

PROSECUTING FRAUD

Damian Bugg QC
Commonwealth Director of Public Prosecutions

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Introduction

The Role of an independent Prosecutor is well known to all of you. The way in which we undertake prosecutions following investigation and charging is also a process with which you are no doubt familiar. The prosecution of fraud, particularly complex fraud is a task which has teased and challenged the criminal trial process and highlighted the need for reform. Today I propose to examine recent responses to these challenges and their relevance to the prosecution process.

Much of what I will say has been said already but I cannot resist the temptation to repeat it, particularly on an occasion such as this.

The Criminal Justice System provides a three stage process of deterrence. The first deterrent is detection. As most fraud is a calculated crime there is time to pause and contemplate the risk of detection. For this reason efforts made to detect and investigate fraud must be resourced and undertaken by competent, experienced people.

The second stage is prosecution to conviction. If, when charged the suspect knows that the procedures to trial and likely conviction are efficient, timely and conducted by a well resourced professional prosecuting authority and the trial itself will be managed firmly by a capable judicial officer who will not tolerate technical frustration and objection, this will have to be factored into the risk equation by the would be fraudster before embarking upon the fraudulent conduct.

The third stage is sentencing. Arie will deal with that. I propose to concentrate on the second phase in particular and consider with you the reform proposals which are now afoot in Australia.

Prosecuting fraud is not easy and, I regret to say, it is in the eyes of many becoming an increasingly difficult task.

There are a number of reasons for this:

- Prosecutions depend for their successful outcome on the quality of the investigation. Limited resources and the ease of completing complex and cross jurisdictional fraudulent transactions make the task of the investigator more difficult.
- The consequent delays in delivery of a brief, the preparation, disclosure and filing process and then the pretrial build up quite often cause delay and impact adversely on the quality of the prosecution product.
- Defence difficulties, *Deitrich* applications and the availability of Legal Aid and the quality of representation for the impecunious (or even moderately well-off) citizen have their own deficits from the prosecution's view point. A well resourced accused on the other hand can, and often will, create further problems of technical challenge, obstruction and delay of a type which most Courts appear either incapable or unwilling to confront.
- The Court process itself bristles with every conceivable difficulty. The rules of evidence, judicial management, the claimed inappropriateness of the jury as an adjudicator of guilt in complex commercial matters coupled with its own human frailties in dealing with the rigours of a difficult and sometimes long running trial (what for example is the statistical

likelihood of 12 people hearing a 6 month trial, not losing one day through illness) provide the average punter with “a real chance in the trial process” Judges are reluctant to take a firm hand and discipline prosecutors and defence counsel. Many Judges are reluctant to become involved in an assertive control of the trial process through fear of falling into appealable error.

Some Lessons from the Past

At the outset I must say that the examples to which I will refer can only be classified as “complex” trials. (Arguably the issue itself was not complex but the process of presentation, proof and adjudication was certainly made complex).

Lessons have been learnt but I doubt whether those lessons have been applied in practise in the way many of us hoped they would. (see “Anatomy of Long Criminal Trials” Dr. Chris Corns, AIJA Publication 1997).

Committees, Royal Commissions and Courts have all highlighted the difficulties thrust upon the judicial system by complex and lengthy trials. In 1986 Lord Roskill in his Fraud Trials Committee Report was quite pessimistic in his consideration of the capacity of the legal system to bring the perpetrators of serious frauds to justice.

Two complex trials in Victoria were the subject of consideration by the Court of Criminal Appeal in that State and formed part of Dr Corns’ study (supra).

R v Wilson & Grimwade was a retrial, the first trial having been aborted after 33 weeks when it was almost concluded. Wilson & Grimwade were charged with 19 counts of fraudulently inducing the investment of monies contrary to Section 191 of the Crimes Act 1958 (Vic) the conduct complained of occurred in 1981.

The trial commenced in January 1991 and a jury returned its verdict on the 17th of December 1992. The Crown case occupied the whole of 1991, included the reading of 2,780 pages of transcript from the first trial which alone took 31 days over a 10 week period. The jury were excused between the 3rd of December and the 14th of January. The trial had obviously become fragmented and during the 52 week period from 12 August 1991 to 7 August 1992 the Court sat on 85 ½ scattered days (the equivalent of only 17 5 day weeks). Between January and July 1992 the jury only heard 36 days of evidence and 11 days of part of the Crown’s closing address. Six and half months had elapsed from the close of all the evidence until the jury retired to consider its verdict. 39% of the time lost by the jury was attributable to matters personal to them. It was hardly surprising that the Court of Criminal Appeal allowed the appeal.

In overturning the convictions in Grimwade and Wilson the CCA held that the course that the trial took did not fit an essential purpose for which a criminal trial is by definition designed: that is to enable it safely to be seen that the jury has been given a true verdict reached upon a proper consideration of the evidence.

I accept immediately that the considerations which lead to the overturning of the convictions of Grimwade and Wilson were exceptional. It is clear however that if the prosecution case is conducted in a manner that fails to meet the essential purpose of a criminal trial then conduct of defence counsel will not prevent a Court from overturning a subsequent conviction. The Court of Criminal Appeal did however provide reassurance for Trial Judges who have held back from interfering in the conduct of the trial by either the prosecution or the defence.

The Court concluded in these terms:

“Before parting with the case we wish to say that our decision is in no respect to be understood as providing a passport to those who would seek to benefit from a wayward criminal trial. This case is in our experience unique. We hope and expect that no other will approach it in its normal characteristics...a firm and resolute management of the trial, and a strong cooperative effort by Judge and counsel were imperative if it was to continue as a proper trial....counsel in future, faced with a long and complex trial, criminal or civil, will cooperate with their utmost exertion to avoid a mockery of the system of justice. If not, they must expect to receive, with the sanction of this Court appropriate regimentation by the Judge, perhaps of a kind not hitherto experienced, designed to avoid the unhappy result that befell this trial.”

See *R v Wilson & Grimwade* (1995) 1VR 163

In his analysis of this case Dr Corns concluded that two factors could be identified which were primarily responsible for the decision of the Court of Criminal Appeal. Firstly it was the fragmented nature of the evidence presented to the jury and secondly was that by the 17th of May 1991 (the jury was empanelled on the 11th of February 1991).

“at the end of the evidence of the Crown’s first witness, it was obvious to all parties that the trial had reached a “state of crisis”(CCA page 172). This was because prior to the jury’s empanelment, counsel for the Crown advised the Judge that the Crown case would last about 3 months yet more than 3 months had elapsed just completing the evidence of the Crown’s first witness.”

In *R v Higgins* (1994) 71A CrimsR 429 the Court of Criminal Appeal in Victoria had cause to consider a trial in which the jury was empanelled on the 1st of November 1991 and returned a verdict on the 26th of March 1993. Higgins, a Victorian Police Officer was charged with 4 counts of obstructing the course of justice between 1977 and 1983. He was first charged on the 13th of April 1987 and the committal proceeding which commenced in October 1987 was discontinued on the 2nd of August 1988 by the Victorian DPP on the basis that the way in which the proceedings were being conducted by the defence, in terms of length of cross examination, constituted an abuse of process.

During the trial the Crown called 125 witnesses, 29 of whom were recalled. Without any interruptions, the prosecution case would have taken 78 Court sitting days to complete but in fact because of interruptions, took 166 sitting days. The defence case took 10 sitting days. The Crown closing address took 17 sitting days and the defence closing took 14 sitting days with the charge taking a further 15 sitting days. By the time the jury had returned its verdict it had seen 2 Christmases come and go.

An analysis of the reasons for the decision of the Court of Criminal Appeal contained in Dr Corns’ study (supra) covers the issues of abandonment of the committal by the Crown, difficulties with Legal Aid and the limited retainer to argue points of law only, a reaction by the prosecution to the position adopted by the defence, and the making of applications by the defence that should not have been made (18 applications for a discharge of the jury). The Court also emphasised the need for trial Judges to prevent unnecessary defence cross examination and concluded that the trial Judge took excessive time to consider questions and prepare rulings and should not have commenced the trial until more of the contentious issues had been decided pretrial.

I could continue with an examination of those glaring examples of trial complexity which, in my view, serve to illustrate some of the difficulties I have attempted to highlight but, in support of my contention that we have really not learnt from and applied the considerations by Committees, Commissions and academics, I merely refer, from a trial which my Office recently ran, to an extract from the comments of the trial Judge following sentencing (12th of May 2000).

“Before leaving this matter, I wish to add a comment about the manner in which the prisoner’s defence was conducted...in the present case on behalf of the prisoner, every legal rabbit was chased down every legal burrow. Every rabbit warren was inspected for possible renovation or complete rebuilding. Days or weeks were spent fishing for barramundi only to come up with shoals of red herrings and the occasional barely edible or creditable catfish. I regret to say that neither as a Judge nor Counsel have I encountered a more tedious, frustrating, long winded and repetitive path to a fair trial than this one.

It is easy to be wise after the event, but the course of a trial is often in defence counsel’s hands when it comes to cross examination. A Judge knows nothing of an accused’s instructions to his lawyer and his lawyers to intervene in case there is some valid point which is not apparent to the Judge but will emerge later in the evidence.

The trial of the prisoner occupied 9 full weeks of the Court’s time. The jury were told, in accordance with counsel’s estimate, that it would take no longer than 6 weeks. With the luxury of hindsight, it should not have taken any more than 3 or 4 at the outside. At the end of the day, the issues in this case, as in most criminal cases, essentially came down to the credibility of 3 or 4 of the Crown’s key witnesses.

This Court is presently in the course of implementing a rigorous system of pretrial reviews for criminal cases. It is hoped that the new system will reduce, eliminate, or at least, reduce trial overruns and have the effect of identifying and narrowing the real issues in dispute. However, whether the new system makes any difference will largely depend on the sincerity and dedication of lawyers in working towards a fair and just system.

In previous cases, I have suggested a situation might be reached where it might be necessary to consider introduction of judicial power to financial penalise lawyers who are unduly prolix in presenting cases. In my view, the trial of...provides substantial ammunition in favour of such an approach.”

I wonder why these comments had to be made after sentencing and why His Honour did not feel confident to have intervened during the trial process demanding the rigour and discipline about which he later spoke.

It is essential, in my view, for the efficient prosecution of fraud, and for that matter other crimes, for the judiciary to impose a firm hand on the conduct of the pretrial process and the trial proper. The best will in the world and a fully disclosed Prosecution brief will not assist the trial process if the Trial Judge is not prepared to take control. The maintenance of proper pre trial disciplines is important, but just as important is the control by the Trial Judge over the management of the trial itself.

Effective Prosecution Fraud

The best practise goals for the effective prosecution of fraud should contain the following essential elements:

1. Early presentation to the prosecutor of the investigator's brief, preferably in an electronic form which assists disclosure and later Court presentation.
2. Full prosecution disclosure to the defence.
3. Engagement of capable and responsible defence and prosecuting counsel both retained at an early stage.
4. A prosecution charging policy which insists upon a minimalist approach but which also one reflects the true criminality of the fraudulent conduct alleged against the accused.
5. The availability of a pretrial hearing whereby essential witnesses may be cross examined by counsel, retained by both prosecution and defence to conduct the trial, who have sufficient experience and authority to discuss issues and narrow and confine matters for trial.
6. The resolution of issues pretrial.
7. Judicial oversight of completed pretrial discussions.
8. A trial process which insists upon economies, provides the trial Judge with authority to maintain those economies, permits ease of proof (e.g. transactional proof by experts) and requires the Defence to at least open the Defence case after the Prosecution opening.
9. An identifiable sentencing discount for early pleas of guilty.

Reform and Recommendations for Reform

I am firmly of the view that no reform proposal will work satisfactorily without the support of the profession and for this support to be forthcoming a significant cultural change will have to be effected. I will not burden you with a recitation of all the reform proposals but only refer briefly to some recent developments.

In *Higgins* (supra) the Court said:

“The powers which trial Judges have always said, independently of statute, of intervening so as to prevent the waste of time have been too sparingly exercised in the past. Judges may expect the full support of this Court when they exercise these powers, or the new powers conferred by the Crimes (Criminal Trials) Act 1993.”

When that legislation was passed many of us who had been advocating reform felt that the opportunity to observe an experiment would assist in formulating our own reform proposals. The provisions of that Act were so infrequently used that one Victorian Judge stated at a weekend seminar in Sydney in March 1998 that the reform proposal had failed through lack of use. Unfortunately the accompanying cultural change was lacking from this experiment.

I have previously referred to Dr Corns "Anatomy of Long Criminal Trials" published in 1997 I recommend that publication to you as the summary of key findings and recommendations contained in it should be compulsory reading for any person anxious to avoid or minimise the problems associated with complex fraud trials.

In August 1998 the Directors of Public Prosecutions and Directors of Legal Aid Commissions in Australia published their "Best Practice Model for the Determination of Indictable Charges". The work undertaken by the Directors was a response to the problems experienced not only by prosecutors but also Legal Aid Directors in coping with the complications caused by restricted Legal Aid budgets, the *Deitrich* decision and the continuing growth of trial times. I have appended a copy of that Best Practice Model to this paper.

In 1999 the Standing Committee of Attorneys General appointed a Working Group following agreement reached at the meeting of the Standing Committee of Attorneys General (SCAG) held in Adelaide in October 1998. The group was asked to consider the serious problems presented to the criminal justice system by complex white collar crime and to address the following issues:

- Sanctions for non-compliance with procedural reforms.
- Means of bringing about change in the legal culture to facilitate effective reform.
- Means of improving the quality and timeliness of the preparation for trials.
- Means of improving judicial management of the trial process, including issues related to instructions to the jury, such as length and complexity.
- Means of reducing the number of adjournments.
- The so-called "right to silence issues" (for example, in relation to partial disclosure of the defence case to enable the issues in dispute to be identified, and allowing adverse inferences to be drawn from reliance on evidence at the trial which was not previously disclosed).
- Means of resolving problems in relation to defence funding arising from the *Dietrich* case e.g which body (Court or Legal Aid Commission) should assess whether a defendant is actually indigent.

In considering those issues the group was asked to have regard to the Best Practice Model (DsPP and Legal Aid Directors) together with the draft principles for reform of pretrial criminal procedure developed by the Criminal Law National Liaison Committee of the Law Council of Australia (prepared as a response to the Best Practice Model).

The recommendations of the Working Group were published in Report form in September 1999 and formed the basis of an AIJA Conference held in Melbourne in late March this year and attended by a broad cross section of practitioners. Following the two day conference a Deliberative Group, appointed by the Commonwealth Attorney-General met to consider the recommendations of the SCAG Working Group and the discussions and suggestions arising from the consideration of those recommendations at the conference. The deliberations of that Group, the Deliberative Forum, were in turn published and are now the subject of consideration by SCAG.

I must say, having been involved in the consideration of the Best Practice Model, the SCAG Working Group, the AIJA Conference and the Deliberative Forum that there is a discernible shift in the attitude of groups representing most sectors of the criminal justice system towards the reform proposals and the need for reform.

The SCAG Working Group Report can be found at <http://law.gov.au/publications/crimtrial/scag.html>.

The cost to the community of long and failed trials is well documented. The political will for reform is such that changes may be made which ignore the protests of well meaning practitioners whose position is blurred into support for a trial process which will no longer be tolerated. Recent legislative changes in Victoria, The Crimes (Criminal Trials) Act 1999 have been launched into an environment which appears to me to be more prepared to embrace reform than that which prevailed in 1993.

Reform will come and we must examine the relevance and cultural genesis of the resistance to it and be prepared to participate in the reform process so that the resultant change is one which serves the purpose of our criminal justice system.

Conclusion

I am convinced that effective means of detection followed by an efficient prosecution process with the prospect of criminal sanctions is the only effective deterrent against criminal fraud.

I cannot emphasise sufficiently the importance of thorough and professional investigations and the presentation of a full Brief to the Prosecution. Whilst there will be many instances where it is necessary to consult with the prosecutor before a charge is laid and while the investigation is continuing it is important for the Prosecution to avoid becoming so involved in the investigation as to risk the loss or appearance of independence from the investigator and therefore the creditability of the disclosure process. Most problems associated with committals flowed from a mistrust of the fairly informal disclosure process then used and a desire to use the committal process to discover the extend of the investigation and prosecution brief.

The loss to the community through fraud is substantial. Restriction and frustration of the means and ease by which fraud can be committed requires not only constant vigilance but an effective and well funded investigative process. The trial process must be seen by the community as something other than a playground for lawyers and properly acknowledged as a process whereby the deterrence it is meant to achieve is not frustrated by delay, confusion and unacceptable technical challenge.