeated 3 years ago, in the ill-fated Criminal Procedure (Committal Proceedings) Bill 1990. That Bill was defeated primarily because of its clause 62. I believed then, and still believe, that that was a fair clause. But the resistance to it was extreme, and very emotional. Clause 62 would have restricted a defendant's right to cross examine far less than is proposed by Nader.[11]

Nader proposes that all defence cross examination at committal hearings be by leave only. For Nader, leave would not be granted unless the magistrate could see a good reason, such as that the cross examination might shorten a trial, result in a plea, or so affect the magistrate's assessment of a witness's credibility as to make a complete discharge at the committal stage a "real possibility". That might require quite a bit of attention to redrafting s41 of the *Justices Act* 1902, in light of *Grassby v R*[12], an issue involving several options, none of them mentioned, let alone examined, by Nader. It would certainly require the defence to reveal its hand a good deal earlier than it might be able to, having regard to normal defence briefing practices. It is also difficult to see why there should be defence disclosure until the prosecution has given its final view as to the sort of case they propose to present at trial.

I am also puzzled at Nader's proposal to allow into evidence an unsigned transcript as a witness statement under Subdivision 7A of the *Justices Act* 1902, where the maker of the statement which is recorded in the transcript refuses to sign it. Surely the parties should at the committal be trying to identify the strengths and weaknesses of each side's case, rather than papering them over until later. Whether a witness will turn to water, or be adverse, is best revealed as soon as possible.

2. *Preparatory Hearings — the Criteria*

Nader proposes a preparatory hearing scheme for serious and complex cases. The mechanics of his scheme would not allow the parties the choice at the first instance of identifying which cases should be subject to the new scheme. Instead, he proposes that every judge should be required to ask, on arraignment, whether there could be "substantial benefits" from holding a preparatory hearing.

I prefer the Victorian model,[13] where either party, or the court of its own motion, can initiate the procedure. One can reasonably assume that at the outset, at least, the prepara-

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11 Clause 62 (1) restricted cross-examination by the defendant to the following witnesses: (a) a witness who is to give, or gives, evidence as to identification of the defendant (being cross-examination only in respect of that identification); (b) a witness who is alleged to have been an accomplice of the defendant or has been given an indemnity in relation to the proceedings (being cross-examination in respect of any matter); (c) a witness who is to give, or gives, evidence of an opinion based on scientific or medical examination (being cross-examination only in respect of that opinion or the method used to arrive at that opinion); (d) a witness who is orally examined in chief by the prosecution (being cross-examination in respect of any matter); (e) a witness whose cross-examination is likely to affect adversely the assessment of the witness's reliability or likely to adduce further material to support a defence (being cross-examination only in respect of reliability or that further material); (f) any witness to whose cross-examination the prosecutor consents (being cross-examination only in respect of the matter to which that consent relates).

12 (1989) 168 CLR 1.

13 *Crimes (Criminal Trials) Act* 1993.

tory hearing scheme will not be applied to the majority of cases. The judiciary, the DPP, Legal Aid, and the Public Defenders, will need to gear up to it. It would be transactionally expensive, and possibly counter-productive, to start out with a presumption (which is the net effect of Nader's procedure) that it be considered in all cases.

3. *Overloaded Indictments*

Nader acknowledges the problem of the overloaded indictment, but to my way of thinking, offers nothing new to address it.

I think that there should be incentives to the prosecution to trim their indictments, incentives relating to taking special findings from the jury which can be carried over into a related case, and being able to keep the same judge in a series of related cases.[14]

4. *Preventing Change of Representation*

Nader's proposals to lock counsel in to a case, once retained, are frightening. I am not persuaded to the contrary view by his statement that under his scheme, the judge would be able to excuse counsel if reasonable cause were shown. If the excuse procedure works well, his scheme will simply waste court time more often than not. If it does not, there is a real possibility of setting up a conflict of interest between a lawyer and his or her client.

5. *Sanctions for Breach of Defence Disclosure Obligations*

Nader's proposals for prosecution and defence disclosure are familiar, but I am distinctly uncomfortable with some of his proposed sanctions for a defence failure to co-operate.

First, I cannot see why the prosecution should be excused from having to offer strict proof of something just because, as Nader suggests, the defence are unable to admit or deny the fact when asked. If they are genuinely unable to admit or deny, why penalise them? If they are not genuine (and I suspect that this is Nader's assumption), then Nader's proposal amounts to a disguised way of saying that the jury should be allowed to take an accused's tactics against them on the issue of guilt or innocence. None of that has been articulated in Nader's Report, let alone argued.

Secondly, Nader proposes to allow the prosecution to assume that the defence will stick to its outline defence as disclosed at the preparatory hearing. That, of course, would simply be an application of existing law, with which one can have no quarrel.[15] But how does it even begin to meet the problem of blanket denials from the defence? It would, I submit, be more helpful to have a legislative provision to the effect that the prosecution does not have to negate affirmative defences unless those defences are specifically addressed in the defence response. Any affirmative "ambush defences" could then be dealt with by the prosecution re-opening.[16]

Thirdly, Nader proposes a costs penalty for defence refusal to co-operate at the preparatory stage. The assumption is that the prosecution never contributes to the delay problem.

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14 Aronson, M I, *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure*, recommendations 18–21 and chapter 5.

15 *Petty v R* (1991) 173 CLR 95.

16 Aronson, above n14 at chapter 7.

I do not see why the same sanction should not apply to the prosecution. The costs order against the English Serious Fraud Office in the *Blue Arrow* case[17] was enormous, rumoured to be several million pounds in a case whose total legal costs were in the order of forty million pounds.[18]

I might add that I understand that there are some who have argued that the trial judge (or, if that is different, the preparatory hearing judge) should be able to punish an accused for contempt if he or she fails properly to comply with their disclosure obligations. That argument to some extent reflects the position taken by Lord Runciman in his recently released *Report of the Royal Commission on Criminal Justice*.[19]UK, Cm 2263. Such a proposal has serious difficulties. I will mention only two. First, it sits oddly with its proponents' usual insistence that an accused should not receive a heavier sentence for having wasted the court's time. Secondly, it is an affront to basic human dignity to impose a separate punishment upon a person for failing to condemn themselves out of their own mouths. I believe that this is reflected in Article 14 of the *International Covenant on Civil and Political Rights*, paragraph (g) of which provides:

> 14. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
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> (g) Not to be compelled to testify against himself or to confess guilt.

6. *Limiting Cross-examination at the Trial*

Nader has proposed that provision be made restricting defence cross-examination[20] at trial, so that it should not be directed to eliciting facts at odds with the line the defence indicated it would be taking in its final preparatory hearing defence response.

This sits uneasily with Nader's statement[21] that the defence should be free to depart from its defence response, subject, of course, to adverse comment. It is difficult to see why the defence should have this general freedom to change tactics, but be bound when it comes to their cross-examination of prosecution witnesses.

7. *Expert Evidence*

I recognise and completely support Nader's endorsement of the English scheme for compelling pre-trial exchange of proofs of expert witnesses. There can be no argument here for the right to silence, as none of the values protected by that right are threatened by compelling disclosure of proposed expert evidence.

I would, however, make two comments. First, it is not completely clear from Nader's Report, but I would trust that his proposal is not limited to those cases in which his preparatory hearing scheme is to operate. The case for mutual disclosure of proposed expert evidence is as strong in straightforward cases as it is in serious and complex cases. Secondly, I

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17 *R v Cohen* [28 July 1992] unreported, English Court of Appeal, Criminal Division.

18 *The Guardian* (4 August 1992) and *The Daily Telegraph* (29 December 1992) put the costs at 40 million, whilst *The Times* (2 August 1992) put them at 35 million.

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20 The need for such restrictions is far from apparent.

21 Above n9 at 41.

believe that some improvements can be made on the English model, to improve the utility of pre-trial disclosure and to enable fair and open testing of the opposing expert opinions before the trial commences.[22]

8. *A General Obligation of Prosecution Disclosure*

It would, I submit, be a pity if the general emphasis on the problem of the long and complex trial were so to dominate discussion as to submerge proposals[23] to legislate for general obligations of prosecution disclosure of material which could assist an accused. This was attempted in 1990, in clauses 41–50 of the Criminal Procedure (Committal Proceedings) Bill 1990, and that part of the Bill was supported in principle by all parties. The Runciman Royal Commission Report has also recommended replacing the existing English Guidelines with statutory rules.[24]

9. *Judge's Outline to the Jury of the Issues They are to Look Out For*

Nader proposes that immediately after the prosecution has opened, the judge should give a brief outline of the key issues to the jury, an outline based on the parties' final positions as ascertained from the preparatory hearing. He also proposes giving the judge the discretion to give copies to the jury of the final prosecution case statement and the written defence response.

I have real problems with a procedure which invites the jury to look at the defence's paperwork against defence wishes. It is not done in England or Victoria, which are otherwise Nader's models, and for good reason.

Where the defence has been basically uncooperative, the only possible reason for showing the jury a defence document full of "do not admits" is to disparage the defence tactics. That disparagement can be logically relevant only if it is to form the basis of an inference of guilt; otherwise, why tell the jury of the lawyer's tactics?

I would not totally preclude a legislative scheme permitting such inferences, but it would have to be much more carefully thought out and argued than Nader's submission. For example, it would have to consider, perhaps on the basis of empirical evidence, the extent to which a person's tactics are determined by the exigencies of Legal Aid briefing practices. It would be appalling to draw an inference of guilt from tactics which are more explicable in terms of counsel's pressure of work.

I submit that if the defence has admitted little or nothing, and if it is helpful for the judge to outline the issues to the jury at the outset, that outline could be done without reference to any defence documentation.

On the other hand, I do not see why Nader has not proposed that the defence have the option of making a brief opening, straight after the prosecution's opening. It would certainly serve as an inducement to make sensible admissions. I urged that reform in my AIJA Report,[25] where I noted that similar proposals have been made by a number of

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22 Aronson, above n14 at 41.
23 Id at 111–113.
24 Lord Runciman, *Royal Commission on Criminal Justice* (Cm 2263, 1993) recommendations 122–131.
25 At 96–98.

judges and commentators (including the New South Wales Law Reform Commission), and opposed in principle by no-one.

10. Admissions

Nader proposes that there be provision for admissions of mixed fact and law.

I am aware that litigants in the United States are allowed to "stipulate" both fact and law, but I have great difficulty in understanding how Nader's scheme is intended to operate.

Nader also proposes debarring proof of primary facts on which a general admission is based, even where those primary facts give rise to an inference not specifically covered by the general admission. I do not understand how one can preclude proof of something not covered by an admission. Either it is admitted, or it is not. Anything else is either too vague, too dangerous, or both.

There is, however, room for "fact agreements" along the lines indicated in the New South Wales Evidence Bill, 1991 (clause 184), limited to the parties and to the case at hand, and precluding proof of the admitted facts.

11. Conclusion

Lest it be thought that the above indicates my overall opposition to the Nader Report, let me state that I think that it is fundamentally on track.

The essence of the Report is to recommend greater judicial case management of complex criminal trials. That has to be right, and from that change, one hopes, we will see the evolution of attitudinal changes on the part of practitioners to the way trials are prosecuted and defended.