

Corporate Crime: Complex Criminal Trials The ASC Perspective

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1. Introduction

Proposals for the reform of evidence and procedures for the conduct of complex criminal trials in Australia have been developed by the National Crime Authority working parties, considered by Professor Mark Aronson in his important work on managing complex criminal trials,¹ the subject of consideration by the Standing Committee of Attorneys General which met in August 1992, and most recently, the subject of a report by John Nader QC to the New South Wales Attorney General, Mr Hannaford.² The Australian Securities Commission (ASC) has indicated that it is generally supportive of the thrust of those recommendations, and accordingly I do not propose to cover in any detail many of the matters the subject of the recommendations.

However, there are some assumptions in those materials and some matters which come from the ASC's perspective as a specialist regulatory agency with enforcement responsibility for corporate law which will be considered in this paper.

The ASC has an interest in the development of new procedures for the conduct of complex criminal trials from a number of perspectives and in this introduction I would like to bring together some of the themes which will reoccur in the body of the paper.

Although the ASC has power to prosecute offences arising under the *Corporations Law* and the *ASC Law* (national scheme laws), in cases of serious corporate wrongdoing, generally the Commonwealth DPP has the conduct of the prosecution.³

As the primary investigative body in relation to complex criminal matters which involve corporate law, the ASC considers it critical that the procedures adopted in relation to complex criminal trials, and in particular the laws of evidence, also facilitate efficient investigations. The ASC also has a direct interest in the rationalisation of such trials because substantial resources of the ASC must be committed to the support of prosecutions arising out of the investigative role that the ASC plays.

In order to maintain confidence in the law and to maximise the use of its resources, the ASC seeks to conduct investigations in as efficient and cost-effective a way as possible,

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1 Aronson, M, *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure* (1992).

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

3 Grahame Delaney provides the DPP's perspective on those trials in this issue of *Curr Iss Crim Just*.

leading to timely and appropriate enforcement action. In undertaking prosecutions, the ASC is seeking not only to uphold the law, but to achieve a regulatory effect, and this effect is dissipated with time. Accordingly, the ASC seeks to take enforcement action as soon as possible after the identification of a contravention. Convictions recorded many years after a contravention has been identified do not support confidence in the law and accordingly it is necessary not only for the court processes to be shortened and made more effective, but also for those rules of evidence which are adopted to enable investigations to be conducted in as efficient a manner as possible.

The establishment of the ASC represents a national commitment to uniform administration of the corporate law across Australia. As a national body, the ASC is exposed on a daily basis to inefficiencies arising out of the lack of uniformity of evidence laws and different court procedures around the country. The ASC considers that a primary objective in reform of matters relevant to the conduct of complex criminal matters should be achieving national uniformity in evidence and procedures relevant to those trials. In addition, there continue to be a number of difficulties in the administration of criminal matters which arise out of the areas of duplication between the *Corporations Law* and *State Crimes Acts* (with differing penalties and limitation periods), the fact that the *Corporations Law* is a national scheme, but its criminal enforcement is through State courts, and with the resultant confusion of responsibility for some areas of enforcement and financial responsibility.

As a specialist regulatory body with enforcement responsibility, the ASC has a number of powers which are not shared by police forces, but most of the proposals for reform assume that police powers are the relevant basis for evidence gathering. For the ASC to perform efficiently all of its functions (which include administrative and civil enforcement and the provision of information to other litigants or coregulators), it will be necessary for the ASC to be able to use investigative powers which may found evidence for all of these actions, without unnecessary duplication. In the interests of the efficiency of the investigative phase of complex matters and to maximise the available remedies, it is necessary that consideration be given to amending evidence laws nationally to admit into evidence transcripts of examinations conducted by the ASC in paper committals, on the same basis as statements or affidavits.

There are some matters which are not sufficiently addressed in the reform proposals and these include the impact on the conduct of proceedings of the failure of an indigent defendant to be represented either at committal or at trial,⁴ and questions of the current lack of uniformity in relation to the court (magistrate, district or supreme) in which these matters may ultimately come to trial.

2. *The ASC Perspective*

The ASC's perspective on complex criminal trials is influenced by a number of factors. These include:

4 See *Dietrich v the Queen* (1993) 67 ALJR 1 in which the High Court indicated that in the absence of exceptional circumstances proceedings should be adjourned, postponed or stayed where, through no fault of his own an indigent defendant cannot obtain legal representation in the trial of a charge for a serious offence.

A. The ASC is a specialist agency with many functions in relation to the regulation of Australian corporations and securities markets

The ASC is directed by the *Australian Securities Commission Act*, 1989 (under which it is constituted) and empowered by the *Corporations Law* to carry out a number of functions in relation to corporate law:

- to be a public information base about corporations,
- to facilitate legitimate business by ensuring appropriate disclosure in a range of corporate or market activities, such as fundraising and takeovers,
- registering, supervising and disciplining a range of intermediaries such as securities dealers, stock exchanges and auditors, and
- to be an enforcement agency, with civil, criminal and administrative capacities.

As a regulator of corporate activity, the ASC considers that the enforcement actions which it takes (whether civil, criminal or administrative) must have regulatory effect. Reflective of the many responsibilities which the ASC has under the national scheme laws, there is a capacity for the ASC to graduate its response, as appropriate, to the nature of the activity which is being undertaken. Some of its enforcement options reflect the need to protect the integrity of the market, such as the disciplinary actions which may be taken against securities licence holders and their representatives, under which the ASC may impose conditions on a licence, suspend or revoke a licence or ban a person from acting as a representative. The ASC has power to institute interim civil action to preserve and protect property. In the most serious cases, the ASC may take long term civil action to recover losses on behalf of investors and institute criminal prosecutions.

For regulatory effect to be achieved, enforcement action and any outcome of that action must be appropriate to the nature of the conduct which is to be remedied and it must occur as nearly to the time of the identification of the contravention as possible. Accordingly, procedures which make prosecutions in relation to serious contravention of the corporate law more efficient and effective are to be encouraged. Unless prosecutions are made more efficient, then there will be continuing public pressure to find alternative remedies.

The ASC has welcomed the recent introduction of the civil penalties regime in relation to certain contraventions of the corporate law by directors, as these new provisions make an effort to distinguish between behaviour which should invoke a sanction because it is against the public interest, but not criminal, and behaviour which should incur criminal penalty. However, the utility of the new provisions is impaired by the characterisation of management banning orders as "civil penalties". Under the new provisions, the commencement of a proceeding for a civil penalty will bar subsequent criminal action in relation to that conduct. This has the practical effect that directors who may be guilty of the most serious conduct (which is recognised as being worthy of a criminal sanction) may be removed from management only after all of the criminal procedures have been undertaken, whereas those who have been guilty of behaviour which is acknowledged to be deserving of penalty but not criminal may be removed from management much earlier. This fails to recognise the protective nature of the management banning order, which should be regarded as an administrative procedure designed to protect the integrity of the market, not as being penal in nature at all.

B. The ASC's primary interest in complex criminal trials will be from the perspective of an investigator of a substantial number of matters which will result in such trials

For the "due administration of a national scheme law" the ASC has power to investigate suspected contraventions of national scheme laws or laws of a State or Territory that involve the management or affairs of a corporation or fraud or dishonesty and relates to a body corporate or a securities or futures contract.⁵

The ASC is therefore the primary investigative body for offences involving serious corporate wrongdoing, although its jurisdiction overlaps with state and federal police forces in relation to matters involving fraud. Accordingly, the decisions which are made in relation to evidentiary rules for prosecutions across Australia, the simplification or liberalisation of those rules and the degree to which uniformity of those rules is achieved will have a considerable impact on the manner in which the ASC conducts its investigations and the efficiency of the use of scarce resources. This is important, because the more efficiently resources can be used, the greater the number of complaints which the ASC can address.

C. The incomplete "federalising" of corporate matters gives rise to many areas of inefficiency and potential for conflict

(i) Questions of uniformity

The nature of corporate activity in Australia is that it is complex and often not confined to one state. This was a primary factor in the decision to introduce the *Corporations Law* and to administer it under a single body, the ASC. The ASC is directed by the ASC Law to "achieve uniformity throughout Australia in how the Commission and its delegates perform" its functions and exercise its powers.⁶ The ASC is frustrated in achieving a desirable level of uniformity because of the failure to complete the federalising process.

Although the "federalising" provisions of the *Corporations Law* generally make contraventions of the *Corporations Law* "federal" offences, trials of those contraventions will be heard in State courts, according to the evidentiary and procedural laws of the State and rules of those courts. Almost without exception those laws and rules are different, often in unimportant ways. For instance, although they are in substance the same, the words of the jurors which must be used in statements forming part of a paper committal vary between the States.

Because it not possible in complex matters to know until quite late in an investigation in what State jurisdiction a criminal matter must be brought, this can result in statements being signed many times resulting in unnecessary delays in the investigative process and unnecessary duplication of effort, cost and inconvenience, not only to the ASC but to citizens who are involved in the prosecution as witnesses. As indicated above, it also ignores the uniform procedure offered by the ASC Law in relation to records of examination.

The importance of uniformity in this area cannot be overstressed. While individual initiatives of State governments to improve complex criminal trials are to be applauded, much of the effort will remain unrewarded unless State and Commonwealth governments agree to a uniform approach. This would involve not only similar processes, but eliminating inefficiencies which have no substantive purpose such as differing jurors on statements. Of

⁵ See s13(1) *ASC Law*.

⁶ *Id.*, s1(2).

those matters which will comprise complex criminal trials, those involving the *Corporations Law* will form a significant part. If the state and federal governments cannot agree to uniform procedures generally, then there may be room in this area for them to agree to the adoption of Commonwealth rules of evidence in relation to those matters.

(ii) Relationship between Corporations Law and State Crimes Act offences

Although the ASC has an ancillary power to investigate crimes constituted under State *Crimes Acts*, it may only do so for the purpose of the "due administration of a national scheme law".⁷

Accordingly, where the ASC identifies the criminality of a matter as being best described by a State *Crimes Act* offence, it may have no jurisdiction to investigate and prosecute the matter and the ASC's preference is to refer it to a State police force. An example of this would be simple fraud by an officer of a corporation in which the fact that a fraud has been perpetrated on a corporation rather than an individual is incidental.

Nonetheless there is considerable overlap in the conduct which is susceptible to charges under both the *Corporations Law* and the State crimes legislation, and it is sometimes difficult to know until late in an investigation which may be the more appropriate. This can give rise to difficulties:

- As a general matter, the ASC has a preference for *Corporations Law* charges, because specific charges under that Law bear public witness to the special nature of corporations and they fall within the purposes for which the ASC was established. However, State *Crimes Act* offences sometimes offer advantages in that they often carry heavier penalties or longer limitation periods, although they tend to be more general offences. This can be a source of tension between the ASC as a specialist regulatory agency and the DPP as prosecutor. In practice, there is consultation between the ASC and DPP on these matters.
- If only State *Crimes Act* charges are to be laid, then the Commonwealth DPP will usually consult with the relevant State DPP as to who should conduct the prosecution. In some instances, the Commonwealth DPP may nonetheless prosecute the matter. The ASC is of the view that complex corporate matters cannot be effectively prosecuted unless the ASC and relevant DPP work closely together in the development of a brief. Under the ASC/DPP Guidelines which were agreed in December 1992, an appropriate cooperative arrangement was agreed with the ASC having primary carriage of the matter during the investigation phase (assisted by the DPP in considering evidence and in scoping the brief),⁸ and the DPP having primary conduct of the matter after it has passed at "hand over" for prosecution (with the ASC assisting in completing any matters remaining to support the brief). This cannot be achieved if there is discontinuity of prosecutor, and again the process is duplicative and expensive.
- Where state *Crimes Act* charges properly describe the criminality and *Corporations Law* charges either do not lie or are incidental, then it is arguably more appropriate that the relevant State government bears the cost of investigation and prosecution, rather than the Commonwealth.

7 Id, s13(1).

8 See ASC Digest, ASC Memos 105.

(iii) The importance of the recognition of powers of specialist agencies in complex corporate trial procedures

As a specialist regulatory body, in recognition of the complexity of the conduct which the ASC must investigate and the diversity of the functions which it has, the ASC has a number of powers under the *ASC Law* which are not usually held by police forces. This gives rise to different investigative techniques, and the ASC seeks to use its powers as a platform to maximise the remedies which might be obtained from an investigation.

For example, the ASC can obtain oral evidence by way of a compulsory examination which is under oath, the examinee may not refuse to answer without cause and the examinee must sign the record if the ASC requests this to be done (sections 19–24 *ASC Law*).

These powers help the ASC to maximise the remedies which it may obtain, or assist others in obtaining, arising out of an investigation.

- These records may be used to found urgent civil action because section 76(3) of the *ASC Law* provides that the record is prima facie evidence of the statements it records.
- Section 25 of the *ASC Law* permits the ASC to release the record to assist civil litigants. Under section 127 of the *ASC Law*, the ASC probably cannot release the same information if it is taken by way of statement.
- The examination, or the investigation, would also found the jurisdiction of the ASC to commence a civil action in the name of a person under section 50 of the *ASC Law*.

In addition, they serve a useful purpose in pretrial identification of issues, since a person who is examined may not refuse to answer a question on the basis of self incrimination or legal professional privilege.

The *ASC Law* (Divisions 2 and 9 of Part 3 in particular) provides a cohesive body of rules setting out the powers of the ASC to take oral evidence under oath, and the evidentiary weight which such evidence should have in civil and criminal proceedings.

In many respects, those provisions go a long way to achieving reforms which have been foreshadowed in other venues, but because there is no federal criminal jurisdiction or common acceptance in relation to the otherwise federalised offences of the Corporations Law that these evidentiary rules should apply in State courts, this uniform system has not been implemented.

However, even though the record is sworn and signed, under the provisions dealing with paper committals in most States, only affidavits or statements (which need not be sworn) may be used. In addition to duplication and delay, this may put ASC investigators in a position where they must choose between the flexibility which taking oral evidence under the *ASC Law* provides in facilitating a range of remedies, or delaying the prosecution process.

The ASC strongly supports the amendment of all evidence acts to admit transcripts of examinations. The difficulties which the ASC faces in this area are also faced by the NCA and other Commissions which may be constituted from time to time with hearing powers.

The ASC would also support a suggestion made by Mark Aronson in relation to procedures such as examination.⁹ Professor Aronson has suggested that, in addition to the perjury proceedings which are currently available in relation to false statements made in examinations, the prosecution should be able to introduce material from an examination in

9 Aronson, above n1.

evidence to contradict inconsistent statements made at trial. The ASC sees this as desirable because perjury proceedings can be distracting in the investigative process, and they do not address the issue of promoting the efficient conduct of criminal trials.

D. The matters which the ASC investigates are complex commercial matters and it may be necessary to adopt some different measures to accommodate them.

The experiences of the 1980s have demonstrated that contraventions of corporate law are frequently committed by means of, or behind a mask of, apparently legitimate, and extremely complex, commercial arrangements. Many of the arrangements under investigation by the ASC are unique, but they often share common characteristics:

- the arrangements are highly structured, and may involve hundreds of individual transactions. Professional advisers (typically lawyers, accountants, tax advisers or merchant bankers) are used at all stages of the arrangements;
- transactions often involve activities in more than one State in Australia or more than one nation;
- transactions often do not involve “paper” but may be effected through use of technology;
- they often involve complex corporate structures or groups with interlinked share-holdings or debts, some of which may be incorporated or have assets outside Australia, often in jurisdictions which do not have cooperative arrangements with Australia for sharing information;
- cover up strategies are often used, for instance nominee corporations or trusts, or devices such as blind trusts (where the beneficiary of the trust may not be named or ascertainable on the face of any document) or bearer shares (which are transferable by delivery and the owner is not recorded on any register);
- there may be hundreds of thousands of documents;
- there may be a number of financial intermediaries or other intermediaries;
- “stakeholders” (such as investors, creditors and company officers) whose interests are often in conflict.

In circumstances such as these, efficient and just conduct of these trials require several conditions to be met:

- (i) defendants must be represented. In factual matrices such as these, many of the assumptions inherent in the reform proposals simply will not apply if defendants are not represented, not only at trial but also in the committal stage. Current experience in New South Wales indicates that where defendants are not represented at the committal stage in matters such as these, then the time taken in the committal can be doubled and trebled, unnecessary witnesses are called and the cost of the hearing to the Crown and any codefendants may be significantly expanded. Mr Nader has suggested that at the committal stage, a magistrate should have a discretion as to the admission of oral evidence, which may ameliorate the problem in part.¹⁰ However, if

10 Nader, J, *Submission to the Honourable Attorney General Concerning Complex Criminal Trials* (1993) 16.

counsel is only involved at trial stage, then the administration of that procedure will be delayed while counsel prepares the case.

In these circumstances, perhaps consideration should be given to making provision for either a magistrate or a judge to order the appointment of counsel in designated "serious" matters, borrowing in part from the proposal adopted in section 360A of the Victorian *Crimes Act*;

- (ii) the matter must be dealt with in the appropriate forum. Many of the cases which will fall into the category of complex criminal trials will involve amounts of several millions of dollars, and highly complex commercial transactions. New South Wales is one of the few States in Australia which customarily tries these matters in the Supreme Court. This should not be the exception but the rule;
- (iii) information must be able to be presented to the court in a comprehensible way. Proposals to permit the provision of charts, summaries and visual aids in presentation must proceed. Without them, justice will not be served simply because cases will not be able to be understood;
- (iv) provision should be made for satellite or other forms of visual presentation of evidence from overseas or from other States. This facilitates court access to all relevant information, makes sensible use of available technologies and is in the interests of economy in trials.

3. Conclusion

The efforts of the many organisations, governments and individuals who have been considering what procedures should be adopted for complex criminal matters are to be applauded. That more efficient and uniform procedures are required surely cannot be argued.

In the corporate area, the need for uniformity is so strong that unless accord can be reached between the States and Territories on issues such as those raised in this paper, then the argument for the adoption of a federal criminal jurisdiction becomes irresistible.