CASE STUDIES IN CORPORATE CRIME

by

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PREFACE

Corporate crime is an important but somewhat neglected subject in criminology. There are many reasons for this, not least of them being the fact that court cases involving corporate crime often raise issues difficult for non-lawyers to understand. Most crime researchers are trained in statistical analysis and empirical research rather than law. Case study and legal analysis, however, often yield more potential benefit than statistical analysis as methods for examining some of the complexities of the legal process in relation to corporate prosecutions. For this reason the Bureau was particularly fortunate during 1987 and 1988 to have the benefit of Rachel Langdale on leave from studies in law at Oxford University. Rachel combined a strong understanding of the legal process with the criminological training necessary to place particular issues which arise in the course of an individual prosecution in their wider context.

The present report provides an analysis of just two cases (R v. Cameron and R v. Maxwell, Smithson and Goman) but the analysis of each is extremely detailed and revealing. Where possible, interviews were conducted with victims and offenders as well as with legal counsel for the defence and prosecution. The results of these interviews and first-hand observation by the researcher of the trials themselves has disclosed a number of areas where the law and procedure involved in corporate prosecutions might be improved. These areas include the need for greater pre-trial cooperation between defence and prosecution to reduce court delay, revision of the rules of evidence as they impinge on corporate prosecutions, the need for a close examination of the disposition of corporate assets as soon as possible after the collapse of an organization and the appropriate balance of investigative responsibility between police and the Corporate Affairs Commission.

Dr Don Weatherburn
Director
May 1990.

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DISCLAIMER

This report reflects the law as of 12 September, 1988. The report has had to be held over pending the outcome of an appeal in one of the cases examined. In the interim, there have been some changes in the law surrounding corporate crime. None of those changes materially affect the conclusions of the report which touch predominantly on the problem of restitution for victims of corporate crime.

Chapter 1

INTRODUCTION

'WHITE-COLLAR CRIME' OR 'CORPORATE CRIME'

The term 'white-collar crime' originated with, and was developed by, an American criminologist, Edwin Sutherland.[1] He defined the concept as a crime committed by a person of respectability and high social status in the course of their employment. Furthermore, he suggested that white-collar crime has its genesis in the same process as other criminal behaviour; that of differential association. In other words, criminal activity is learned from others who define such behaviour.

Whilst Sutherland was significant in generating interest in crimes of the business classes, his approach has been criticised as too broad and general. Leigh[2] describes any definitions of 'white-collar crime' or 'economic crime' as 'unsatisfactory', because it is difficult to find unifying elements within the criminal activities concerned. After all, at the most general level, 'white-collar crime' can refer to breaches of the Companies Code; Occupational Health and Safety Legislation; Tax Regulations; Environmental Protection Legislation; Transport Safety Regulation, Consumer Protection Legislation, etc. Since 'white-collar crime' thus encompasses so many diverse behaviours, some authors have attempted to avoid behaviourally based definitions by introducing concepts of 'elite deviance', 'official deviance' and 'corporate deviance'.[3] Whilst such notions may be more flexible, they merely shift the definitional problem onto the word 'deviance'. As Coleman[4] points out:

> Because of the absence of clearly formulated public standards for elite behaviour, sociologists using the deviance approach must often rely on their own values and prejudices to define the parameters of their work. In so doing, they not only threaten the integrity of the research process but also undermine the credibility of the entire effort to bring the problem of white-collar crime into the arena of public debate.

Various operational definitions of 'corporate crime' have been used. For example, Sutton[5] describes such criminality as that against property; involving fraud or deception; without violence and arising from some corporate or business activity. Following Sutherland, Braithwaite[6] in his study refuses to accept the exclusion of civil violations from a consideration of white-collar crime, and defines corporate crime as:

> The conduct of a corporation which is proscribed and punishable by law. The conduct could be punishable by imprisonment, probation, fine, revocation of licence, community service order or other court-imposed penalties.

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[1]Sutherland, E.M., (1949), 'White-Collar Crime'. New York: Holt, Rinehart & Winston.

[2]Leigh, L.H., (1982), 'The Control of Commercial Fraud'. London: Heinemann Educational Books Ltd, p. 7.

[3]For example, Simon, D.R. and Eitzen, S.D., (1982) 'Elite Deviance'. Boston: Allyn and Bacon. Ermann, D.M. and Leindman, R.J., (eds.), (1978), 'Corporate and Governmental Deviance'. Oxford: Oxford University Press. Douglas, J.D., and Johnson, J.M., (eds.), (1977), 'Official Deviance'. Philadelphia: Leppincott.

[4]Coleman, J.W., (1987), 'Toward an Integrated Theory of White-Collar Crime'. Australian Journal of Sociology, Vol. 93(2), pp. 406-439.

[5]Sutton, A.J., (1983), 'Company Crime in NSW - A Sociological Perspective'. Thesis, Doctor of Philosophy, University of NSW.

[6]Braithwaite, J., (1984), 'Corporate Crime in the Pharmaceutical Industry'. London: Routledge & Kegan Paul.

Even law-based definitions, however, pose problems for some authors. Freiberg[7] suggests that there is legal and moral ambiguity in corporate crime, since what is acceptable and unacceptable changes. Shifts in legislation, inconsistencies in court decisions, and the continual rise of new and complex business forms make definition problematic.

The ambit of the current study

Within the general concept of 'corporate crime', this study is concerned with company or organisational fraud and responsibilities of directors and principals. Problems of criminal responsibility are raised by the corporate form, and this study provides a brief legal background to responsibility for company actions. The process of 'lifting the corporate veil' is summarised as an important concept in the corporate crime literature. Of additional legal significance, the developing area of directors' responsibilities is also considered in part. After this legal introduction, enforcement strategy in Australia against corporate crime is outlined, and a qualitative examination of organisational fraud cases prosecuted by the NSW Corporate Affairs Commission is presented. Using two 'major' cases initiated by the Corporate Affairs Commission in 1988, the problems for individuals (victims and defendants) and the court process are documented.

One of the cases studied concerns a director of two proprietary companies, and the discussion of the legal position of directors is particularly relevant. The other major case, however, concerns an unincorporated association and the Presidents and Vice-Presidents of that association. In this example, the discussion of the responsibilities of directors is not applicable because the same legal entity (a company) is not in existence. For practical purposes, however, the offences alleged against all defendants are very similar and it has been considered appropriate to discuss both cases as examples of company/organisational fraud as dealt with by the Corporate Affairs Commission. Individuals have been prosecuted, not companies, for the alleged defrauding of investors.

Definitions of some terms

The following are brief notes on the meaning of some of the central concepts used in the current study.

Company

Under the *Companies Code (NSW)*, a company may be a private (proprietary) company or a public company.

Private (proprietary) company

A private company is defined under section 34(1), and has important limitations compared with a public company. These include: restrictions on share transferral, a maximum of 50 members, prohibitions against subscriptions by the public for shares and debentures, and prohibition of invitations to the public to deposit monies with the company.

Public company

By section 5(1), a 'public company' is a company other than a proprietary company. Under section 33(1), when companies are formed, two or more persons are required as members for a proprietary company, and five or more persons for a public company.

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[7]Freiberg, A., (1987), 'Abuse of the Corporate Form: Reflections from the Bottom of the Harbour', University of NSW Law Journal, Vol.10(2), p. 67.

As one might expect, most of the offences detailed under the *Companies Code* relate to public and private companies, and individuals acting for or in the name of those companies. An organisation or association which does not register with the Corporate Affairs Commission (CAC) as a company is not the same legal entity, is unincorporated and not affected by much of the *Companies Code*.[8] In practice, however, there may be little to distinguish the conduct of an association from a company. An association should still register with the CAC (as an association), it might still be brought to the attention of the CAC for alleged misconduct, be investigated in a similar way, and prosecuted using similar Commonwealth offences.

Fraud

Whilst the courts have not laid down a clear definition of 'fraud', Buckley J. posed a general formula in *Re London and Globe Finance Corp. Ltd* (1903, 1 Ch. 728, p. 737):

> To defraud is to deprive by deceit, it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind, to defraud is by deceit to induce a course of action.

Crucially, therefore, a person must act on the misrepresentation made.

'Deceit' is relatively straightforward to prove, where there has been an affirmative misrepresentation of fact. The law, however, distinguishes between deliberate fraud at this level, a negligent misrepresentation, and, failure to disclose a material fact or circumstance. The last category ('omission') is only treated as fraudulent where there is a legal duty to disclose.

Given what we understand by 'company', therefore, and the technical definition of 'fraud', how can a company be involved in fraud? Leigh[9] suggests:

> A company may be the victim of fraud or it may be a vehicle by which frauds are committed or it may be both at the same time. It may have been created for a fraudulent purpose or adapted to that end. It may, on the other hand, have been created in order to carry on a legitimate business but have suffered the degradations of an unscrupulous management which treated it as its fief, disregarding the interests of shareholders, creditors or employees.

In practice, separating these different possibilities can be difficult owing to problems of evidence. For example, it requires clear knowledge of a company's dealings to prove it was 'created' for a fraudulent purpose, rather than 'adapted' to that end at a later stage.

Leigh, nonetheless, identifies three reasons why companies may be a suitable vehicle for fraud. Firstly, a company is a very common form of business organisation, and provided a private company is chosen, it is not difficult to form and thus create a semblance of respectability. Secondly, a company has 'perpetual succession'. This means that although the shareholders may change, and the directors can be replaced, the company continues operating under the same name. It is possible, therefore, to deceive the public and suppliers that they are dealing with familiar people. Thirdly, shareholding in large and even medium-sized companies is diffused and often divorced from control, so that the power of management rests unchecked with the board of directors.

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[8]Section 169, the 'offering to the public of a prescribed interest', provides a notable exception.

[9]Ibid (ii), p. 15.

Superficially, therefore, company structure suggests a perfect means for fraud, whereupon individuals are protected under the guise of an organisation. In a legal process, however, often described as 'lifting the corporate veil', individuals can be found liable for conduct in the name of the company.

'Lifting the corporate veil'

Corporations are for most legal purposes regarded as persons, in that they can enter contracts for example, but the concept is a legal fiction. At a practical level, corporations act through human agents, and through those agents the company has knowledge and intention attributed to it. In a process known as 'lifting the corporate veil', therefore, it is possible that a company can have the requisite state of mind to be found guilty of a criminal offence.

Not all employees of a company, however, are capable of having their intentions attributed to the company. Lord Denning has likened a company to the human body, distinguishing between its 'hands', the agents who do not represent the mind and will of the company, and the directors and managers, the company's 'brain and nerve centre'. The state of mind of directors can be viewed as the state of mind of the company, and is treated by the law as such.[10] Lord Parker similarly states:

> There is no doubt that there are many cases where somebody who is in the position of the brains - maybe a director, the managing director, the secretary or a responsible officer of the company - has knowledge, his knowledge has been held to be the knowledge of the company..... that is a long way away from saying that a company is fixed with the knowledge of any servant.[11]

Some Acts of Parliament, such as certain sections under the *Factories, Shops and Industries Act 1962*, prohibit specific conduct in absolute terms, requiring no guilty intent. The commission of an act in breach of the prohibition is a crime and the commission of such an act by an agent in the company's business renders the principal (the company) guilty of an offence. Such absolute offences are uncommon, however, and most crimes require a guilty intention, known as *mens rea*. It is possible if the status of the person acting for the company is sufficiently high, and he or she has the relevant intention, to attribute the requisite *mens rea* to a company and find it guilty of a crime. In *R v. I.C.R. Haulage Limited*[12], for example, a company, its managing director and eight others were charged with conspiracy to defraud. They had agreed to bill another company for more goods than had actually been delivered. The Court ruled that there was no bar to a conviction of the company because the fraud of the managing director was the fraud of the company.

The role of directors

Given the greater legal significance of managers and directors over other employees, it is important to understand something about their eligibility and functions. Management and legal theorists offer many definitions of directors' roles. Feuer suggests:

> The management responsibilities of directors are those of control, policy determination and supervision. They elect officers, fix their salaries and prescribe their duties not otherwise prescribed in by-laws. They

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[10]Denning L.J., *H. L. Bolton (Engineering) Co. Ltd v. T. J. Graham and Sons Limited*, (1956), 1 All E.R. 799.

[11]Parker, J., *John Henshall (Quarries) Limited v. Harvey*, (1965) 1 ALLER. 725.

[12](1944) 1 All E.R. 691.

> determine the area of corporate business, questions of expansion and the development of new products, the nature and extent of corporate borrowings and the payment of dividends. They keep informed, through budgets, reports, financial and other, and through inspection of the company's progress. Basically, the company's objective is to make money, and it is the responsibility of the directors to guide the company's affairs in such manner as to attempt to achieve that objective.[13]

To perform these or similar functions, under the *Companies Code* a director needs no specific qualifications. By section 5(1) of the *Companies Code* a director includes any person occupying the position of director of a corporation by whatever name called, and includes a person in accordance with whose instructions or directions the directors of a corporation are accustomed to act. The purpose of this definition is to ensure that all the people who really are the 'brain and nerve centre' of the company are included within the section. Other than this, however, the *Companies Code* makes no attempt to define a director. There are some disqualifications - for example, by section 236(7) of the *Companies Code*, the secretary of a company cannot be its sole director, and under section 227(2), after conviction for certain offences including fraud or dishonesty a director cannot resume office for five years. The penalty for acting contrary to section 227(2) is $5,000 or imprisonment for one year, or both.

Directors' responsibilities

Although directors are recruited from a diverse range of people, once appointed they must observe certain standards of care. Directors owe duties of good faith, loyalty, skill and diligence. The duties of good faith and loyalty arise out of the fiduciary (i.e. based on trust) relationship between the director and the company, and are similar to those imposed on trustees. Traditional reluctance on the part of judges to interfere with matters of business judgment, however, has meant that the extent of a director's duties as regards skill and diligence are not readily defined. In the company fraud case *Re City Equitable Fire Insurance Co. Limited*[14], Romer J. reduced the law in this area to three propositions. These were:

> A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience..... A director is not bound to give continuous attention to the affairs of his company. His duties are of an intermittent nature to be performed at periodical board meetings and at meetings of any committee of the board upon which he happens to be placed. He is not, however, bound to attend all such meetings though he ought to attend whenever in the circumstances he is reasonably able to do so..... In respect of all duties that, having regard to the exigencies of business and the Articles of Association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly.

Since this decision, rising standards of commercial education have, arguably, increased the level of skill required by directors. Against the background of Romer J.'s judgment, section 229(1) of the *Companies Code* was introduced:

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[13]Feuer, M., (1974), 'Personal Liabilities of Corporate Officers and Directors', Englewood Cliffs: Prentice Hall, p. 11.

[14](1925) Ch. 407, pp. 428 et-seq.

> An officer of a corporation shall at all times act honestly in the exercise of his powers and the discharge of the duties of his office.
>
> Penalty:-
>
> (a) in a case to which paragraph (b) does not apply - $5,000; or
>
> (b) where the offence was committed with intent to deceive or defraud the company, members or creditors of the company or creditors of any other person or for any other fraudulent purpose - $20,000 or imprisonment for five years, or both.

The section is wider in scope than its predecessor.[15] Section 229(1)(b) requires directors to have regard to the interests of creditors as well as other persons in the performance of their duties, and section 229(1)(a) contemplates some kind of dishonesty other than that 'with intent to deceive or defraud etc'. Precisely what sort of dishonest conduct is involved, however, is difficult to isolate. Of useful indication to the process of interpretation is the following passage from *Nicholson v. Permakraft (N.Z.) Limited* (in Liq)[16]:

> In weighing the evidence as to the honesty of the actions taken it is important to bear in mind that the honesty of the action must be tested as at the time the action was taken and not with hindsight. The question of justification commercially must be judged in light of the known facts at the time. All the circumstances must be examined...

As long as a director acts honestly, he or she cannot be made responsible in damages unless guilty of gross or culpable negligence. The question of 'negligence' (see section 229(2)) is a developing one, since the notorious case of *Hedley Byrne v. Heller*.[17] This negligence action resulted in a number of statements being made by the court that have a considerable influence on duties generally. Lord Morris of Borth-y-Gest suggested (p. 503):

> ...if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry; a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.

The statements indicate potential liability for directors who advise shareholders, particularly in relation to company prospectuses. Arguably, liability is not limited to a fraudulent misrepresentation, but negligent misstatements invoke legal responsibility as well. If a director knows others will be relying on a document he or she is involved in preparing, he or she is under a duty to exercise reasonable care in its preparation.

The Companies legislation details other duties of directors, such as the requirement not to do anything which is beyond the powers of the company, as defined in the objects of the company. It is not necessary, however, to outline all the provisions here, since we are chiefly concerned with dishonesty and director fraud. Of added relevance to section 229(1) of the *Companies Code*, for our purposes, is the fact that directors can be prosecuted for dishonest conduct under the *Crimes Act, 1900*, with the more severe maximum penalties of a fine of $10,000 and/or imprisonment not in excess of 10 years. Relevant sections of the Act include sections 173 - 179, and they prohibit: section 173, fraudulent appropriation of property; section

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[15]Section 124(1) of the Uniform Companies Act, 1961.

[16](1985) 3 A.C.L.C., p. 453.

[17]*Hedley Byrne v. Heller*, [1964] A.C., 465.

174, directors omitting certain entries in the company's books; section 175, director wilfully destroying the books of the company; section 176, director or officer publishing fraudulent statements; section 176A, directors cheating or defrauding; section 178BA, obtaining money by deception; and section 179, obtaining property by false pretences. At common law it is also possible for two or more persons to be guilty of a conspiracy to cheat and defraud.

In addition certain employees of a company are capable of having their intentions attributed to the company, and can invoke criminal sanction for both the company and themselves.[18] Alternatively, as with the examples contained in this report, individuals committing offences in positions of trust in an organisation may be prosecuted in their own name. This may be jointly at common law for the offence of conspiracy or, since the introduction of section 176A of the *Crimes Act*, on an individual basis for alleged cheating and defrauding. Consequently, directors have to be particularly careful to act 'honestly' in the performance of their duties. Directors' duties and responsibilities are developing areas of law, and the standards of care and diligence expected are increasing since *Re City Equitable Fire Insurance Co. Limited*. In civil actions, since *Hedley Byrne v. Heller* directors may be liable for negligent advice given. In criminal prosecutions, the more rigourous test remains: that of deliberately deceiving persons dealing with the company. Only when *mens rea* is proved beyond reasonable doubt, can a director be found guilty of fraudulent behaviour.

The significance of organisational fraud

Traditionally, perhaps because they have more observable impact, law enforcement agencies and the public have largely considered 'crimes' in terms of acts of violence, threats of violence and overt thefts. Such offences are readily definable, they are relatively simple to investigate, the victims know they have suffered harm and the offenders are often perceived to be a risk to the community at large. These considerations are not paralleled for company or organisational fraud. Investigation is frequently complex, offences are difficult to categorise, the victim has parted with his property 'voluntarily', there are often alternative civil remedies available, and the offender is not perceived as 'dangerous'. The alleged offender will often also be involved in legitimate activity and will not regard himself as a 'criminal'. The following statement of a defendant in a British corruption case typifies this:

> I will never believe I have done anything criminally wrong. I did what is business. If I bent the rules, who doesn't? If you are going to punish me, sweep away the system. If I am guilty, there are many others who should be by my side in the dock.[19]

The defendant's belief that 'many others' are equally guilty of unethical conduct is echoed by contemporary American research. A 1975 survey of top officials in America's 57 largest corporations found, for example, that they believed unethical behaviour to be widespread in industry and that it had to be accepted as part of business activity.[20]

A further reason for the neglect of this type of crime is that victims are often perceived as 'gullible' or 'greedy'. This generalisation is difficult to justify when one considers a possible range of fraud victims. A retired person, on a limited income, investing money for financial security, is difficult to group with the experienced investor, having some commercial expertise. In both cases the terms 'gullible' and 'greedy' are, nevertheless, relative since fraud artists may be specialists in the business of deceit, and successfully exploit the trusts and needs

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[18]See *Tesco Supermarkets v. Natrass* (1972) A.C., 153.

[19]Chibnall, S. and Saunders, P., (1972), 'Worlds Apart: Notes on the Social Reality of Corruption'. British Journal of Sociology, Vol. 28, p. 142.

[20]Silk, H. L. and Vogel, D., (1976), 'Ethics and Profits: The Crisis of Confidence in American Business'. New York: Simon and Schusher.

of others. More importantly, victims in other areas of the criminal justice system might be considered naive or gullible, but this is not advanced as a reason for ignoring law enforcement responsibilities.

Company fraud has been neglected by many researchers on the left, as well as on the right of the political spectrum. For the left this may reflect the belief that 'poor man's law' is more relevant and important than 'rich man's'.[21] Authors on the right, meanwhile, have concerned themselves with public order issues such as street crime and industrial picketing, and do not include corporate crime as part of the real 'crime problem'. The result of such neglect is that popular myths remain unchallenged. For example 'white-collar criminals' are considered cunning and wealthy, or victims are perceived as 'greedy and blameworthy'.

Research based on the two cases which follow attempts to increase understanding in relation to corporate offences. At an individual level, the competing versions of the accused and investors and the consequential loss to both, are outlined. At a procedural level, problems for the prosecution and court process are raised.

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[21]Cain, M., (1975), 'Rich Man's or Poor Man's Law', British Journal of Law and Society, Vol. 2, pp. 61-6.

Chapter 2

BACKGROUND TO THE RESEARCH

CORPORATE ENFORCEMENT IN AUSTRALIA

The Formal Agreement, 1978

By an agreement made on 22 December 1978, known as the *Formal Agreement,* the Commonwealth and each of the six States established a Co-operative Companies and Securities Scheme, to promote commercial certainty, reduce business costs, achieve greater efficiency in the capital market and maintain investors' confidence in the securities market through suitable measures for their protection. A further objective of the scheme was to establish uniformity of legislation relating to companies and the regulation of the securities industry, throughout Australia. The Northern Territory, the only previously non-participating jurisdiction, was admitted as a party to the *Formal Agreement* on 1 July 1986.

The administration of the Scheme is provided by the Ministerial Council for Companies and Securities, the National Companies and Securities Commission (NCSC), and the Corporate Affairs Commissions/Offices in each State/Territory. Each party to the *Formal Agreement* is represented at the Ministerial Council, and this has overall responsibility for operation of the legislation and administration of the Scheme. The NCSC's function is, broadly speaking, to apply the companies and securities industry legislation enacted by the Commonwealth for the Australian Capital Territory, and the State and Territory legislation applying the provision of the Commonwealth legislation and regulations. To assist in uniformity, the NCSC has formed a number of advisory committees, responsible for reviewing procedures, improvements and legislative changes.

Whilst the Scheme legislation imposes upon the NCSC responsibility for the entire area of policy and administration of Scheme legislation, the *Formal Agreement* states that, to the maximum extent practicable, the functions of the NCSC will be delegated to the State and Territory authorities. To this effect, therefore, the NSW Corporate Affairs Commission, for example, is responsible for the administering of the *Companies (NSW) Code;* the *Companies (Acquisition of Shares NSW) Code;* the *Securities Industry (NSW) Code;* the *Futures Industry (NSW) Code;* the *Companies and Securities (Interpretation and Miscellaneous Provisions) Code;* the *National Companies and Securities Commission (State Provisions) Act* and the *Corporate Affairs Commission Act.* Independent of the Scheme legislation, the Commission is also responsible for the application of the *Business Names Act, 1962,* the *Associations Incorporation Act, 1984,* and part of the *Trustee Companies Act.*

The operation of the NSW Corporate Affairs Commission

The objectives of the NSW Corporate Affairs Commission (CAC) are defined in their corporate plan, 1987/88 as:

> To promote and facilitate a fair, informed and efficient financial, business and corporate environment. This will be achieved by implementing and developing the objectives of the Co-operative Scheme for the regulation of Companies and Securities, and for relevant policies and legislation of the New South Wales Government.

Further aims of the CAC include the deterrence of corporate crime; monitoring of developments in technology, and integration of appropriate advances into the Commission's strategic planning; regular reviews of legislation and administrative procedures to ensure efficiency; and promotion of a public awareness of obligations under the legislation.

To implement such a broad range of functions, the CAC is subdivided into five programs. These are: Information Program; Enforcement Program; Management Program; Policy Program and the recently created Ministerial and Consumer Services Branch. The Information

Program, *inter alia*, maintains public registers on companies, and provides company searching services to the public. Enforcement division is responsible for the conduct of criminal and civil proceedings, and the provision of legal advice. Management section reviews management practices and procedures and organises staff training and development. The Policy Program is designed to provide legislative and policy advice, and the Ministerial and Consumer Services Branch gives information to the media and CAC clients about the Commission's activities and services.

Since this report is concerned with company fraud, an outline of the operation of the CAC will concentrate on enforcement division who are, as previously stated, responsible for criminal prosecution. Targets for their investigation include: futures traders operating in breach of the *Futures Industry Code;* failed companies which have not kept proper books and records; officers of companies failing to act honestly in the discharge of their duties; undischarged bankrupts or convicted persons acting as directors or managing companies; the offering of prescribed interests to the public without a registered prospectus; officers of companies who have been involved in two or more failed companies; persons who may have been involved in insider trading or market rigging; and finally, officers of companies who have been involved in the commission of offences under the *Crimes Act*.

Reports and allegations of offences are categorised by the CAC according to the source of the matter and the statute being administered. For some years in the NSW CAC the categories have been designated as: Failed Companies, those investigations arising from liquidators pursuant to section 418 of the *Companies (NSW) Code;* Market Surveillance, those investigations arising from reports from the Sydney Stock Exchange, complaints or directions from the Commission relating to the affairs of public companies; or Complaints, those investigations arising from general complaints from the public etc. concerning the affairs or management of companies.

In the review, assessment and allocation of cases held for investigation, certain guidelines exist for the different categorisations, to determine priority. For insolvent, failed companies these are: whether any complaints have been received from the public, particularly through a member of Parliament; whether any directors or officers have previously come under notice to the Commission or the police; the public interest in the company; recommendations by the liquidator; the offences indicated and the seriousness thereof; the amount of the deficiency; the age of the matter; the relationship with associated companies and whether the whereabouts of the possible offender or offenders is known.

Securities Industry matters will be reviewed and preferred according to the above and in addition: the amount of funds involved; the extent of media coverage; the number of director complaints; the size of shareholding and the public spread of shareholding; and, whether the company is listed or unlisted.

For 'general complaints' a similar list of criteria apply. They are: the source of the matter; the number of complaints; the offences indicated and the seriousness thereof; the amount of money involved; the public interest in the company; whether any company officer is adversely known to the Commission or the police; the age of the matter; the relationship with associated companies; media coverage; and, if the whereabouts of the possible offender or offenders is known.

The powers of inspection of the CAC are listed under the National Companies legislation and an investigation can, in fact, be one of many types. It may be an ordinary investigation under Division 1 of Part II of the *Companies Code;* an examination carried out by a prescribed person (normally a liquidator) under section 541 of the *Companies Code;* an ordinary investigation carried out under Division 1 of Part II of the *Securities Industry Code;* a special investigation carried out under Division 2 of Part II of the *Securities Industry Code;* or, finally, a hearing held by the NCSC.

The *Companies Code* sections 12-16 details the investigative powers for 'ordinary investigations'. Division VII of the *Companies Code*, by contrast, empowers the Ministerial Council, a Minister (if it appears in the 'public interest' of the State or Territory) or the Commonwealth Minister (if it appears in 'the national interest') to direct the NCSC to arrange for an investigation into the affairs, or particular affairs, of a corporation. A direction to the NCSC will specify the matters to be investigated and may require the investigation to be undertaken by the Commission or a person identified in the prescribed direction. Provisions similar to these, for special investigations, are also contained in the *Securities Industry Code* and the *Futures Industry Code*. The major difference from general investigations is that the inspector appointed has the power to compel the attendance of witnesses and the production of documents and the report must be made to the 'relevant authority'.

The 'relevant authority' is either the Ministerial Council or the Minister. Since a 'special' investigation requires a report to be drafted and then a further preparation of the evidence for the hearing, it has become an unpopular mode of inquiry for the CAC. Instead, the CAC implements section 7 of the *NCSC State Provisions Act*, whereby the Commission may hold hearings 'for the purpose of a power conferred or expressed to be conferred on it by or under an Act'. Section 8 gives the Commission the power to summon witnesses and take evidence, and section 10 imposes a penalty of $1,000 or 3 months imprisonment for the failure of witnesses to attend and answer questions. A report is not required, but an inspector must form an 'opinion' as to whether there is a case to answer.

At first glance, therefore, powers of investigation into companies are enormous, and should not prohibit detection and the gathering of evidence. In his analysis of 'how the law is set in motion', however, Donald Black[1] identifies two possibilities. In the reactive mobilisation process, a citizen may set the legal process in motion by bringing a complaint; in the proactive mobilisation process, the State may initiate a complaint upon its own authority, with no participation of a citizen complainant. An obvious criticism of the reactive model is that the responsibility for detection of violations rests with the public, thereby denying the control process whatever violations citizens are unwilling or unable to report. Most CAC investigations are limited in this sense, as they depend upon citizen report. They are initiated after a case has been brought to the CAC's attention by, for example, a company liquidator, a member of the public, or the press. Proactive enforcement, however, is a complicated question of resources, priorities, and, more crucially in the corporate sphere, of 'sufficient evidence'. Investigators argue that suspicions of defrauding are often difficult to prove 'beyond reasonable doubt', before a victim suffers known loss or the malpractice is brought to a complainant's attention in an identifiable form.

Methodology

Data base

From this outline of Australian enforcement strategy, it is clear that the CACs are very much involved in the detection, investigation and prosecution of breaches of the *Companies Code* and *Crimes Act*. To examine further the types of cases investigated by the NSW CAC, permission to access their files was granted for a twelve month period. Files were made available on request, and the research was conducted in the Enforcement Division. These files were used as the basis of the following comments on corporate crime, and for the selection of the case studies to be reported here.

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[1]Black, D.J., (1975), 'The Mobilization of Law', Journal of Legal Studies, Vol. 2, pp. 125-149.

Case study approach

In 'Corporate Crime in the Pharmaceutical Industry'[2] Braithwaite identifies four stages in social science after a problem has been recognised by scholars:

> At first scholarship is limited to armchair conceptualising of and theorising about the phenomenon. Then empirical work beings: first with qualitative case studies; then with statistical studies (which themselves see refinement through descriptive to correlational to causal analyses); and finally, vigorous experimental studies are attempted in which key variables are strictly controlled.

With the exception of Sutton's[3] study, empirical work on cases dealt with by the CAC is distinctly lacking. Detailed statistical studies are hampered by the small number of cases available. For example, among 'fraud' prosecutions instigated by the CAC, major cases involving director/principal dishonesty in NSW total between three and six per year. Many years of data would have to be collected before a statistical study would be practicable and such data are not yet available. Thus, research on corporate crime has only reached the second of Braithwaite's stages, and is not yet up to statistical studies.

In recommending in-depth research, Sutton[4] comments that work on 'white-collar crime':

> ...still seems more often to be guided by a desire to expose and condemn than by the need for objective assessment. This is understandable, when one considers the ways dominant ideologies and power structures have enabled white-collar sectors to conceal both the extent of their offending and the massive harm inflicted. Nonetheless, we argue that concentrating on denouncing the wealthy and powerful may also have led researchers to gloss over important dimensions of white-collar criminality. We refer in particular to offences by small business, which tend either to be ignored or to be presented in terms of crude stereotypes.

Sutton's study of investigations into alleged violations of companies in NSW in fact demonstrated that a considerable amount of CAC time was devoted to pursuing smaller and medium-sized firms, which have arguably been neglected in the corporate crime literature. In an area of crime often characterised as 'uninteresting', it is perhaps not surprising that studies have concentrated on major frauds and the more sensational cases. This study examines 'ordinary' investigations the CAC has conducted into organisational fraud, and which were prosecuted during the research period (January - September 1988). Since little has been done of an empirical nature in this area and there are very few cases prosecuted, an exploratory case-study approach has been adopted. Only with a deeper understanding of corporate criminal activity will there be the basis for a more rigourous methodological approach.

Case selection criteria

In selecting cases for examination, an obvious constraint was that they should be processed through the courts during the allocated research period. Furthermore, as one aim of the study was to gain an appreciation of the criminal activity from all those concerned, views of the CAC investigators, the legal personnel, and the alleged offenders and victims, were required. The

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[2](1984), London: Routledge & Kegan Paul, p. 7.

[3]Sutton, A.J., (1978), 'Company Investigations 1975-1977'. Sydney: NSW Bureau of Crime Statistics and Research.

[4](1985), 'Small Business: White-Collar Villains or Victims?', International Journal of the Sociology of Law, Vol. 13, p. 247.

only way of securing data at the outset from the 'offender' and 'victim' groups was to select cases where successful prosecution, at least in part, seemed likely. For some people, this might be viewed as seriously affecting the 'typicality' of the data, since many cases are not prosecuted by the CAC, or when they are, do not result in a 'successful' outcome. The study was designed, however, to look at legal difficulties in alleged business fraud, the loss and hardship it may or may not cause, the offender's perspective and consequential media report. It is concerned with the principal legislation the CAC deals with, and examples of where and how that legislation has been breached. To that extent, our potential sample was typical of corporate crime anticipated by the legislature, whether or not it numerically represented cases processed by the CAC.

Originally, an examination of three to five cases had been thought possible. The number of major briefs to be prosecuted throughout the research period, however, was only three. Since the length of each brief was considerable and the fixed court date not less than eight weeks, a sample of two was considered more feasible. The study also covered the trial process in part, as access to the CAC only secured the prosecution perspective. As well as indicating defence arguments and procedural difficulties, it was hoped that attendance at the trials would familiarise the researcher with witnesses and the accused, facilitating collection of data at a later stage.

The two cases finally selected were: *R v. Cameron* and *R v. Maxwell, Smithson and Goman.* Both prosecution briefs were supported by substantial evidence, the cases involved a number of investors and had alleged offenders with contesting views and pleas of 'not guilty'. The court hearings were scheduled for 1 February 1988, and 7 May 1988 respectively.

Chapter 3 of this report deals with the *R v. Cameron* case, and Chapter 4, *R v. Maxwell, Smithson and Goman.* For both cases background information is provided, the counts of the indictment are considered and the arguments of prosecution and defence are outlined. After the verdict and sentencing is reported, 'victim impact' statements are drawn together, and interviews with the alleged offenders described. Finally, media report on both cases is included.

18.

Chapter 3

R

v.

CAMERON

R v. D. G. CAMERON

By section 176A of the *Crimes Act 1900*, as inserted by *Act No. 95* of 1979:

> Whosoever, being a director, officer or member of any body corporate or public company, cheats or defrauds, or does or omits to do any act with intent to cheat or defraud, the body corporate or company or any person in his dealings with the body corporate or company shall be liable to imprisonment for ten years.

In March 1985, Donald Cameron in his capacity as director of two companies was charged on nine counts of fraud under this section. The case was first investigated after the liquidation of the companies in June 1982. Mr. Cameron was eventually sentenced on 25 March 1988. The following account details some background to the Cameron group of companies, the matters which had to be investigated and the proofs required.

An outline of the Cameron group activities

The Donald G. Cameron group of companies comprised:

First Mortgage Investments Pty Limited (FMI)
Mercantile Mortgages Pty Limited (MM)
Donald G. Cameron Pty Limited (DGC)
Sabang Pty Limited
Trazmall Pty Limited

The principal characters in the Cameron group of companies were Donald Cameron and Walter Grimm. Mr. Cameron engaged in mortgage broking through a registered business name 'Donald G. Cameron and Associates', which had operated as one of Australia's major broking houses since 1949. The business offered a number of financial services including corporate finance, commercial and industrial mortgages ($20,000 - $10,000,000), domestic finance, residential property mortgages ($20,000 - $500,000), finance for real estate development, lease finance and commercial bill finance.

From 1978 to 1979 Mr. Cameron entered the field of property developments through FMI and MM. Originally, MM's development scheme was to be backed with a pool of home sites owned by FMI, from which prospective investors could select a site for development. The construction of the domestic dwellings involved the use of a recognised builder, and at a later date the builders became another Cameron company, Trazmall Pty Limited. Future projects envisaged building town houses, units, motels and shopping centres, but these investments never eventuated.

The responsibility for selecting the sites and arranging purchasing, plans, buildings and approvals seemed to rest with Walter Grimm. Donald Cameron largely saw to the financing and to the canvassing of investors and the arrangements to purchase the sites in the first instance. In selecting sites, Mr. Grimm focused on country areas which he thought would experience increasing demands for housing. After inspection of the sites and a decision to purchase was made, a 5 per cent deposit was paid by FMI (as against the normal 10 per cent of purchase price), preliminary enquiries were undertaken regarding council requirements, the project costed, plans prepared and then submitted to council. Some properties were also purchased by another Cameron company not mentioned thus far, Sabang Pty Limited.

In many of the projects, particularly the later ones, development approvals were sought before the contract to purchase was settled. Prospective investors were canvassed from the time the deposit was paid by FMI and before FMI completed the settlement for the purchase of the

land. Theoretically, after having purchased the land FMI would then transfer the title to the investors.

The method adopted by Donald Cameron in achieving and allowing the transfer of title from FMI was a fairly complex one. An investor would place the required monies with MM, and MM would settle the purchase of the land from FMI to the investor at an inflated price. This would ensure a capital profit to FMI from the sale of the land. At the same time, MM would act as the manager of the project. The capital profit to FMI was in the order of 50 per cent.

After agreeing to participate in one of the development projects, the investor signed a management agreement and building contract. The management agreement, firstly, took two forms:

> 'Contract for Purchase and Immediate Resale' - this provided for an immediate sale of the property upon completion of the project; and
> 'Contract for Investments' - where the property remained in the hands of the investor.

As mentioned above, MM acted as the manager of the projects and received the investors' money. Several forms of management agreements existed over the period of Cameron's projects, but they all provided that where the investor's money was used to purchase a property, any balance remaining could be applied at the discretion of the manager. The building contract, meanwhile, was a standard Master Builders' Association building agreement to be entered into by the investor in his or her own right with the builder.

To finance the construction, Mr. Cameron often approached finance companies to arrange a loan. The loan was to be advanced in stages to a value of 80 per cent of the building and land as the construction progressed. The real property was presented as security, and since the title to this property belonged to the investor it was he or she who was required to take out the loan.

According to the investors, Mr. Cameron did not often explain this to them until well into discussions. Mr. Cameron regularly arranged loans through Finance Corporation of Australia Limited, Beneficial Finance Corporation Limited and Alliance Acceptance Limited. To obtain the progress payments, valuations were made and an estimate of the work to date was reported to the finance company, which forwarded the funds to pay for the work.

Financial problems - mid 1981 onwards

From June 1981, Trazmall Pty Limited, the building company of the group, was experiencing liquidity problems. The liquidity problem continued throughout the months of July, August and September 1981, and manifested itself by consistent dishonouring of cheques through its bankers.

During this time, Mr. Cameron was interested in having his group of companies acquired and to enable proper consideration of the intended companies' acquisition, accountants were engaged to report on the financial position of the group as at 31 August 1981. Despite the fact that the takeover offer lapsed, Mr. Cameron, on behalf of his group of companies, requested professional services, to review the financial position of the group and maintain its records. On 16 September 1981, accountants completed a report on the position of FMI and the report stated, *inter alia*:

> The operations of the Company and its associated concerns which, through the nature of their operations are inter-related, are currently suffering from a liquidity problem. The liquidity situation appears to have resulted from, firstly, the high level of properties which are

> currently being held, and secondly, from the problems associated with the previous builder engaged for the construction of the projects. The situation is further aggravated by the fact that Mercantile Mortgages does not receive its fee until completion and sale of each respective project.

The final recommendation of this report was against further land acquisitions until group liquidity problems had been overcome.

This advice went unheeded and the companies continued to operate and attempt purchases. There had been an unacceptable growth in overdraft levels for the months of July, August and September 1981, and a steady number of dishonoured cheques recorded. On 6 October 1981, the CBA Bank had come to the conclusion that the Cameron group was trading unsuccessfully, and the Bank Manager advised that no further transactions could pass through the company accounts other than deposits which would reduce existing liabilities.

From 1 September 1981, accounts for FMI, MM and DGC Pty Limited were opened and maintained at the State Bank. The overdraft facility had reached a level of $120,000 by January 1982, and the facility was maintained by virtue of the bank securing mortgages over FMI properties. The Bank Manager was monitoring all Cameron bank accounts through the months of January and February 1982, as he wanted to extinguish the overdraft.

In the period 1 September 1981 to 30 April 1982, fourteen investors deposited funds totalling $711,286.23 with MM. This same amount was traceable in the Cameron group's single cash book, which only commenced, to be partly maintained, from 1 September 1981. For the purposes of the indictment, counts were settled on the invested funds of nine of the fourteen. Although the counts will be considered in more detail later, the relevance at this stage is that Mr. Cameron allegedly obtained investor funds to be used for the general purposes of the companies. In other words, he used their monies to try and alleviate the companies' financial difficulties and pay debts due, rather than use the money on the terms agreed.

The financial situation, however, did not improve and the companies were forced into liquidation in June 1982. Under the *Companies Code*, the winding up of a company can be a voluntary process, and the payments of debts be made in conjunction with section 403. Alternatively, the court might appoint a liquidator, under section 404, following the complaints of any creditors to the company. In this case, aggrieved creditors petitioned the winding up of the two dominant companies in the Cameron group, Mercantile Mortgages Pty Limited and First Mortgage Investments Pty Limited. The liquidator was appointed on 3 June 1982, to investigate the affairs of the companies and to produce a report as to their financial situation.

Basis of the liquidator's report

In compiling reports, the liquidator obviously has access to the financial records of the company, and should be able to determine the financial position, cash flow and assets of the company. Under section 418 of the *Companies Code*, the liquidator should report to the Commission if it appears that, *inter alia*, management may have been guilty of a breach of trust.

In the case of MM and FMI, section 418 was relevant. The liquidator felt that monies received from investors had possibly been used contrary to agreed purposes, and the companies had not maintained proper books and records within the provisions of the *Companies Code*. As for the unsecured creditors, MM were only able to pay .08 cents in the dollar. FMI were able to provide their unsecured creditors with nothing. To date, DGC Pty Limited has paid no dividends, but when it does these also will be negligible amounts. From all of the companies, those to whom money was owed received less than 1 cent in the dollar dividend.

Source of the complaint to CAC

Within the CAC the matter was first allocated for investigation in October 1982. This was done on the basis of the liquidator's section 418 report, that the company was 'very insolvent' and could not possibly pay all outstanding debts. Accounting procedures had been ignored by MM and FMI, which made an understanding of the companies' financial position more difficult than it should have been. For example, the principle of double entry book-keeping had been neglected, there were no individual records and statements of the different Cameron group companies, no separate registers maintained and, crucially, no separate trust accounts/bank accounts for the investors' deposits. There were sufficient indications of fraud to justify investigations proceeding.

In addition to the liquidator's report, several aggrieved investors complained directly to the CAC, thus informing them of the case. At the trial, defence evidence for Mr. Cameron pointed out that he too had reported to the CAC, but the CAC suggest they were aware of the companies' difficulties by then and were awaiting the liquidator's report.

Details of the indictment

The death of Walter Grimm in 1984 resulted in the conspiracy count which had been laid against the two directors being dropped. Notwithstanding the overall confusion of allocation of responsibilities, the Crown felt able to produce evidence as to Donald Cameron's behaviour individually; behaviour amounting in the Crown's view, on nine counts, to defrauding investors contrary to section 176A of the *Crimes Act*.

The documentary evidence in the case referred to the affairs of DGC Pty Limited, FMI Pty Limited, MM Pty Limited, Sabang Pty Limited and Trazmall Pty Limited, despite the fact that the last two companies were only involved peripherally. At trial there were many 'technical' witnesses - solicitors, estate agents, bank managers, consultants, the liquidator, accountants, investigators etc., all giving evidence as to the general affairs of the companies. There were also witnesses who made complaints against the companies - in other words, the investors. The evidence of the nine investors on the counts of the indictment, allegedly defrauded in their dealings with the Cameron companies, will be summarised as well as the competing arguments of Mr. Cameron.

Investor A: A process worker whom the Crown described as having 'little or no commercial expertise', responded in mid-1980 to an advertisement in the Financial Review for DGC Associates (see Appendix 1). 'A' went to Mr. Cameron with $2,000 and said he was considering placing his money on a first mortgage. He was told by Mr. Cameron that whilst $2,000 was too small an amount to invest on his own, his money could be joined with other people's advancements and so secure a first mortgage in that way. Soon after, 'A' made a cheque payable to MM, received a white pass book detailing payment of the funds and monthly interest cheques at 12.5 per cent. In February 1981 'A' deposited two further cheques of $10,000 each, and continued receiving interest payments towards the end of that year. 'A' said he believed his money was secure by way of first mortgage.

Mr. Cameron recalled 'A' having a small amount to invest, and said he had undertaken to find an appropriate mortgage, but at the time of liquidation this had not been possible.

Investor B: In June 1981, 'B' was introduced by a friend to Mr. Cameron and Mr. Grimm, in relation to investment in a building scheme. 'B' had $50,000 to invest in real estate, and said that one of the directors told him: 'we own the land you will be buying from us'. 'B' an unemployed person, invested a total of $124,616.82 as he mortgaged his own home to create further capital. After liquidation of the companies 'B' was returned a cheque for $1,000.

For Mr. Cameron, the defence suggested that contracts for purchase had been exchanged, and FMI had an equity in the property they indicated owning.

Investor C: 'C', a secretary, was slightly different from the other investors in the case, in that she had known Mr. Cameron for over thirty years as a personal friend, and was a general investor rather than a property investor in the companies. She had placed money on deposit with the Cameron group since 1964, and in October 1987 invested a further $20,000. She gave evidence that Mr. Cameron assured her the money had been placed on first mortgage, and she was not aware her funds were being used for the general purposes of the company. After liquidation, she was returned $489.

Mr. Cameron suggested that the nature of 'C's investment meant it was impossible to place her money on a first mortgage, as she wanted ready access to her funds, to be able to withdraw her money regularly if required and to receive interest every month.

Investor D: 'D', a retired person, invested $50,000 with MM in November 1981, on the basis that title to investment property would pass to him at a later date. In the interim period, he said he believed his money was secured by way of first mortgage.

The defence queried how anyone could have this belief, especially someone such as 'D', who, in his employment had been in charge of a legal department.

Investor E: In July 1981 'E' (a teacher) saw an advertisement in the paper for the Cameron group of companies. He phoned Mr. Cameron about investing $100,000 and Mr. Cameron suggested an investment of $75,000 into land development. 'E' advanced this amount, and was sent the balance sheets of FMI plus a copy of statements and liabilities of Mr. Cameron and his wife. This information was pursuant to the 'personal guarantee' which Mr. Cameron offered all his investors. 'E' said he was pressured to advance funds 'to clinch the deal', and the speed of the transactions and payments left little time for independent consultations.

In Mr. Cameron's defence, it was suggested that if he was really desperate to obtain funds to pay pre-investment debts, why would he have advised 'E' to invest only $75,000 instead of $100,000?

Investor F: 'F' became aware of the Cameron group of companies in July 1981, because of a friendship with investor 'B'. 'F', a contract driver, became interested in a property development at Lithgow, and because of Mr. Cameron's impeccable business reputation invested $36,785 in December 1981. After liquidation, he was refunded $170.

The defence emphasised the problem of memory and recalling events and conversations that had happened in 1980/1981. Through no deliberate fault of witnesses, evidence could be unreliable.

Investor G: 'G', a retired engineer, on the recommendation of a friend, phoned and arranged to meet Mr. Cameron in December 1981. He discussed investment possibilities with Mr. Cameron and Mr. Grimm, in particular in relation to a site in Mittagong. 'G' invested $84,351.50. He received certificates of deposit signed by Mr. Cameron. The companies did not own the properties they suggested in Mittagong, and after liquidation 'G' received, as he remembers, between $720-$800.

Counsel for Mr. Cameron said that Mr. Cameron had not been the one to encourage 'G' to invest the large amount he did, rather that it was Mr. Grimm who encouraged the high investment.

Investor H: 'H' went to see Mr. Cameron on the recommendation of another investor. Prior to investing $124,000 in February 1981, 'H', a bread vendor, was assured by Mr. Cameron that title to property would pass to him immediately. After liquidation, 'H' received $1,000.

For Mr. Cameron, the defence pointed out that once again Mr. Grimm had encouraged the final investment sum. Furthermore, since 'H' was experienced in purchasing land, he should be aware that the solicitor checks the title of land in a land search, and Mr. Cameron was entitled to rely on the fact that his investors gain such independent legal advice.

Investor I: In December 1981, 'I', an airline pilot, was introduced by another investor to Mr. Cameron and Mr. Grimm, and was given details of several different investment projects. 'I' showed interest in a Mittagong project, and Mr. Cameron informed him he could buy a one-fifth share for $40,000. He would be a tenant-in-common of the properties acquired, and the vendor would be FMI. 'I' invested $45,000 and was overseas until 3 February 1982. He then learnt of the companies' difficulties, and was paid $330 on the winding up of the companies.

Mr. Cameron's defence suggested that all the investors had voluntarily taken risks on the property market, and were motivated by monetary gain. Their losses were attributable to the economy they were gambling in. By March 1982, Mr. Cameron had made applications to two banks for further loans for the companies. He expected that money would be forthcoming, but when it was not, the companies' financial situation was aggravated by a recession in the building trade. The recession deepened, and the defence drew on evidence from real estate specialists that the extent to which the market was to depress was a surprise. These were factors outside the Cameron group of companies' control, and Mr. Cameron had done all he could in backing the companies, by making personal guarantees and mortgaging his own home.

These were the counts, therefore, preferred against Donald Cameron. The Judge spent four days summing up a trial which had lasted from 1 February 1988 to 11 March 1988. He directed the jury, in the usual way for criminal cases, that they were the judges of fact, and, representing a cross-section of the community, they were expected to use their knowledge, experience and understanding of people, in judging another member of the community. The

essential elements of the offence of section 176A needed to be proved in relation to each investor. They were, firstly that Donald Cameron was an appropriate officer of the company to be prosecuted. This was at no stage disputed by the defence - Mr. Cameron was a director according to the documentary evidence, the witnesses and his own evidence. Secondly, it had to be shown that the accused defrauded the investor. In other words, he had to have behaved dishonestly and deliberately dishonestly. This was the real issue in contention, and in deciding the question of 'dishonesty', the Judge directed the jury that they should use current standards of 'ordinary, decent people'. As with all criminal matters, the jury had to be satisfied 'beyond reasonable doubt' of Mr. Cameron's guilt.

The verdict

The jury were unable to find the difficulties in the property market an explanation for the collapse of the companies, and returned a verdict of guilty on 11 March 1988, on eight of the nine counts. In relation to the first count, there was a 'not guilty' finding.

The case was adjourned to hear evidence for sentencing, until 18 March 1988.

Sentencing

After the verdict of guilty on eight counts was returned, Counsel for the defence suggested he would be appealing for a non-custodial sentence on behalf of Mr. Cameron. It was argued that the project development schemes had been successful for two and a half years and that the economic circumstances of late 1981, and the implications of the recession realised in 1982, were beyond Mr. Cameron's control. Mr. Cameron gained nothing personally, and had forfeited his own home by way of mortgage as a personal guarantee for the companies. Furthermore, in the Queensland case of Smee[1] the Court of Appeal had taken into account the prisoner's own impoverished circumstances when sentencing for the fraudulent obtaining of property.

Personal deterrence was not in issue for a man aged 74 years, and as for general deterrence, Counsel was unable to find a single similar precedent. Most cases under this offence involved fraudulent designs deliberately set up for gullible people. Defence preferred to use the English case of Liddle[2] where a man of 50, who had become managing director of a company 'through many years of endeavour and effort, conducted with absolute integrity', admitted to a large number of offences of obtaining by deception 132,000 pound sterling.

The Court was satisfied that the appellant had not personally profited from the frauds, his main motive was to maintain the company during difficulties, and justice was not 'stretched too far' by reducing the sentence of three years' imprisonment to two years, suspended.

For its part the Crown did not recommend a particular sentencing course, but introduced certain competing interests. It was put forward that Mr. Cameron was a director, not a mere functionary of the companies, but occupying a position of trust and dealing with funds placed in good faith. The *Companies Code* places fairly rigourous responsibilities on directors for a purpose, and in electing to become a director Mr. Cameron accepted certain duties. Whilst he had lost financial security, so had eight fair minded persons, and in some cases it was their life savings. There was much disadvantage and hardship caused for them by Mr. Cameron, and the court should view this sternly.

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[1] 19 ACR, 261

[2] 17/5/73, 6513/C/72

Prosecution recognised the subjective facts of the case, such as loss of reputation, and the need of the court in some circumstances to be 'merciful'. However, it was suggested, that there was no reason why sophisticated white-collar criminals should expect any immunity over and above traditional offenders, and general deterrence was important in this area. There had been delay, but then the investigation involved detailing the affairs of four or five companies, and tracing approximately thirty witnesses. Once the indictment had been laid, the matter progressed with as much efficiency as possible, but court delay was inevitable when corporate cases are viewed as 'low priority'.

Kinchington J. adjourned for one week to consider the arguments raised, and passed sentence upon Mr. Cameron on 25 March 1988. Balancing the competing views he said *inter alia*:

> Public policy requires a custodial sentence of such proportion not only to maintain public confidence of those engaged with here, mortgage brokers, but to continually remind them what they undertake in these jobs.

In each case, it was considered the appropriate tariff was a prison sentence of three and a half years. This, Kinchington J. suggested, reflected the deterrent value necessary for the community. The sentences were to be served concurrently, but in defining the non-parole period, respect to the subjective factors could be given. The appropriate period was chosen as seven months non-parole.

Victim impact

After the sentencing of Mr. Cameron, the eight defrauded persons were contacted for interviewing. They all gave their opinions, their experiences as victims and suggestions for alleviating future victims' difficulties. As this is an exploratory study, an unstructured interview approach was preferred, which provided the complainants with the opportunity of emphasising areas they felt important.[3] One victim preferred a more structured approach, but it was possible from the interviews which preceded it to ask a series of questions.

Initially, it had been intended to meet the victims. All of them, however, had recently been involved in giving statements and official interviews in connection with the case. Many had resented this process. What transpired, therefore, were informal telephone conversations, where a mutual working knowledge of the case was assumed. The investors were aware that the researcher had been in court intermittently throughout the proceedings and had access to the files and information at the CAC. Shared understanding precipitated conversation flow, and the interviews averaged approximately thirty minutes with each respondent.

All eight victims gave a description as to the extent of their financial loss. Even though they all lost considerable sums of money, for four in particular the results were extremely significant:

> It's had a terrific impact on my life. When my husband retired we planned on doing things and I wanted money to help my children and father...

> My wife and I were devastated. The Missus is at work, I'm at work, we were worried about losing our house, but for family support and having to beg and borrow, we'd never have kept above board.

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[3]See Denzin, N.K., (1970), 'The Research Act in Sociology - A Theoretical Introduction to Sociological Methods', London: Butterworths, Ch. 6.

> When Cameron failed to meet repayments on the mortgages, I borrowed money. When he failed to do that I had to sell the properties for the best available price in 1982 - during the real estate property slump. Six years down the track, to think how much money I've lost and capital interest.

The fourth victim in this group described the loss as 'obvious and substantial'. The other four victims described their losses as significant, but either because it was not all their savings invested or because they were young enough to 'get over it', they did not present the loss as emphatically as the above:

> I haven't suffered terribly badly - but enough. Half my retiring lump sum he got, the other half, I still have. It would be very different if he had all my money.
>
> I lost $100,000 - a significant portion of my ownings at that stage. It didn't cripple me. I've been through many business crises and I've learnt not to chew over them. If it goes wrong, you did your best and no-one gets 100 per cent.
>
> I'm still quite young and I have my health and a good job. It did change my lifestyle, put me under much pressure for a few years, but I'm young enough to recover from this.
>
> It didn't hurt me. I was a younger person, able to work my way out of it...

Not surprisingly, the more significant the monetary loss was for a victim, the more pronounced their emotional responses in other areas. Three victims emphasised a change in their personal outlook on life, as they became more cynical or unable to trust:

> When a friend of such long-standing does that to you it makes you wary of everything..... I feel I couldn't trust anyone.
>
> Until I met Cameron I was optimistic and believed in my fellow men. Now I'm very pessimistic. I have become very cynical and questioning of the whole system.

The third reflected on the realisation that 'people are dishonest'. Three victims experienced marital difficulties as a consequence of the fraud, two at the level of 'fights and arguing like we'd never had before' and one at the level of: 'after it had happened, I thought I'd be divorced. My wife couldn't believe it, she went off with the kids and I had a hell of a job with the reconciliation'.

Victim embarrassment, blame or guilt varied between the eight people. Two felt passionately deceived through no fault of their own, three felt reassured by the number and variety of people Mr. Cameron had allegedly defrauded, but three felt awkward with themselves for investing with the companies in the first place:

> It all seemed legitimate..... and yet a feeling I have had is a certain amount of guilt that I was silly enough to do it.
>
> I shouldn't have fallen for it..... but he was very smooth and had an excellent personality, making everything seem so easy. I had never invested anything before.
>
> I blame myself in that I'd deposited money with Cameron until the project could start on the basis that he should pay monthly interest. But

> he never paid promptly once. He was behaving exactly like an accountant in dire financial straits.

Three victims experienced disillusionment with the 'professions' and the legal system:

> I felt badly let down by my solicitor. I'm in the process of suing one of them for negligence.
>
> I inquired of solicitors and accountants and everything - he (Cameron) was well known. It amazes me how people can get to these positions and be able to rip people off.
>
> All the statements, their expense and for what?

In relation to the delay in the processing of the case, two made no comment, two were unbothered by it, three were slightly bothered and one was extremely concerned by it. One complainant did refer to the problem of memory in relation to the delay, and said that; 'no-one could give word to word accounts of conversations'.

All victims commented on the trial itself, and only two were unconcerned about giving evidence. One felt comfortable in court from jury experience, and 'just felt sorry for the jury'; the other found it 'not too much of a problem'. The other six were concerned, and made similar comments in relation to what they claimed to be the unsatisfying formal procedure:

> The legal technicalities can get the average person like me bombarded.
>
> I hated giving evidence. I didn't sleep for a week beforehand and it made my stomach churn.
>
> The legal profession live in a fanciful area. You should be able to say what you feel, in the first person or the third person - as you see it. They expected legal jargon and not everyday usage. And we all had in the backs of our minds that we had to be sure not to be libelling people or making a questionable statement.
>
> They try to make out you're the crook - You can't be expected to remember seven years ago. When entering these types of things you have no reason to commit it to memory, itemise it.
>
> I got a bit emotional giving evidence. I wasn't familiar with the rules... I thought that I could make a statement from the box, but in fact I had to answer 'yes' or 'no'. I found the questions couldn't always be answered 'yes' or 'no' - it wasn't that simple. I felt I'd be perjuring myself if I had meant 60 per cent 'yes' and 40 per cent 'no'.
>
> I've resented having to recall it, write out things and go to court - but being sensible about it, it's got to happen in the process of justice. Someone has to be a witness, but the opposite point of view is that it's a bother which you don't need.

All of the investors found the individuals from the CAC 'very helpful' in their dealings with them, but three made additional miscellaneous remarks. One victim had a feeling 'they had tunnel vision; and were concerned about a conviction to stick'. Another felt slightly resentful that he was expected to remember things from a long way back, 'when I really couldn't see anything happening to Cameron'. A third said that the CAC were 'very hard to get in touch with', and 'whilst the people individually seemed to be nice, there were long delays, and some documents they sought they had'.

Victim resentment for Mr. Cameron varied between the eight people. Three felt genuine resentment which had not altered over time. The close personal friend/victim felt badly cheated, and two others commented:

> I feel resentment - I'd hang him. He knew what he was doing and he usually picked on older people, their life savings when you can't pick yourself up again.
>
> I must admit I felt hatred for him. He deceived me completely. I totally trusted him. When the battle took place [the trial] I hated him.

Two other victims expressed initial resentment, which had lapsed over time with the philosophy 'you can't cry over spilt milk'. Three people had no personal resentment - one suggested Mr. Cameron 'looked a bit pathetic in court' and that 'he hasn't really had a great time of it either'. Another described himself as a 'fairly placid individual' with no real loathing of Mr. Cameron. The last said he had 'no personal vendetta; what use is that?'

Three victims were indifferent or satisfied with the sentencing outcome. Two wanted Mr. Cameron to have his reputation destroyed, and felt that the sentence achieved that. The other was 'rather neutral' to the non-parole period of seven months, and said he 'wouldn't want Mr. Cameron to be put in jail for ten years or anything, but white-collar crime gets off too easy when it can have just as bad effects as other crime'.

Three people felt the jail term to be inadequate. Their comments were:

> It's not a lot for $1.5 million is it? Put him away for life, he's caused tremendous misery.
>
> That's a joke..... If found guilty he should be made to do longer time. I know he's old, but he should take that into account at the time.
>
> I object to this, the sentence. It's pathetic... - and yet I suppose it's us that are contributing to keep him in jail. We're the losers again.

Two commented on the unsuitability of imprisonment as a penalty, and suggested community service type options:

> He could do our gardening for five years or something - him getting seven months in Long Bay or wherever proves nothing. It won't make him better or worse and it won't help his victims.
>
> I don't think he's a criminal who needs to be locked away. He should be forced to do community service for a longer period - it might be too easy for him in prison. I'm not saying jail's easy, but helping the community - maybe meals on wheels, painting pensioner's homes etc., might be of more use.

Apart from one investor who described Mr. Cameron as 'slightly reserved', the others found him very bright and jovial. Different comments were; 'a very plausible character, maybe a bit too pally'; 'full of all sorts of assurances, with an impeccable reputation'; 'always very bright, smiley and happy'; 'a dominating man and very convincing'; 'clever and shrewd'; 'I thought he was fantastic - one of the nicest people I'd ever met'. Two relied heavily on his reputation, and that he had been established for a long time:

> Everyone knew him..... solicitors, accountants, bank managers..... They all knew him and spoke highly of him. I didn't think I could go wrong.

In an overview of what could or should be done to help victims, two out of eight felt some type of insurance against this crime should be available:

> With corporate crime I wish there was insurance to help victims who lose their life savings. You can be insured if robbed from your house, or if the house contents are burned. Could there be some kind to help victims get their money back?
>
> It should be compulsory for monies over a certain amount to be insured and then the insurance companies could check the investments.

One rejected the notion of victim compensation schemes as implausible and said 'it has to come back from the man'. This view was shared by two other people who felt that, somehow, Mr. Cameron must have money hidden somewhere:

> Too many people get away with corporate crime and hide their money in Swiss Banks... to prevent people hiding money, the Corporate Affairs Commission ought to be stricter about how they put money into other people's names.
>
> Cameron should be forced to pay money back into his bankrupt estate.

One of the victims had written to the Ombudsman about Cameron's financial state of affairs, however, and knew he had no further funds available:

> They said he is entitled to a reasonable lifestyle and he is not in a position to pay into his bankrupt estate. What can you do about it? Nothing.

Commenting on this outcome, another victim stressed the importance of preventative action; and seeking 'independent appraisals' before entering any business transaction. One investor thought that Mr. Cameron had been declared bankrupt many years before, and felt the system here was inadequate:

> There's a loophole in the system. He was bankrupt before 1980 and he can set up companies again and go bankrupt a second time.

Two victims were aware that after the winding up of the companies, Mr. Cameron was working as a mortgage broker, and they considered that this was inappropriate.

To summarise the interview responses, therefore, there was of course some variance in the impact upon victims. Interestingly, however, certain key areas associated with victims of other offences were selected to be of importance. The difficulties in the giving of evidence, the feeling that 'you're the crook', the emergence of self-doubt and guilt, and reduced faith in the judicial process were all mentioned. The magnitude of the uncompensated financial loss, a feature of corporate crime, substantially altered lifestyle and attitudes. The subsequent family traumas in three cases have been ongoing. The subsequent levels of resentment felt towards Mr. Cameron, however, vary. Seven years after the offences, three feel very embittered towards him, two are less angry, and three people deny they have ever 'loathed him'. All victims are in agreement that the lack of redress for corporate crime victims is critical, and five were unsatisfied with the judicial outcome, and the wasted expense of the process.

Interview with Mr. Cameron

Mr. Cameron agreed to be interviewed for this study, and a tape recorded interview of over an hour took place. The interview was conducted at Silverwater Jail Complex, a minimum security prison, and two researchers were present.[4]

To be consistent, the issues raised in the interviews with the victims were discussed with the offender. In addition, Mr. Cameron described his personal background, career details and attitudes towards 'criminality'.

Personal background and career details

Mr. Cameron was born in Cootamundra and completed his School Leaving Certificate. Later, he enlisted for the army, and post-war, helped his father with an engineering tools business. The business collapsed, however, and Mr. Cameron explained that this was:

> Caused through the fact that during the war time we were manufacturing and got overstocked with a lot of stuff which was only useful during war time. And we were landed also with a batch of, from a sub- contractor, what were then pipe cutters for cutting steel pipes, and the whole batch of this was faulty. We took action against them, the faulty manufacturer, they won the case, we didn't give them any specifications of what they were to be made out of. They made them out of ordinary cast iron and of course with the pressure that was going to be put on there the cast iron broke. Anyway, that was the cause. That was only a minor bankruptcy.

Around 1947/1948, Mr. Cameron began work for the TNG Life Society, in the commercial policy division:

> I acted as a consultant..... Through life insurance I arranged a lot of mortgage loans for people and with the company I was working for that gave me a good knowledge of mortgages and values of property. When the TNG Society couldn't provide the client with a loan I used to still sign him up for life insurance but I used to get his loan privately, through a private lender and private lenders started to come to me and say; 'look can you put money out on a mortgage for me...' The TNG were so pleased with the amount of business I was writing that they gave me an office in the old Campbell building for a pound a week..... I became an independent agent for the TNG, which meant that I wasn't working exclusively for them because I was able to get independent representations from several other large companies who had money to lend every now and then, and do business for them as well. And it developed from there, when I gave up my life representation altogether and stayed with brokerage.

Mr. Cameron remained as an independent mortgage broker until the winding up of the companies in 1982.

During the investigation and trial period, he continued to work on a commission basis for a local firm. After completing his sentence, he wants to find employment, possibly in mortgage broking.

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[4]See Braithwaite, J., (1985) 'Corporate Crime Research: Why Two Interviewers are Needed'. Sociology, Vol. 19(1), pp. 128-136.

View of 'criminal behaviour' and 'sanction'

Mr. Cameron suggested that the time was passing slowly for him in jail, and particularly the first five or six days out in reception had been a shock for him. Asked about 'what he's done' he said:

> I simply tell them that it was, er, an investment scheme that we got together for investors, that would give them a large return on their investment - up to 30, 40 or 50 per cent on their money. And the scheme, where I was wrong in the first place, was that a prospectus wasn't issued, which should have been done, that's with Corporate Affairs. The people put their money in with the idea that they would, that land and buildings would be eventually be given to them, which we would be a partner, and we were guarantors. You see myself I was a guarantor for every one of the propositions, but unfortunately the building company which we took over was in a much worse state than we thought it was... The coal mines which were originally going to be re-opened were not opened, land values dropped accordingly and also the building company had problems with the building unions as well, they went out on strike two or three times. The thing just..... the investors never got what they expected to get. They expected to make a big profit - 30 to 50 per cent on their money.

Mr. Cameron described his partner as an 'entrepreneur', and when the first few deals were successful, he was 'misled' as to his reliability. Mr. Grimm reassured him 'with great confidence' and insisted:

> We've got to get more investors. We've got to get more land. We've got to increase, we've got to build, larger, more splendid!

Mr. Cameron admitted being at fault for not issuing a prospectus, and for trusting his partner's assurances without checking them, but he believed there was no question of deliberate fraud:

> I don't think I misled these people at all. They knew full well what they were going into. I know that there were problems which I perhaps should have had more, or been more, conscious of the difficulties... Yes, I think some penalty should have been inflicted for my not acting properly as a company director. I think there were some loopholes there..... but I think that a punishment for deliberate fraud? There was no suggestion of deliberate fraud at any time.

In relation to the investors' statements, he added:

> But you see there was evidence brought in that they were told that they were going to have their money invested in mortgages. Now, that was never discussed and in two or three cases it was never brought up at the lower court. But, obviously, in my opinion, Corporate Affairs would have said: 'Well, when you put your money in did you think it was going to mortgages?' And they said, 'oh yeah, I did' where it wouldn't have occurred to them before!

The investigation and trial process

When asked about the length of the investigation and court case, Mr. Cameron said:

> Well, I though the delay was appalling, quite frankly. It was far too long. To have an action some six and a half years after the event - the mental strain of that hanging over me for that time. It had a severe effect on me. I still don't sleep well at night.

Although he said his counsel were 'nice people', Mr. Cameron was critical of the legal advice he had received:

> They were nice people but I do think that I could have had better legal advice. To start with, I was unrepresented at the lower court hearing. I had no funds to pay any solicitors, so I was relying on legal aid to do it. Naturally, you don't get the top barristers on legal aid. He gets $259 a day which is peanuts for a barrister.

Mr. Cameron also expressed concern about the Judge on the case:

> The fact too that the Judge had only been a Judge, I think, for five months and he already, prior to that was a prosecutor for the Corporate Affairs Commission, I thought was a bit rough..... He would have been fully aware of my case from the CAC because it had been in the CAC for six years. And I really felt he should have disqualified himself there...

Mr. Cameron's financial position

Mr. Cameron has experienced financial difficulties and for the future he says:

> Well, I've lost a lot and at my age to start off with nothing is not an easy proposition. Fortunately, my wife is working as a secretary, and she's keeping house and home together. The cases have taken a total of twelve weeks. I work on a commission basis and I haven't earned anything for you might say for a quarter of a year.

When asked what had happened to the companies' capital, Mr. Cameron said:

> Where the bulk of it went was to Trazmall. We ploughed money into them thinking we would get it back when it was all sold for a higher price...

As for the partners' financial positions, Mr. Cameron pointed out:

> Mr. Grimm got himself a BMW car which we paid for. I was driving a Ford - so you can see how it was.

His own biggest asset was a house allegedly worth $300,000. He added:

> There was a mortgage of $200,000 on it. And they got $200,000 for it by auction. Then the bankruptcy people came along and they took a lot of my goods in the house itself. There were a few other things which had to be sold and so that left me with nothing.

Media report

The sole report of the Cameron trial was in the Sydney Morning Herald, Business Section (28/3/88, p. 2). The article (reproduced on the following page) describes the case as a major victory by the Corporate Affairs Commission in its battle against white-collar fraud. To the extent that such a report might be effective in communicating the decision to other business persons, it may contribute to the 'general deterrence' anticipated by Kinchington J. At another level, however, report in the business section isolates this criminal behaviour from the way other criminal offences are treated, and limits readership and public knowledge.

There are certain curious aspects to this article. Firstly, the headline is inaccurate as there were eight, and not seven, convictions. Secondly, the photograph depicts the liquidator of the group of companies, and the caption 'a disastrous decision'. This, in fact, refers to the property investments undertaken by the group of companies, but in the context of the article may be read to apply to the court decision.

Jail for director, 74, after seven fraud convictions

By ANNE LAMPE

A 74-year-old director of a mortgage broking and property development group has been sentenced to 3½ years' jail on each of seven fraud convictions involving more than $500,000, in what is viewed by the NSW Corporate Affairs Commission as a major victory in its battle against white-collar fraud.

A jury earlier had found the director, Donald Cameron, guilty of seven offences under section 176A of the Crimes Act, which relates to directors' acting dishonestly.

One of the investors involved in Cameron's companies lost $100,000. Another lost $75,000.

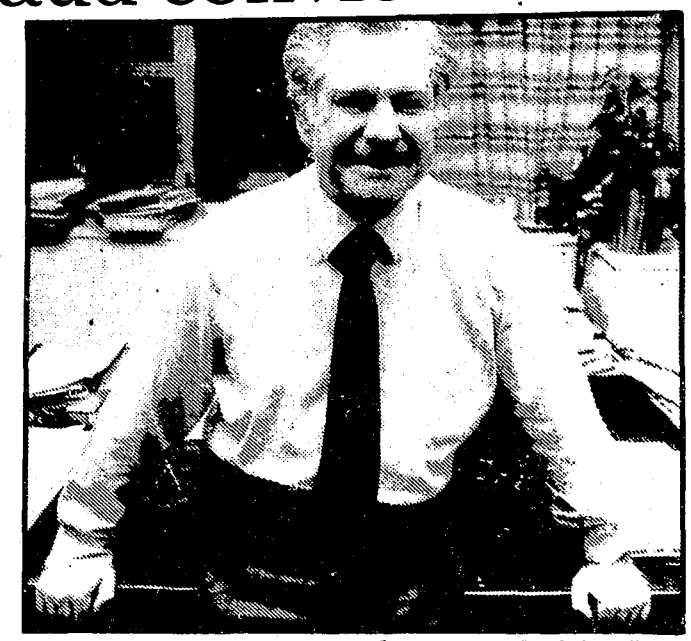
Justice Kinchington in the District Court ordered on Friday that Cameron serve the seven sentences concurrently, and set a non-parole period of seven months.

He said that while he was sympathetic to various circumstances, including Cameron's age, state of health, bankruptcy and family stress, a custodial sentence was required to reflect both the deterrent value of such a sentence to others in positions of trust who defrauded investors and "the community interest in cases of this kind".

For more than 30 years, Cameron was a large mortgage and finance broker who, in the early 1980s, went into land development. The mortgage-broking business was conducted under the name of Donald G. Cameron Pty Ltd. Other companies in the Cameron group included First Mortgage Investments Pty Ltd, Mercantile Mortgages Pty Ltd, Sabang Pty Ltd and Trazmall Pty Ltd.

Donald G. Cameron Pty Ltd was wound up in April 1982 after it was discovered that Trazmall Pty Ltd was insolvent. According to a report by liquidator Mr John Walker of Walker Wayland: "... the entry of the Cameron Group of companies into the property investment and building industries was a disastrous decision and one which played a major part in the eventual demise in the group."

Sabang Pty Ltd was formed to handle property investments using personal funds provided by Cameron and a now deceased Mr Grimm.



Mr John Walker ... "a disastrous decision."

Instead of operating independently of the other companies, however, Sabang drew on the cash flow and funds invested in the mortgage-broking company and other companies. Before long, as the group of companies found themselves with liquidity problems, bank accounts were amalgamated and one bank account was used for the whole group.

Justice Kinchington said that while the land development concept was sound in theory, "I am satisfied that, by mid-1981, it was no longer viable through lack of money and cash flow".

He said that, by August 1981, Cameron was aware of this situation in his capacity as director involved in the scheme and as a mortgage broker and, being aware of the financial problems, he made some efforts to raise finance from financial institutions.

Notwithstanding the financial problems, however, Cameron continued to encourage the public to invest in his development scheme, Justice Kinchington said.

"During July 1981 to the end of March 1982, through your efforts, a number of persons deposited various large sums of money with Mercantile Mortgage Pty Ltd on the understanding that it would be for the completion of building projects or on first mortgage," he said.

"Eight persons invested during this period and all lost their money because of the dishonesty and the way you dealt with each of them.

"As a result of your dishonest conduct, eight members of the community have lost over $500,000."

The money lost was lifetime savings, superannuation money and money raised by mortgaging homes.

As Cameron had been involved so intimately in the operations of all the companies, he had been fully responsible and betrayed the trust of those who had relied on him and who thought their money was safe with him, Justice Kinchington said.

Justice Kinchington said the seriousness of the offences were such that a custodial sentence was required by the p[illegible] to maintain public confidenc[illegible] professional groups such as mortgage brokers, and to remind those persons of the onerous responsibilities of embarking on their activities.

Chapter 4

R

v.

MAXWELL, SMITHSON & GOMAN

R v. SMITHSON AND ANORS.

This case involves the International Commodity Traders' Association of Australia (ICTAA) and its three principals: John Maxwell (President), Kenneth Smithson (Vice-President) and Margaret Goman (Vice-President). The Crown alleged a conspiracy to cheat and defraud by John Maxwell and Kenneth Smithson; fraudulent misappropriation of $50,000 by Kenneth Smithson, Margaret Goman aiding and abetting; and, in the alternative to the count of conspiracy, the offering of a prescribed interest to the public by John Maxwell and Kenneth Smithson contrary to section 169 of the *Companies (NSW) Code*. Before each count of the indictment is considered, a background to the development of the ICTAA will be given.

ICTAA

In mid-1982, Kenneth Smithson sought legal advice *vis a vis* forming an association and a constitution for ICTAA was subsequently prepared. Its objectives were to:

> further the interests of International Commodity Traders;
>
> provide such traders with information and advice to assist them in their trading;
>
> provide an organisation to represent the interest of traders; and
>
> do all things as may be considered desirable by the Executive for the time being of the Association in connection with any of the above objectives.

The constitution provided for three types of membership: foundation, ordinary and associate. Annual subscriptions were $800 for ordinary members and $95 for associate members.

During the period October 1982 to June 1984, advertisements were placed in newspapers, inviting investments with ICTAA. The advertisements varied but generally offered membership of the Association and the possibility of favourable returns on investments. In addition to such advertisements, Kenneth Smithson conducted seminars in different cities in Australia. During these seminars Mr. Smithson suggested that ICTAA was a non-profit organisation, achieving lower brokerage rates for members, members were making profits, members' balances were available on call, and that members' funds not being traded were placed in ICTAA's trust account.

The Association offered members the facility of trading on their own behalf either on the Sydney Futures Exchange during daytime in Sydney, or on the New York or Chicago Futures Exchanges during nighttime in Sydney. This facility was known as the members self-trading facility, and the member made the decision as to which futures commodity to trade and the price to trade at.

In addition to self-trading facilities, for less experienced investors the Association offered the benefits of member assisted accounts. Here, decisions as to what commodity to trade, the price and the time to enter and leave the market, would be made by Mr. Smithson or Mr. Maxwell, according to the predictions of a computer trading system. The trading was carried out at night in Sydney on the Chicago Futures Exchange, and instructions were given to Messrs Ho and Szeto to place the trades. The commodity traded was Standard and Poors (S & P), which is a weighted index of 500 companies on the New York Stock Exchange. The member assisted method of trading proved very popular, and some of the members were divided into nine trading groups. Persons were appointed to represent these groups and

trading took place in respect of each group. It was the responsibility of each group leader to divide the profit or loss between the members on a pro rata basis, according to the amount of monies deposited by the member. Some members did not join groups and trading was to be carried out on a managed individual basis for them.

The Association had a number of documents produced:

(a) Membership Application

(b) The Constitution

(c) Client agreement and Rules for Commodity Trading forms

(d) Booklet headed - 'Introduction to Commodity Futures'

(e) Booklet headed - 'Trading Techniques for the Commodity Speculator'

(f) Pamphlet headed - 'International Commodity Trader's Association of Australia'

(g) A member instruction form.

All potential members were given these documents. If a person wished to join the Association he or she had to complete the membership application form, the client agreement and lodge $95 membership fee.

The Association used three brokers: Continental King Lung Group Pty Limited, Crombie and Nichols Pty Limited, and Rijade Pty Limited. In relation to overseas trading Continental King Lung Group Pty Limited was the first broker and was utilised from November 1982 to December 1983. Rijade Pty Limited was used from October 1983 to February 1984. Crombie and Nichols Pty Limited took over from February 1984 to June 1984 when the receiver was appointed. Crombie and Nichols used Continental King Lung to trade on their behalf overseas in respect of trades placed by the Association with it.

Reasons for the investigation and prosecution

On 11 July 1984, the Commission sought orders from the Supreme Court of NSW pursuant to section 573 of the *Companies (NSW) Code*, resulting in the appointment of a receiver of all of the property of John Maxwell and Kenneth Smithson, two of the principals of ICTAA. This action was instigated following the receipt of complaints from members concerning their unsuccessful attempts to withdraw funds from the Association.

The indictment

The indictment contained three counts, the first which alleged that between November 1982 and June 1984, Mr. Maxwell, Mr. Smithson and Ms. Goman conspired amongst themselves to cheat and defraud Peter Stollery and other members of the ICTAA, of large sums of money. In exercising his judicial discretion, Ford J. directed the jury to acquit Ms. Goman of the conspiracy, as a matter of law. The second count alleged fraudulent misappropriation by Mr. Smithson, Ms. Goman aiding and abetting. Originally, the evidence relating to this matter formed part of the overt acts relating to the conspiracy, but Ford J. directed it to be heard as a separate charge, as a matter of law. The third and final count on the indictment was an offence under section 169 of the *Companies (NSW) Code*. This was alleged against John Maxwell and Kenneth Smithson, and was a count in the alternative to the conspiracy charge - in other words, the jury were only to consider this, if there was a not guilty finding on the count of conspiracy.

Conspiracy to cheat and defraud

(a) Law on conspiracy

The crime of conspiracy is committed whenever two or more persons agree to do something which they know to be unlawful either as an end in itself, or as a means of securing some object lawful or unlawful. 'Cheating and defrauding' includes every kind and description of fraudulent statement, conduct, trick or device, by which a person inflicts economic loss on another, or deprives a person of an economic advantage.

Where a count in conspiracy charges only one conspiracy to effect one or more improper purposes, the only issue before the jury is whether all, or at least two, of the accused are guilty of the conspiracy alleged, of a conspiracy to effect some of the improper purposes. The jury cannot find some of the accused guilty of a conspiracy to effect some of the improper purpose and others guilty of conspiracy to effect other of the improper purposes. This would amount to finding two conspiracies under a count alleging only one.

Although facts to establish an agreement between the accused must be proved, it is not necessary to produce such evidence as would be required in a contractual agreement. If it is established that the accused did things which indicate they were acting in concert to achieve a common purpose, this is sufficient to establish that they had agreed to achieve that purpose. It is unusual in a conspiracy count for any other evidence of agreement to be tendered than is supplied by certain overt acts.

(b) The Crown case

In this case the Crown alleged that the parties to the conspiracy, at the time of the agreement to cheat and defraud, had not agreed upon the identity of each of the victims. The Crown alleged that John Maxwell and Kenneth Smithson agreed to cheat and defraud those persons who would become members of the ICTAA. The Association had over 700 members and the Crown did not intend to prove that all such members were defrauded. Rather, the Crown settled upon those persons who were members of the nine 'member assisted' trading groups, and 22 other individual investors.

The Crown alleged that the objectives of the Maxwell and Smithson conspiracy were to:

(a) fraudulently obtain and fraudulently retain monies deposited by members and applicants for membership of the ICTAA;

(b) fraudulently use these monies for their own purposes contrary to the economic interests of the members of the Association.

In relation to 'fraudulently obtaining' money, the Crown submitted evidence of the promotional literature which sought to attract investors to the ICTAA. One of the great attractions was the Association's Software Trading Systems, which were supposed to predict when one should profitably enter and exit the market. However, the Crown alleged that these systems produced a long losing sequence and this necessitated Smithson and Maxwell engaging in fictitious trading and the creation of non-existing profit. Another attraction was that members' funds which were not being traded were to be placed in a separate ICTAA trust account. And yet, whilst a total of $8,562,879 was banked or passed through the ICTAA general account, only $268,242 ever found its way into the trust account.

In order to ensure the 'retaining' of monies deposited with the ICTAA, the Crown alleged that members were deceived by Smithson and Maxwell that successful trades were being negotiated on their behalf and consequently profits were being generated. This situation was aggravated by Mr. Smithson and Mr. Maxwell paying commissions to Association group leaders for non-existent trades. Evidence to support the allegation by the Crown was a

comparison made between the purchase and sales statements[1] of ICTAA, and the actual records of trading from the brokers. Here, there is a substantial disparity, not only in the number of contracts traded (the net discrepancy on CAC 'grand schedule' was minus 32,525 Standard and Poors contracts), but also in the outcome of the transactions. The purchase and sales statements issued to members show that member assisted accounts were making profits. The known brokers' statements in the relevant period (October 1982 - July 1984) however, suggest this is impossible, because contracts placed through them indicate losses were, in fact, being made. The Crown relied upon the substantial difference in the number of contracts traded and the value thereof, to say that the purchase and sales statements were false to the knowledge of both Mr. Maxwell and Mr. Smithson, who were responsible for producing and despatching statements to members and group leaders.

Documentary evidence for the Crown included, *inter alia,* ICTAA promotional literature, purchase and sales statements sent to members, brokerage records of Crombie and Nichols Pty Limited, Rijade Pty Limited and Continental King Lung Pty Limited, banking records, and schedules of funds calculated by the CAC. For example, exhibit 268 detailed the total funds allegedly owing to members as at appointment of the receiver (capital invested plus purported profits) as $6,991,578.94. The jury had 286 Crown exhibits to consider. In addition to these, the Crown had attempted to tender a tape of a conversation Mr. Smithson had with two witnesses. Details of this *voir dire*[2] were, briefly, that a police listening device had been placed on a member of the Association, and he and another met Mr. Smithson for lunch. The Judge accepted that since the Association was under investigation at this stage, the witness with the listening device strapped to him was a 'secret and undisclosed' agent of the fraud squad detective. Consequently, it would be wrong to admit the tape in evidence, since under section 410 of the *Crimes Act,* confessional material should be given voluntarily and there should be free choice on the part of any person who makes admissions.

In excess of seventy witnesses were called in this trial and twenty-one were investors who gave evidence as to the amounts of funds deposited. The Crown sought to demonstrate that a net capital of $3,119,424 had been invested and lost by the witnesses thus called. Approximately $2.5 million had been lost in the 'member assisted' group accounts and $0.6 million by individual traders.

The second objective of the alleged conspiracy was that funds fraudulently retained were used by the accused for their own purposes. By way of direct gain, $257,000 was alleged against Mr. Maxwell, including his purchase of a Mercedes, a mortgage repayment, payments to a personal company, and payment of an American Express account. For Mr. Smithson, $542,000 was alleged, including purchase of a Mercedes, a Porsche, a Lancia, payment of an American Express account, payment to a personal company, and $50,000 to a soccer club. Other unauthorised payments by Mr. Maxwell and Mr. Smithson collectively, were alleged at approximately $1 million. This figure includes, for example, inappropriately advanced commissions to agents, personal trading by the accused and various cash cheques drawn.

(c) The defence cases

On a conspiracy count, where there is evidence of one individual accused doing something, it is not necessarily in furtherance of a conspiracy unless it can be assessed that such actions were preceded by an agreement. In other words, evidence against one accused is not automatically admissible against another. As one might expect, therefore, defence cases are argued separately.

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[1]The purchase and sales statements recorded details of all trading done on behalf of each member, including profits and losses, brokerage and the opening and closing balance for each day's trading.

[2]Procedure by which a decision is made by a Judge in the absence of the jury, as to whether or not evidence may be admitted to the trial.

Other than for examination on the *voir dires*, Mr. Smithson did not seek legal representation. He expressed the view that the matters were so complicated they would be difficult to communicate to a third party, and no-one knew the facts and personalities involved as well as him.

In his defence, therefore, Mr. Smithson said that whilst there might be discrepancies in both the number and value of the ICTAA purchase and sales statements and the brokers' records, that is an incomplete version of the facts. He alleged and sought to demonstrate that he had funds which were available to him in Hong Kong. They were, he believed, in a segregated account of King Lung Gold Traders Limited, futures brokers. The funds which were available in Hong Kong were funds which were employed to finance the member assisted trading, not through King Lung in Sydney, but directly with a company, King Lung Gold Traders, in Hong Kong. None of the trading done in Australia related to member assisted accounts (except for the first ten days of trading). Instead, trading took place in Hong Kong, directly, to avoid delay. Mr. Smithson therefore argued that the substantial discrepancy in the value and number of contracts traded as alleged by the Crown was invalid, as the Crown had wrongly compared the member assisted accounts purchase and sales statements with the trading placed through the King Lung Sydney operation. The Crown had failed to take into account the trading placed directly through King Lung Hong Kong.

Mr. Smithson tendered 40-50 exhibits to support his case, including a letter he had written to the receiver (31 October 1987). This stated that he had evidence of ICTAA's funds in Hong Kong, and it also urged the receiver to investigate the Hong Kong brokers and specifically, their representative in Sydney. Mr. Smithson alleged that the Sydney representative was unable to be traced, and that he had stolen deposited funds. ICTAA, he said, had further problems of monies stolen by two employees responsible for placing trades, Ho and Szeto. In March 1987, Szeto was convicted of 32 counts under section 178BA of the *Crimes Act*, (cheating and defrauding, $156,000) and Ho of one count under section 178BA (involving $12,000). The defence suggested that in spite of the proven amounts, the total stolen could not be stated with certainty, and it had a bearing on this case.

Mr. Smithson attempted to tender a telex which evidenced funds available in the U.S., purportedly transferred to the Hong Kong brokers. At first, tender through an ICTAA employee was attempted, but the telex was marked for identification, and the Judge considered the appropriate witness by which to admit the evidence was the author. The Crown later called the relevant overseas witness, a director of King Lung Traders, Hong Kong. He was unable to identify the telex, said he personally 'wouldn't send a telex like this', nor was he likely to authorise someone in his office to send such a telex.

During the course of his evidence, the Director of King Lung Gold Traders Limited said that he would normally require a half deposit[3] for day trading[4] in S & P contracts. In the light of this evidence, Mr. Smithson, summing up, sought to refer to trading summaries prepared by an employee of the Continental King Lung Sydney operation. The trading summary contained details of all over night trading[5] as well as day trading, placed through the Sydney office. The evidence of the author of the trading summary suggested that no deposit was required for day trading in S & P contracts. However, relying on the overseas director's evidence, Mr. Smithson said that the amount of funds required to be held by the broker based on the number of day trades recorded on the trading summaries would, on occasions, amount to considerably more than the funds held on deposit by the Continental King Lung Sydney office. Since the funds

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[3]A 'deposit' is the amount of funds required to be deposited by the client with the broker in order for the client to trade. The amount of deposit, which varies depending upon the commodity, is required to protect the broker against adverse price movements in the commodity traded.

[4]'day trading' refers to a situation where futures contracts are opened and closed in one trading session.

[5]'over night trading' refers to a situation where futures contracts are opened in a trading session and not closed until a subsequent trading session.

were not on deposit in Sydney, Mr. Smithson alleged this proved funds were being held in Hong Kong.

For Mr. Maxwell, Counsel suggested that the point in issue was alleged fictitious trading, based on a comparison of the Association's records with brokers' records. This, it was submitted, ignored the direct trading taking place in Hong Kong, and to test this allegation the jury should remember a green exercise book completed by employee Ho. Ho was placing trades and recording them in a green exercise book, but this, the defence alleged, had been suspiciously lost or destroyed. Counsel reminded the jury that the onus in a criminal trial is on the Crown to bring evidence 'beyond reasonable doubt', and bearing this in mind the defence, without the same resources, was not expected to investigate or bring records from the brokers in Hong Kong. Mr. Smithson had urged an investigation of the Hong Kong brokers, the Crown according to Counsel had failed to do this thoroughly, and had failed to trace records at the clearing house of the Chicago Futures Exchange. The jury were being asked, Counsel suggested, to judge on part only of the facts.

Counsel urged that in deciding a count involving 'dishonesty', the jury should bear constant attention to the character of the accused. Failed companies did not automatically represent fraud or dishonesty. Character witnesses had given evidence as to John Maxwell's good nature, and the jury had to give thought to the accused's state of mind at the time of the alleged conduct. The Association membership had 'grown like topsy', to over 700 members in 18 months, and as a hitherto small business-man, John Maxwell was unable to handle the size and sophistication of the Association.

According to Counsel, Mr. Maxwell believed that trading was taking place in Hong Kong, that the only information Hong Kong needed was the number of contracts the Association required. The trading would then take place automatically at certain prices based upon the signals given by the trading system as to when to enter and exit the market. He (Mr. Maxwell) thought that Ho or Szeto were advising the brokers' representative in Sydney of the required number of contracts, who then passed the information on to Hong Kong before the market opened that evening. If any trading had taken place, Mr. Maxwell suggested information returned in the same way. In the morning, there would be a note from either Ho or Szeto advising of the number of contracts traded and at what price.

Finally, Counsel stated that all funds of the Association utilised by Mr. Maxwell were overtly so, and fully documented. This was because the accused understood it was money he was entitled to in Sydney, as the same amount was being made available for direct trading in Hong Kong.

Fraudulent misappropriation

The elements of this offence are that the accused received valuable securities upon certain terms, and fraudulently misappropriated those securities contrary to the agreed terms.

Evidence relating to this count concerned Mr. Smithson's and Ms. Goman's dealings with a New Zealand member of the Association. The jury were directed that evidence of conversations between witnesses and the individual accused were not admissible against the other accused. Unlike the conspiracy charge, it was possible for one accused to be found guilty, and the other not guilty.

The Crown established that the witness/investor joined the Association as a consequence of an ICTAA seminar in New Zealand, and had done some self-trading. In June 1984, she phoned Mr. Smithson and said she would like to transfer NZ$50,000 into the Association trust account. Mr. Smithson, accompanied by Ms. Goman, travelled to New Zealand, met the witness at an agreed bank, and NZ$50,000 was handed over. The witness alleged that this was taken by Ms. Goman and placed in her bag, and a hand-written receipt was drawn by Mr. Smithson. This

acknowledged receipt of $50,000, to be deposited in ICTAA's account. The Crown then evidenced payment of NZ$50,000 into Tolana Pty Limited's bank account in Sydney, a company of joint concern to Mr. Smithson and Ms. Goman. The witness' funds were allegedly misappropriated, therefore, and used to prop up the bank account of Mr. Smithson's and Ms. Goman's company.

Mr. Smithson suggested that the background to this transaction placed it into perspective. Previously, when the same investor had wished to transfer NZ$12,000 to Australia, she had done so by paying over a sum of money to Mr. Smithson's solicitors in New Zealand. The receipt granted detailed an amount of money credited to Mr. Smithson personally, not the ICTAA. Subsequently, Mr. Smithson said that he believed this arrangement to be a similar one, and that the NZ$50,000 did not have to be placed into the ICTAA trust account. It was a personal dealing between him and the investor.

For Ms. Goman, Counsel explained that she did accompany Mr. Smithson to New Zealand, but did not take an active part in the monetary transactions. She waited in the bank whilst Mr. Smithson received the money, and she certainly did not place it in her bag. Counsel could appreciate why the witness felt bitter about losing her money, but her evidence was inaccurate. Ms. Goman was having a relationship with Mr. Smithson at the time, and that more fully explained her presence in New Zealand. As for Tolana Pty Limited, whilst Ms. Goman was a director, Counsel explained that the company's finances and overdraft were organised by Mr. Smithson, and she had no dealing with the funding arrangements.

Invite the public to purchase a prescribed interest

Section 169 of the *Companies (NSW) Code* states:

> A person, other than a company or an agent of a company authorised for that purpose under the common or official seal of the company, shall not issue to the public, offer to the public for subscription or purchase, or invite the public to subscribe for or purchase, any prescribed interest.

A 'prescribed interest' is defined in the *Companies Code, inter alia,* as a right to participate in any profits of any financial scheme, or 'plan of action'. To commit the offence, a person, other than a company, needs to 'invite' a member of the public to participate.[6] 'Invitation' is used in its daily sense in this section, an act of 'inviting' to attend or take part in something, and it may involve spoken or written form. There need not be an express invitation, but where a number of alluring features are designed to attract people, that is sufficient.

The 'prescribed interest' alleged by the Crown, was the Association's financial scheme, whereby members would deposit money and that money would be administered on a futures exchange. In relation to Mr. Smithson, the Crown alleged that he invited participation in the Association's scheme at an ICTAA seminar in Coffs Harbour, April 1983. At the seminar, a video on commodity trading was shown, and then Mr. Smithson spoke to the seminar participants. He pointed out that the Association was a non-profit-making body, that traders grouped together to gain greater leverage, and that it cost $95 to become an Association member. Actual trades were to be on the S & P 500 market, following a computer predicted pattern. Mr. Smithson stated that there was a 'stop loss' arrangement, whereupon risks were minimised. It was this description, the Crown alleged, that made the Association an attractive proposition, and 'invited' one investor to participate in the financial scheme.

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[6]As founders of an unincorporated association, Mr. Maxwell and Mr. Smithson are not protected by the 'company' exceptions.

Mr. Smithson, in his own defence, suggested that he was not impliedly inviting investment contributions, but he was there simply to encourage people to join the Association. He had sought legal advice, and thought he was within the bounds of the law in seeking members. The term 'member assisted accounts' was very different from 'managed accounts', and unlike traditional broker-investor relationships, Mr. Smithson said he was never undertaking to trade for the members. The Association depended on the computer system, not his expertise for each trader or group of traders. Hence ICTAA's use of the phrase 'member assisted'.

The case against Mr. Maxwell relied on the evidence of an individual who saw an advertisement in the Financial Review concerning the Association, and came to the Association's premises where he met the accused. Mr. Maxwell allegedly explained to the witness that the Association dealt in futures trading, and it was possible to have an account on your own, or a 'managed account where you put your money in with other investors'. The witness said that he was told in the second case that 'we do all the trading for you'.

Mr. Maxwell allegedly spoke of the ICTAA trust account, that the commodities traded were American S & P 500, and that there was a stop-loss arrangement. The witness asked what benefit the Association had for the accused, and he was told, lower brokerage fees. Subsequently, the witness deposited $7,000 with the Association.

In reference to the prescribed interest, Counsel for Mr. Maxwell suggested that his client understood that the only thing he was offering was membership to the ICTAA and he believed he was entitled to do this.

The verdict

In a case of this magnitude, the Judge summed up each count individually, and asked the jury to deliberate for an hour after each summing up. All verdicts however, were to be returned at the end. The jury returned their verdicts after four days. They found Mr. Maxwell and Mr. Smithson guilty of the conspiracy to cheat and defraud, Ms. Goman guilty of fraudulent misappropriation, and Mr. Smithson guilty of aiding and abetting the fraudulent misappropriation. The prescribed interest verdict, therefore, did not have to be returned.

Sentencing

For Margaret Goman it was pointed out that she had made no personal profit from the fraudulent misappropriation; she played a lesser role in the offence and her career had been dramatically affected. Her proven involvement in community work with Lifeline and handicapped children in the U.K. made her a good candidate for a non-custodial sentence. Sentencing was adjourned for six weeks, outside the dates for this report, so that a medical and pre-sentence report could be prepared (see note at the end of this chapter).

For Mr. Maxwell, Counsel recognised the seriousness of the offence, and that community interest required a custodial sentence. Direct payments received by Mr. Maxwell were $257,000, and an alleged $1 million unauthorised payments with Mr. Smithson. If Mr. Maxwell had been a director of a corporation and therefore charged under the *Crimes Act* section 176A, Counsel pointed out that the penalty is a maximum of ten years imprisonment. However, it was argued that certain subjective factors should be taken into consideration in the non-parole period. Mr. Maxwell, aged 62, had an excellent reputation, a hitherto blameless life, and his family and friends had already suffered over the last four years, during the trial process. The Association in its inception had 'commendable ideals', and Counsel argued it just became too difficult for a man of Mr. Maxwell's experience.

For Mr. Smithson, Counsel argued that there was no need to impose a penalty which would reflect some type of rehabilitation or deterrence. He had learned enough from the experience.

The key question was what punishment would the community want? Counsel pointed out that for a man of Mr. Smithson's age, 56 years, a jail sentence was much more crushing and severe than for a younger person, and the community would not require a term of imprisonment which would affect the rest of his life. Counsel also asked that the fraudulent misappropriation be considered in the context of the conspiracy, and therefore one penalty be imposed.

Following a trial that had commenced on 11 May 1988, sentence was passed on 17 August 1988. This fifteen week trial represents NSW CAC's longest corporate criminal trial. Ford J. said:

> 'This is a case which involves dishonesty and incompetence to a high degree. The Association which was formed in late 1982 was probably an association which was commenced and created by Mr. Smithson and Mr. Maxwell with good motives and its idea was one which attracted many people... As regards the conspiracy it seems clear to me that there was deception on behalf of Mr. Maxwell and Mr. Smithson, in the purchase and sales statements they sent to members. They were deceptive because they showed losses of a temporary nature and profit statements increasing. The explanation offered for justification of the profits showing on the purchase and sales statements, was an explanation by way of funds Mr. Smithson said he had in a segregated account of King Lung in Hong Kong. It seems to me that explanation was a flimsy pretext made in an effort to cover up what was and became a policy of deception of members...

Dealing with Mr. Maxwell first, Ford J. said:

> It appears to me that Mr. Maxwell was simply unsuited to undertaking that in which he was involved. He didn't have the administrative experience or ability to handle a business of that size.

Ford J. suggested that until Mr. Maxwell had become involved in the Association he had led 'an honourable life'. It was 'very sad' that a man of his years must be sent to jail; but because of the magnitude of the funds involved, a sentence appropriate in the circumstances was required. Ford J. then imposed a custodial sentence of six years for conspiracy to cheat and defraud, with a non-parole period of two years and six months, both beginning 16 August 1988.

In relation to Mr. Smithson, Ford J. pointed out that he had been urged to treat the offence of fraudulent misappropriation as part of the conspiracy. He was, however, not disposed to do that, since trading for the ICTAA had ceased for practical purposes at the time of receiving the NZ$50,000. It was, he suggested, a 'bare faced fraud', although he added 'it's true of course that it's impossible to understand fraudulent misappropriation charges unless one knows the background'. The witness had deposited funds earlier, but it nonetheless seemed to Ford J. that Mr. Smithson sought 'to prop up the finances of Tolana'.

For the offence of conspiracy, therefore, a custodial sentence of six years was imposed, and for the fraudulent misappropriation count a custodial sentence of two years. These terms were to be served cumulatively, with a non-parole period of four years (see note at the end of this chapter).

Victim impact

Unlike the Cameron trial, in the ICTAA case the Crown did not allege the defrauding of particular individuals. Instead, it was suggested more broadly that the accused conspired to cheat and defraud members of the Association. Twenty-one investors gave evidence as to the amount of funds deposited and lost, and these twenty-one have been focused upon as victims for this report.

Telephone interviews were conducted with the witnesses, many of whom lived interstate. Seventeen of the twenty-one were successfully contacted, and interviews ranged between ten and thirty minutes. Based upon the experience of interviews conducted with victims in the Cameron case, a more structured interview technique has adopted, focusing upon the following questions: How much did you lose and what were the effects of this loss? What do you feel should or could be done for victims of corporate crime? How do you feel about the sentencing of the offenders? How do you feel personally towards the defendants? And finally, what do you feel about the CAC, the investigation and the trial process?

Rather than cite the amount owed to them on ICTAA statements, most investors gave their losses in terms of hard cash. Here, responses ranged between $3,000 and $250,000. The impact of the fraud varied amongst respondents. For some, it meant that the quality of a new car was affected or renovations to the house were delayed for two years. Three identified the futures exchange as an area of risk, explained that they invested only a portion of their wealth at one time and said that 'you'd have to be a fool to put your life savings in it'. At the other end of the spectrum, however, victims reported experiences of 'financial turmoil' 'mental trauma', 'devastating financial insecurity', 'four years to stabilise' and 'it left me broke for a long time'. Five isolated breakdown in family ties as a consequence of the financial loss - both marital instability and 'enormous strain' with offspring were reported.

In terms of what could or should be done for victims of corporate crime, seven emphasised preventative measures to assist in the avoidance of malpractice in the first place. Five stated that newspaper advertisements should be validated, to ensure proper registration of an organisation and that a prospectus has been issued where appropriate. One respondent said that he should have done this for himself, but the four others felt it was incumbent upon the CAC. Two considered close auditing of companies and associations should be mandatory. One victim suggested that had there been a careful audit in the early stages of the Association, the fraud could not have been perpetrated.

Eight respondents commented on the importance of tracing funds and drawing statements of account after liquidation. One suggested:

> The shame of it all is that whilst in terms of the criminal law justice appears to be done, the real problem is that members have no idea of where the money has gone.

One investor was critical of the receiver for denying him information as to the whereabouts of funds, and felt that the receiver was an inappropriate person to investigate the paper trail. All eight considered that the CAC should be identifying and tracing funds.

Attitudes towards the sentencing of Mr. Maxwell and Mr. Smithson varied. Four considered the terms of imprisonment reasonable, although one reflected that there was not enough publicity to effect general deterrence. Six found the sentence length to be inadequate. One suggested: 'to spend all the tax payers money putting him (Mr. Smithson) away for that period of time is ridiculous', and another commented; 'Age is irrelevant - they should have known better. They had no consideration for the age of their victims.'

One victim was opposed to the defendants' imprisonment and said: 'It's not helping me is it? I'm not really keen on it at all. I don't think they were that bad, things just went wrong.'

Another interviewee found it difficult to imagine how an appropriate sentence could be determined, when there had been no attempt to establish what funds had been repaid by the offenders.

Seven victims identified confiscation of assets and the tracing of funds to be the key issues in sentencing. One commented:

> The imprisonment doesn't help me at all - I don't feel anything. I just feel disappointed that the law convicts them but doesn't do anything for those who lost.

Two regretted the expense of imprisonment to the taxpayer and considered reimbursement was a more favourable aim. Whilst a 'short term of imprisonment' might be necessary as a punishment, they suggested that emphasis in prosecuting the offenders should be placed on 'leaving them (the offenders) with no assets'.

Seven felt bitter towards Mr. Maxwell and Mr. Smithson, because as one investor said:

> There was a lot of trust placed in them. They put themselves up as professional traders and they let us down.

One did not feel bitter until after the trial, because:

> Until the trial I was prepared to believe them innocent. Now I feel badly towards them both. They've been totally irresponsible and set out to defraud.

Four of the seven, however, acknowledged that their anger had reduced over time, and that they had 'mellowed in the years'.

Nine expressed feelings of indifference towards the offenders, and one a stern contempt. Of the nine, one found accepting Mr. Maxwell's 'criminality' particularly difficult:

> Mr. Maxwell - I enjoyed his company. I find it difficult to accept that he set out to do it but based on the facts, that appears to be the case. I still have some difficulty in coming to grips with it.

Another in the 'indifferent' group suggested; 'if you invest money, you're going to lose money'.

In relation to the investigation, only two made comments about the CAC and considered first they had been thorough and courteous. Twelve people recognised a community responsibility to give evidence, but said it was nonetheless 'inconvenient', 'a bit degrading', and 'too long really'. The five others made these comments about the trial and giving of evidence; 'it was a waste of time', 'harassing', 'a trauma', 'made me feel sick' and 'it was difficult'.

Nine mentioned the delay between the collapse of the Association and the final hearing. The main consideration was:

> It takes so long getting to court and they want word to word rendition. The case should be processed a lot sooner so that it's reasonably fresh in your mind.

Four victims suggested being able to give fuller statements initially, and having access to these in court.

To summarise the victim responses, therefore, the impact of the financial loss reported varied between 'I could cope with it' and 'total devastation'. Unlike those defrauded by Mr.

Cameron, victims were prepared to accept certain risks of loss of funds on the Futures Exchange. As one victim emphasised, however, 'I wouldn't have minded if I'd lost it properly'. Five experienced consequential family problems from the financial loss and serious emotional stress. Seven were anxious to see closer government surveillance of companies and organisations, and nine were keen for funds to be monitored on liquidation. Only four out of seventeen were satisfied with sentencing outcome; six believed the jail terms to be inadequate and seven were dissatisfied that there had been no tracing of funds. Personal feelings towards the offenders varied from indifference to anger, and whilst most victims felt an obligation to give evidence, nine were concerned about delay of process.

Interview with Mr. Maxwell and Mr. Smithson

Mr. Maxwell and Mr. Smithson agreed to be interviewed as part of this project to provide an alternative 'offender' perspective. Interviews were conducted at the Metropolitan Reception Prison, Long Bay, and two researchers were present.

Open-ended discussions took place, lasting about an hour with each respondent. Consistent with the interview with Mr. Cameron, issues of criminality, sentencing and enforcement process were raised.

Mr. Maxwell

Personal background and career details

Born in Sydney, Mr. Maxwell has been happily married for 34 years. He has three adult children and five grandchildren. Since a young man, he has been mainly self-employed in the area of small business. He has owned a newsagency, a hairdressing salon, an interstate transport truck and a taxi.

View of 'criminal behaviour' and 'sanction'

Mr. Maxwell says that he is innocent, he did not take any money he was not entitled to, and in a sense that makes his position easier. He reported that friends and relatives, who know and trust him, have been very supportive, and he said that since he is serving a sentence for defrauding his only regret is that maybe he should have taken the money. As it is, his wife is working and living in rented accommodation, and he has sold his house and Mercedes.

Mr. Maxwell said that it would be easy to become bitter, but this serves no useful purpose, and he has resigned himself to a 'temporary interruption' in his life. The first week of imprisonment was traumatic, but he has been pleased and surprised at the assistance of other inmates in his process of adjustment.

Mr. Maxwell suggested finding alternatives to imprisonment is difficult, as it would be hard to find appropriate community service options. He is accepting of the prison system at one level, but feels saddened that there are not more jobs available for inmates, to help pass the day. He does not find the length of his sentence unbearable, although it has obviously been traumatic at times.

In relation to investors who had suffered losses, Mr. Maxwell emphasised that people engaging in futures commodities were speculating, just as with horse racing. One should only speculate with money which can be lost, and the psychology of trading is such that the suffering from a loss depends more on personality than financial position. So, he described, a wealthy man might suffer more from a lost investment than a poorer person, because he is pre-disposed to be more angered by loss.

Investigation and trial process

Mr. Maxwell felt there was an imbalance in the amount of funds and effort put into the investigation and prosecution, and the amount of time and effort allocated to the defence. He had no complaints whatsoever about his legal advice, but considered that financial constraints limited the preparation of his case. The case took four years to reach final hearing, and yet he had a matter of days to prepare with Counsel.

In the trial itself, Mr. Maxwell was also concerned about the morality of 'plea bargaining'. If he had pleaded guilty, then he was told prosecution would request a minimum sentence. If he pleaded not guilty, however, he ran the risk of a maximum sentence being requested. He decided on balance that the case should go to a jury.

Mr. Maxwell was also concerned about an alleged incident whereupon parts of the court transcript were found in the jury room before the end of the trial. Although a juror was examined on the material read, Mr. Maxwell believes material inadmissible to the jury was available to them. At his age, however, he said he was not interested in appealing because to wait for an appeal, and then perhaps have the same case outcome, he would rather 'get in and get out', before he was 'too decrepit'.

As a point of law, Mr. Maxwell considered it unfair that on a conspiracy charge both accused have to be found guilty or innocent, where the evidence against them is the same.

Financial position

Over the last four years Mr. Maxwell says he and his wife have sold everything they have. They rent accommodation and Mrs. Maxwell is working.

Mr. Smithson

Personal background and career details

Born in England, Mr. Smithson lived and grew up with his grandparents. He moved with his wife and five children to Australia twenty years ago, and worked successfully as a journalist. As he moved into business and company dealings instead, Mr. Smithson commented:

> Many years ago I took a MENSA test and failed to gain entry by two points, and I've kidded myself I'm capable of doing anything. But when it comes down to it I'm not.

He ran a company with a partner which incurred a bad debt, and later became interested in commodities trading. In his career, Mr. Smithson says his happiest years were probably those spent as a journalist.

View of 'criminal behaviour' and 'sanction'

Mr. Smithson draws a distinction between legal guilt and moral guilt, but says he accepts people lost money and he is responsible. He commented; 'If the jury find me guilty then I must accept I'm guilty'. He added that; 'nothing is black and white', and claims that there were inaccurate renditions in the trial, but said that he was aware that in order to cope people try to justify to themselves what they have done, and he was trying not to do this. He was confronting the hurt he had caused others, and in realising the consequences had more than 'learned his lesson'. Clearly of great concern to Mr. Smithson is that his family, in particular, have suffered through what he described as his own 'criminality, stupidity, or whatever you like to call it'.

Mr. Smithson recognised that there had to be a punishment for his offences, but that regrettably 'no man is an island' and others, namely his family, were being punished in the process.

He suggested, that the 'punishment factor' should be minimal compared with 'putting something back into the community'. He does not consider himself anti-social or anti-establishment, and said he would like to be able to make some contribution. He commented on the self-absorption of prisons, and said that:

> Prisoners need to be asked to help, not always the other way round, and they need to feel they're helping people outside. There is so much anti-social 'us' and 'them' going on, and prisoners are not going to crack out of that unless they can relate and sympathise with people in other circumstances.

Investigation and trial process

The length of the investigation and trial process was a concern for Mr. Smithson. He described it as 'grossly unfair' and an 'excessive delay'. He commented:

> This would be more so for people incarcerated rather than on bail. Even on bail it is a traumatic period where your life is in limbo. It affects you and your family greatly.

Similar to Mr. Maxwell, Mr. Smithson was also concerned about how the transcript allegedly came to be in the jury room in the trial. He did not dwell on this, however, and described Ford J. as a 'shrewd, compassionate and intelligent man', and he was grateful for the assistance provided to him in representing himself. He does not regret appearing on his own behalf. Mr. Smithson said that he knew it was a complex matter and felt incapable of conveying the nuances involved to a legal representative. Furthermore, he said it gave him pleasure to cross-examine and expose some of the investors who he felt were 'riding the gravy train'.

At a broader level, Mr. Smithson considered that the adversarial approach, the 'win and lose' competitiveness, forced an over-simplification of the whole case. Whilst he thought that it was the worst possible approach, he said that unfortunately there was none better.

Financial position

Mr. Smithson said he had sold his home, and his wife was renting accommodation. He said that since he and Margaret Goman had been personal guarantors for the premises of ICTAA and Tolana, this is where the money went, when forced into bankruptcy.

Media report

The ICTAA case received some media attention during the trial and an article (reproduced on p. 56) described aspects of the Crown's opening address (S.M.H. 12/5/88). After sentencing, a further report described the case outcome in the Sydney Morning Herald Business Section (18/8/88, p. 1).

This article is an unfortunate representation for an enforcement agency aiming to deter corporate crime. Firstly, the report refers to 'the now defunct NSW Corporate Affairs Commission'. This phrase has presumably been used because the CAC is now incorporated into the Business and Consumer Affairs Agency. However, as a statement in itself it is misleading. Secondly, the article refers to 'a successful joint prosecution by the Director of Public Prosecutions and the NSW Fraud Squad'. The prosecution, was actually instigated by the joint efforts of the CAC and the Fraud Squad.

Such a misrepresentation of the CAC and it's role is not only unhelpful for staff morale but, more crucially, reduces its credibility as a deterrence to potential offenders in the business community.

ENDNOTE

Margaret Goman was sentenced on 21 October 1988. She was given a recognizance under section 556A of the *Crimes Act* and was placed on a two year good behaviour bond with a $100 surety. In pronouncing sentence, Ford J. indicated that he had taken into account a number of factors in setting the tariff in this case. These factors included the facts that Ms. Goman had no prior convictions, had been charged with only one offence (involving $35,000), and had derived no personal benefit from the offence. Ms. Goman had received good character references and had performed community service through her work with Lifeline and various charities. She was considered a naive participant in the matter and, in view of her current pregnancy, a bond was the most appropriate penalty.

Kenneth Smithson subsequently lodged an all grounds appeal with the Court of Criminal Appeal. The appeal was dismissed in September 1989.

Investors' money diverted, court told

By ANNE LAMPE

Money meant for investment in futures contracts on the Chicago Mercantile Exchange had been diverted, instead, by officers of the International Commodity Traders Association into luxury cars, the discharge of a mortgage, personal loans and a variety of other private uses, the District Court was told yesterday.

Facing trial on charges of conspiracy to obtain and retain monies deposited by members of the association and to use fraudulently these monies for their own private purposes and contrary to the economic interest of members are the former president of ICTA, John Maxwell; former vice-president Kenneth Smithson and former vice-president, membership, Margaret Goman.

Crown prosecutor Mr Neville Parsons said the agreement to cheat and defraud was a crime "even though the parties have not agreed on the precise form of cheating or who the victims will be".

The trial, set down for 10 weeks, started before Judge Ford on Monday, but was aborted on Tuesday when a jury member withdrew.

A new jury was empanelled yesterday. More than 70 witnesses are expected to be called.

The court heard that ICTA was set up in November 1982 and collapsed 18 months later. During that time, more than 700 investors became members of the association, which operated from an office in Help Street, Chatswood. The investors allegedly were told that by banding together, ICTA could negotiate lower brokerage rates. They were told that futures trades would be channelled through a Hong Kong company and then to Chicago.

Mr Parsons said that although investors were told their funds would be placed in a trust account, subsequent investigation showed that just $268,242 went through ICTA's trust account, and $8,562,879 was placed in ICTA's general bank account.

Mr Parsons said the conspiracy charge was backed up with "61 overt acts" involving the three accused, including the making of false statements to investors and the misappropriation of investors' funds which investors were told would be used to trade on the Standard and Poor's Index, the United States equivalent of the Australian Stock Exchange index.

The association was set up by Maxwell and Smithson in August 1982, and was joined by Goman in May 1983. Goman subsequently was appointed vice-president, membership.

Investors, who were required to trade in minimum amounts of $4,000, were told they could either trade on their own account or entrust their funds to a managed trading account that used a software system designed to predict futures contract profits and where their trades would be done for them. ICTA did not have a prospectus or a trust deed while it attracted investment funds from the public throughout Australia.

Instead of the system producing profits, however, as was consistently claimed by the accused, "the system produced a long, losing sequence", and that necessitated Maxwell and Smithson to engage in fictitious trades, Mr Parsons told the court.

Investigations by the NSW Corporate Affairs Commission showed that although ICTA's records said 21,709 contracts had been allocated to investors, brokers' statements showed only 10,457 trades.

This leaves a deficiency of more than 11,000 trades, which the Crown says did not go through a prescribed futures exchange.

The Crown says the actual situation was that members made a net capital loss of $2,828,720. "This was cold, hard cash that people lost," Mr Parsons alleged.

Mr Parsons further alleged that members were deceived into entrusting funds with ICTA in the belief that the money would first be deposited in a trust account and would then be placed in futures trades that would generate profits. Instead, investors were fed the results of fictitious trades and charged commissions on "trades that did not occur".

Instead of the money being used to trade in futures, "the monies were used for their own private purposes without any need to account to each as to how the money was spent".

"In other words, they could dip into a pool of funds for their own private purposes," Mr Parsons alleged.

The prosecution alleges that more than $1.5 million was so misappropriated, and a further $300,000 of investors' funds was placed in jeopardy by ICTA's acting as guarantor for various borrowers rejected by banks.

The alleged misuses of the funds include the discharge of a mortgage on Mr Maxwell's house, the purchase of four motor vehicles, including two Mercedes cars for the use of Maxwell, Smithson, Goman and another person, a $50,000 donation to the Manly-Warringah Soccer Club, $10,000 for soccer player George Best to play a match in Sydney, $50,000 to Tolana Pty Ltd, a company controlled by Smithson and Goman to reduce an overdraft, $203,000 to Quantel Pty Ltd, a company controlled by Maxwell.

The crown alleges that a further $900,000 was drawn in the way of cash cheques, with no account or book to show where they went.

In July 1984, the court was told, when Tolana Pty Ltd found itself in financial difficulties, Smithson and Goman allegedly flew to New Zealand and spoke with a Mr and Mrs Thomas, allegedly investors who gave Ms Goman $NZ50,000 in cash which "she put in her handbag". After returning to Australia, a Tolana employee (Tolana shared the same office as ICTA in Chatswood) was instructed to take the cash down to Tolana's bank and deposit it.

Goman, it was alleged, was responsible for arranging investment seminars and sending out brochures and material on ICTA. Mr Parsons said ICTA had failed to keep proper books, and had no cash payment or receipts book, no journal, ledger or cheque requisition. Cheques were drawn in favour of a private company, Caljad Pty Ltd, allegedly owned by one of ICTA's principals.

By late June or early July 1984, Smithson allegedly directed an employee to tell concerned investors that their cheques were "in the post", even though a receiver was about to be appointed.

He allegedly also said no-one was available to talk to concerned investors requesting information about the fate of their investments. On another occasion, Smithson allegedly instructed an employee to accept any cheque that came in from investors, but to say no-one was available to talk to them.

The trial continues today.

ICTA duo to serve fraud sentences

By ANNE LAMPE

Two former officers of collapsed financial group International Commodity Traders Association (ICTA) were jailed yesterday for conspiring to cheat and defraud investors.

John Maxwell, 62, a founding member of ICTA, who benefited directly by more than $250,000 from the group, received a six-year term, with a non-parole period of two-and-a-half years for his role in the association's affairs between November 1982 and June 1984, when a receiver was appointed.

Maxwell's associate, Kenneth Smithson, 56, was sentenced to six years on charges of conspiracy to cheat and defraud, and a further two years, to be served cumulatively, for aiding and abetting the defrauding of a New Zealand couple of $50,000 by ICTA, and of misappropriating the funds. There is a non-parole period of four years.

The men were convicted on Tuesday.

In the District Court yesterday, Judge Ford described Smithson's action as "a bare-faced fraud".

A third defendant, Ms Margaret Goman, was acquitted on the conspiracy charge, but was convicted of fraudulently misappropriating investors' funds. She has been released on bail, and will be sentenced in October.

The convictions and heavy custodial penalties came at the end of a 15-week trial during which more than 70 witnesses were called, making it NSW's longest corporate criminal trial. It also was the first trial for Crown Prosecutor Mr Neville Parsons, formerly a senior executive officer with the now defunct NSW Corporate Affairs Commission.

After the sentencing, Detective Sergeant Steve Higgins said the case had been a successful joint prosecution by the Director of Public Prosecutions and the NSW Fraud Squad and he hoped that future fraud investigations would be able to draw on the extensive resources of both groups in the same way.

Judge Ford said it was a matter of regret for him that he had to sentence the two men to jail, and that while he, at times, admired the

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ICTA duo to serve fraud sentences

From Page 27

efforts of the two men, he also pitied the people who were defrauded by ICTA.

ICTA, set up as a financial intermediary between futures brokers and clients, attracted more than 700 members in less than two years. During the trial, evidence was given by 22 former members who had lost a net amount of $3.3 million.

The court was told Smithson benefited directly by at least $542,000 from ICTA. Money meant for investment in futures contracts on the Chicago Mercantile Exchange had been diverted, instead, by officers of ICTA into luxury cars, the discharge of a mortgage, personal loans and other private uses.

In June 1984, when ICTA was experiencing serious financial difficulties, Smithson and Goman flew to New Zealand to collect a further $50,000 being "invested" by a couple.

Judge Ford said the case involved "dishonesty to a high degree".

He said that while the intentions of the two men might have been good when the association was set up in 1982, "it seems clear to me that there was deception on behalf of Maxwell and Smithson on the purchase and sales statements the association sent out to members".

The deception took the form of the statements showing "ever-increasing profits", even though it was plain at the time that losses were being incurred.

Smithson's explanation that funds were sent to a segregated bank account in Hong Kong ". . . was a flimsy pretext made in an effort to cover up what was a policy of deception of members", Judge Ford said.

Members who already had deposited money with ICTA were induced to leave it with the association and, in some instances, to make further contributions as late as June 1984, by which time the association had ceased trading.

"The pretended existence of funds in Hong Kong was used as a flimsy excuse for Smithson and Maxwell to help themselves to funds of members," Judge Ford noted.

"In the case of Smithson, he obtained in a direct way a sum in excess of $500,000 and in the case of Maxwell a sum in excess of $250,000.

"And it would appear that various other substantial amounts were squandered."

Judge Ford said he was not sure if "bucketing" had taken place, but that if trading had taken place there would have been brokers' records to prove that funds were held on account of the association. Instead, cheques had merely been written by referring to the profit on the purchase and sale statements.

Time after time, Judge Ford noted, cheques had been written largely without reference to records or because Smithson and Maxwell knew very well that the trading involved bucketing.

"The conspiracy also involved Maxwell's and Smithson's pretending that because there were those funds in a segregated account in Hong Kong that they could help themselves to members' funds in the Sydney accounts."

Judge Ford said Maxwell had led an honourable life before his involvement with ICTA and he was impressed by at least one act of kindness when he paid an elderly investor $6,000 "out of his own pocket".

Despite his age and his chronic arthritic condition, however, "the magnitude of the funds involved and disposed of fraudulently required an appropriate sentence".

Smithson, Judge Ford noted, had seized funds when ICTA was, for practical purposes, defunct and had used them to prop up his family company Tolana.

Smithson, it emerged during sentencing, had prior convictions dating back to 1975. He had continued to attract funds and misappropriate them even after ICTA was defunct.

Before the sentencing, while her husband wept silently in court, Mrs Myra Smithson gave evidence that the past four years had been a severe strain on her family. She said the effect of the investigation and trial on her husband and family had been "shattering". He had lost 19 kilograms in weight and was on pills.

Smithson had been declared bankrupt and had been forced to sell their Pymble home.

"We have nothing. We have even sold furniture in the past four years," Mrs Smithson told Judge Ford during a plea from Smithson's counsel for leniency.

Chapter 5

CASE DISCUSSION

CASE DISCUSSION

This chapter seeks to identify some of the problems for both defendants and law enforcement in alleged corporate crime cases. The Cameron and ICTAA examples are used to highlight certain controversial areas. Issues raised for discussion are: length of investigation; length of prosecution; problems for the Judge and jury; sentencing outcome and examination of assets.

Length of investigation

For both cases detailed in this report, the length of time from the different liquidations to the final hearing was considerable. It is not surprising that cases of such magnitude require much preparation, but for Mr. Cameron sentence was passed six years after liquidation of his companies, and for Mr. Smithson and Mr. Maxwell four years after the receiver to the ICTAA was appointed. Some of this time lapse is explained in terms of court delay, although there were different investigation approaches adopted in each case and these investigations also accounted for some of the delay.

In June 1982, the CAC were aware of the collapse of the Cameron group of companies, but they were unsure if offences had been committed. The investors themselves seemed to have no detailed understanding of their transactions, and all the creditors had to be circularised to see if they could elaborate on the nature of schemes offered. A pattern of expected land ownership emerged for those who had invested during the later life of the companies, and investors of that period were selected for prosecution focus. Two investigators shared the task of interviewing 'technical' witnesses (solicitors, bankers, etc.) and 'investor' witnesses.

The death of Mr. Cameron's partner in 1984 affected the preparation of charges, and it was in March 1984 that the Cameron brief was sent to the legal division. Clerical support at that time in the CAC was allegedly poor, and lack of typing/photocopying facilities seemed to be a contributing factor in the nearly two year investigation period. In 1984 the legal division were in-house lawyers with the CAC. They were seemingly understaffed, and notwithstanding complaints from one of the investigators, the case joined a backlog and was referred to a solicitor in 1985.

The indictment was laid late in 1985, when further evidence had been obtained in relation to two charges recommended for prosecution by the legal division. The committal was to be heard in March 1986, but there were three or four 'mentions' with six week intervals, as Mr. Cameron required more time. The committal eventuated in October 1986. It lasted for two weeks and Mr. Cameron was not represented. The transcripts were available in June 1987, and the date for the hearing set for February 1988. In October 1987, Mr. Cameron filed a 'no bill application' and a 'stay of proceedings application', due to abuse of process following the Cambridge Credit case.[1] This was refused late November, and the trial commenced in February. Thus, it was some three years (from the collapse to the filing of the indictment) before the prosecution was ready to proceed, and a further eight months before the defence was ready and the committal proceedings could be held. Of the first four years of 'delay', therefore, only a few months (late 1985 to March 1986) could be said to be attributable to delays in the court system. Waiting for transcripts and a trial date added a further eight months a piece to this delay. Thus, of the six year delay between liquidation and sentence, less than two could be attributed to court delays, and the remainder was due to delays in the preparation of the case, or to the actions of the defendants.

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[1]More accurately, *Whitbread v. Cooke* and *Purcell v. Cooke*. In this case, a receiver was appointed in 1974, and in 1975 the Attorney General appointed a CAC inspector to investigate the matter. The final report was delivered in 1980, charges were laid in 1985 and the hearing began in 1986. Owing to the unreasonable delay, the defendants were successful in staying the proceedings.

Whilst in the gathering of evidence the CAC appeared to be very thorough and careful in Cameron's case, it represents a much more 'gentle' approach than that which was employed in the investigation of the ICTAA. Here, two investigators from the CAC conducted a joint investigation with a detective from the Fraud Squad. The receiver was appointed to ICTAA in July 1984, and reported to the CAC that something was amiss in August 1984. Two weeks later, 5 September 1984, the two male accused were arrested for conspiring to cheat and defraud. The female defendant was arrested in the December of that year, when the fraudulent misappropriation charge was laid. The first date for the committal was set for August 1985, and a four week hearing was intended. At that time, however, bomb scares in the court resulted in only a three week hearing, and the case was delayed until October 1986. After this committal, eighteen months elapsed before the hearing in the District Court, in May 1988. Thus, the majority of the delay in this case (over three years) was due to delays in the court system, compared with only about six months in case preparation time.

This approach, therefore, from an investigation point of view, was much more rapid and prosecutorial in nature. Arguably, a combination of public servants and police officers, with different skills and powers, more effectively investigates cases and can speed up the process. For example, under section 12(3) of the *Companies (NSW) Code*, an investigator of the CAC can serve a notice to produce documents, and under section 12(6) take possession of books delivered to him or her. There is provision, under section 13(1), for entering and searching premises where there are 'reasonable grounds' to believe documents requested under section 12 are held; a warrant may be issued to a CAC investigator by a magistrate, although a member of the police force is required to be present. However, this search warrant is pursuant to section 12, and in this sense is not as effective if there is a possibility of documents being destroyed. A detective from the Fraud Squad, by comparison, can arrive with a search warrant, look for documents personally and in this way seek to minimise alleged destruction of documents. In the investigation of ICTAA a detective did search brokers' premises unannounced in this way, and also initiated the police listening device (see Chapter 4) which produced the tape which was not admitted in evidence against Mr. Smithson.

In a community which seems to be demanding that 'white-collar offenders' be brought to justice[2], a close working relationship between the Fraud Squad and the CAC is, at one level, effective. The monitoring and accounting skills of the CAC investigators can identify likely offences, and the powers of the Fraud Squad facilitate the gathering of evidence to substantiate those offences. At the same time, however, certain civil libertarian issues need to be considered. Only two weeks after the receiver's complaints to the CAC were made, Mr. Smithson and Mr. Maxwell were arrested and relinquished their passports. Whilst they secured bail, the charges at that stage had not been fully evidenced. Proceeding quickly without the benefit of a full and thorough investigation may carry with it some risk for the defendant, and yet if, as in Cameron's case, the process is one of summons following investigation, a defendant may experience great delay.

This raises an important question for law enforcement. Would an enhancement of CAC resources[3] be sufficient to ensure that alleged offenders are brought to justice within reasonable time periods? Or, alternatively, is the CAC framework and its powers so inadequate for this task that it needs to be linked with other enforcement bodies such as the police?

Since it seems that in practice the CAC are conducting investigations with the Fraud Squad for major cases, research and understanding into the implications and effectiveness of this practice is required.

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[2]See Grabosky, P.N., Braithwaite, J.B. and Wilson, P.R., (1987), 'The Myth of Community Tolerance Toward White-Collar Crime', Australian and New Zealand Journal of Criminology, Vol. 20, pp. 33-44.

[3]For example, clerical support, word-processing facilities, number of investigators, staff morale.

Length of prosecution

Since company fraud cases are often characterised by their complexity, it is not surprising that fraud trials are slow and lengthy. Most criminal prosecutions deal with one or two major incidents, and proof for the Crown is in the form of oral evidence as to events seen or heard. In cases such as Cameron and ICTAA, however, the Crown attempts to follow a series of transactions taking place over a period of years, in which many people are involved and which are evidenced at different stages by numerous documents. Schedules need to be prepared, documents have to be traced and witnesses' statements collected. The paperwork is considerable, and since there is no pre-trial means of compelling defendants to indicate the accuracy or inaccuracy of schedules, originals which are the source documents of the schedules have to be available in the court room in their entirety.

It would, in some respects, seem desirable to have greater pre-trial cooperation in corporate cases. In civil matters, 'pre-trial conferences' find 'common ground' between the parties to avoid complicated evidence where possible. In criminal cases it is equally possible that agreement be reached on aspects of evidence, before trial. For example, copies of advertisements, standard letters, undisputed bank documents, purchase and sales statements - these could be accepted without insisting on original insertions and affidavits. Achieving 'common ground', schedules agreeable to both sides can be admitted. Where, however, there is an irreconcilable version of evidence offered by defence and prosecution, it is inevitable and appropriate that court time will be used. Both sides are more likely to concede difficult points before a Judge in a court room, than in a pre-trial format which does not have any binding authority.

In suggesting greater pre-trial cooperation, an important question of funding is raised. For defendants employing their own Counsel, days saved in court time legitimates pre-trial expense in this respect. All the defendants in this report relied upon legal aid, however, and the situation is then more complicated. The Legal Aid Commission 'consult' with Counsel on the amount of days required to prepare for a case, depending on the size of the matter and the paperwork involved. Prosecution estimates the length of the case, and this dictates defence preparation time. So, for example, Mr. Maxwell's barrister was aware that the estimated duration of his client's trial was eight to ten weeks. As there were 5,000 pages of exhibits to be examined, the Legal Aid Commission granted five working days preparation. The CAC delivered another 5,000 pages of exhibits, and Counsel was granted an extra three days preparation for his client. It then became apparent that the trial of Ho and Szeto had a bearing on the case, and the transcripts of this seven week trial secured a further two days funding for preparation. This totalled ten days preparation, the maximum available, for a trial which actually lasted fifteen weeks. This limited amount of preparation time, coupled with the Legal Aid rate of payment, is arguably a strong disincentive for Counsel to accept lengthy corporate cases. Consideration could be given to increasing the amount of preparation time allocated to a case and introducing a pre-trial conference along the lines of those in civil matters. Further research would be needed, however, to quantify the potential benefits of such innovations.

An alternative strategy employed in Queensland to reduce court delay is a more effective system of 'call-overs'. Here, before an anticipated trial, a Supreme Court Judge hears both sides define the issues involved and the proofs required, and a realistic court date is determined. By contrast, for example, Mr. Smithson when representing himself in the ICTAA case was under no obligation to state any of his argument until the trial began. A defendant representing himself or herself will always lengthen proceedings, but at no time was it required of the prosecution and Mr. Smithson to determine the points in issue at the trial. The defence need not reveal their argument fully, but establishing common definitions and relevancy could be useful in terms of saving court time. Formalised in open court with a Supreme Court Judge, the listing system might improve in the accuracy of predicting the likely duration of cases.

Also relevant to a discussion of the length of prosecution is some consideration of the rules of evidence, particularly as they relate to the admissibility of documents in fraud trials. Any mention of the law of evidence involves a balance of considerations between prosecution and defence. Claimed frustrations for the prosecution relate to the strictness of outdated rules, sometimes the actual impossibilities of 'strict proof', combining to impede a 'successful outcome'. The fear for the defence is fabricated evidence. Any relaxation of the rules of evidence would apply to both sides, and for some this raises the possibility of documents being 'created' after the accused is charged. It is a complex area, and certainly any inroads should be made with caution. Using ICTAA as an illustration, however, there are aspects of the *Evidence Act 1898* which could be reformed to improve cost effectiveness, without adversely affecting the rights of the individual.

Part IIC of the *Evidence Act (NSW)* deals with admissibility of documents in criminal and civil cases. By section 14CE(1):

> Where in a legal proceeding evidence of a fact is admissible, a statement in a document of the fact is admissible as evidence of the fact if the requirements of sub-sections (4), (5) and (6) are satisfied.

These sub-sections insist that the statement must be in a document which forms part of 'a record of business'; the statement must have been made in the course of or for the purposes of the business; and finally must have been made by a 'qualified' person. That is, a person associated with the business provided he had, or may be reasonably supposed to have had, personal knowledge of the facts stated. 'Business records', of necessity, has been interpreted more broadly recently, and may include, for example, a bank's ledger cards, a company's books of account, invoices received, etc.

In criminal proceedings, if the statement is made by a person, reproduced or is derived from information in a statement made by a person, the statement is then not admissible unless each person concerned is called as a witness if the opposing party so requires. Similarly, if the potential witness is dead, or unfit to attend, or outside the State, or it is not reasonably practicable to secure attendance, or is unidentifiable, or cannot be expected to have any recollection of the matters in the statement; or, having regard to all the circumstances, undue delay or expense would be caused by calling the person (section 14CG), the statements will be inadmissible.

The number of documents involved in the Cameron case and the ICTAA case was considerable. From the above section of the *Evidence Act*, the defence may require authors of statements to be called as witnesses. The accused's rights of cross-examination should be preserved, and yet cases of such magnitude involve potential witnesses interstate and overseas, who may not have the time to travel and give evidence. This was one of the problems confronting the Roskill Committee.[4] The *Criminal Justice Act, 1987*, was enacted in England and Wales to redress this and other difficulties in evidence. In relation to witnesses across the country, evidence can be taken live by video, linked between the court room and the witness' residence. This preserves the defendant's rights of cross-examination and the benefit of the evidence for the prosecution. In the ICTAA case, by illustration, it would have been a fair and possibly cost-effective way of hearing the overseas director's evidence.

A detailed study of the rules of evidence in relation to corporate crime is not within the scope of this report, but there is clearly scope for review. The costs for the prosecution in relation to witnesses for the ICTAA case amounted to approximately $20,000 alone. If the community wants a less expensive, more expedient and fair investigation and prosecution of corporate offences, the rules of evidence may need to be reviewed to deal with the alleged criminal conduct.

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[4]Lord Roskill, (1986), 'Fraud Trials Committee Report', London, HMSO, 1.

Judge and jury

There is much debate about whether jurors are able, or should be asked, to be the judges of fact in fraud cases. As with any other criminal trial, 12 jurors are required in fraud trials and since the *Jury (Amendment) Act, 1987*, the Crown and each accused are allowed only three peremptory challenges without restriction. This limitation to 'random selection' seems to echo the views of the Roskill Report, where the Committee suggested:

> We have considerable sympathy with the exercise of the right of peremptory challenge in pursuit of an aim of securing a better racial and sexual balance in a jury. We have no sympathy with its exercise where that exercise is, as the evidence suggests is too often the case, largely tactical. (para. 7, p. 29)

The Cameron trial was before the introduction of these amendments, and more than three challenges were made by both sides. Both Counsel were apparently keen to eliminate older, retired jurors. The defence may have anticipated pensioner sympathy for the investors, and the prosecution probably feared a lack of 'business expertise'. In the ICTAA case, two panels were selected. The first jury panel was discharged after one day, because an individual asked to be excused when his employer knew of the length of the trial. When the second jury was empanelled defence Counsel suggested that with only three peremptory challenges, there is 'virtually no control over the jury'.

Where fraud trials fundamentally judge 'honesty', it is important that juries represent the public, and a cross-section of the community. The more closely the jury is to being chosen 'at random', then the more often, on average, they will reflect a broader cross section of the community. Ideally too, jury presence should also ensure a comprehensible exposition of the case. It may be argued that where jurors 'do not understand' a particular argument, it is not because they are unable to do so, but rather, because it is not being explained adequately. There are ways of making fraud trials more accessible and compelling, for example, by the use of audio-visual aids and glossaries, and clearer explanations. In the ICTAA case, the use of an overhead projector by the Crown and the provision of clear summaries seemed to engage the jury's attention more than mere words.

Where the complexity of a trial is due to a large number of accused and multiple charges, the Judge is able to assist jury comprehension by instructing the jury separately in respect of each charge. Ford J. in the ICTAA case asked the jury to consider its verdict in relation to each count on the indictment, independently of the others. By arranging the summing up in this way, the Judge seemed to facilitate jury understanding and enable absorption of the various counts of the indictment.

In conclusion, there is very little evidence in the present study to suggest that juries do not have an adequate grasp of the material on which their verdicts are based. In the Cameron and ICTAA cases, the jury response indicated that there was a conscientious attempt by the jury to understand the complexities of the case. Notes passed to the Judge asking key areas to be cleared up, suggested jury attentiveness. In the Cameron case, for example, amidst all the documentation, the jury asked for clarification from Mr. Cameron on:

> Why didn't you sell properties in November 1981, when advised by the accountant and prices were still high?

Identification of such points, with a public rather than technical dimension, is arguably crucial to the criminal justice system where individuals risk imprisonment for lengthy periods of time. In the absence of conflicting research which demonstrates lack of comprehension by the jury, the present study suggests that erosion of the system would not appear to be justified.

Sentencing outcome

There is substantial evidence to suggest that community attitude towards corporate crime is one of intolerance. In an article summarising the international research in this area, Grabosky et al. conclude:

> The public perceives many forms of white-collar crime as more serious, and deserving of more severe punishment, than most forms of common crime... white-collar crimes which cause severe harm to persons are generally rated as more serious than all other types of crime and even some types of individual homicide.[5]

In the Australian Institute of Criminology Survey[6] of attitudes towards crime, the preferred penalty for corporate offending was monetary fine, albeit a substantial one. By contrast, respondents generally preferred sentences of imprisonment for conventional, 'street' crimes.

This raises the crucial question of what is an appropriate sentence for persons convicted of corporate crime. On the one hand, it is desirable that there is consistency in the treatment of all offenders, and for corporate offenders guilty of obtaining substantial funds this inevitably results in imprisonment. However, it is arguable whether incarceration serves any of the aims of rehabilitation, retribution and deterrence for corporate offenders, or for other offenders.

From a 'rehabilitation' perspective, as the examples in this report support, the corporate offender is often older than other offenders and opportunities for re-creating corporate schemes and positions of influence are arguably reduced on re-integration into the community. Retribution and individual deterrence may be exacted by the process of arrest and successful prosecution, and the subsequent formal and informal prohibitions of acting as a director or principal.

As Kinchington J. outlined in the sentencing of Mr. Cameron, however, 'public policy' requires a deterrent factor to all members of the business community. It is impossible to measure the 'general deterrence' value to mortgage brokers and futures traders served by the imprisonment of Mr. Cameron, Mr. Maxwell and Mr. Smithson. Presumably, some public knowledge of offence type and sentencing is required, and as the limited media reporting of cases included suggests, this has not been far-reaching. Furthermore, if contemporary research is accurate in suggesting 'unethical behaviour' to be widespread in the business community[7], it is possible that offenders will be perceived as unlucky rather than culpable.

An argument for incarceration may be in its effect of incapacitating the offender. Once more, however, it is possible that this is achieved by successful prosecution itself. Re-offending is difficult where business reputation is ruined, and where there is a prohibition placed on acting as a company director, following a conviction for a period of five years.

Although some victims were satisfied to see the offenders imprisoned, all of them suggested financial remuneration was their main concern. Some felt the imprisonment of the offenders actually compounded their existing loss, in that the costs of prosecution and imprisonment are borne by the taxpayer. Their suspicion, particularly in the ICTAA case, that the money must be somewhere has not been dealt with by the enforcement process, and they were not, therefore, satisfied with the sentencing outcome.

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[5]'The Myth of Community Tolerance Toward White-Collar Crime', (1987), Australian and New Zealand Journal of Criminology, Vol. 20, pp. 42-43.

[6]'The Myth of Community Tolerance Toward White-Collar Crime', (1987), Australian and New Zealand Journal of Criminology, Vol. 20, pp. 38-42.

[7]Silk, H.L. and Vogel, D., (1976), 'Ethics and Profits: The Crisis of Confidence in American Business'. New York: Simon & Schusher.

Examination of assets

It seems fundamental in all corporate crime cases where substantial monies have been involved, that some attempt be made to trace the movement of funds and assets after the collapse of an organisation. Surprisingly, however, Ford J. was informed in the ICTAA case at the time of sentencing that no statement of accounts had been drawn to date. In imposing sentence, therefore, the Judge did not have any knowledge of the amount of money allegedly paid out by the accused, in their sale of house and assets. And yet, as an indication of the wealth of offenders and their attempts at reimbursement, this is surely an important sentencing consideration in fraud.

It is in the interests of both accused and investors that some financial account take place during liquidation or receivership. Using the ICTAA case as an illustration, the investors remain convinced that substantial funds have been misappropriated by the offenders, and that the offenders and their families are benefiting from the conspiracy. If these suspicions can be legitimated, the victims should be entitled to financial redress.

If, alternatively, the offenders' stated financial position is accurate, then they should be given the opportunity to dispel the myths and have formal proof. Both Mr. Smithson and Mr. Maxwell report having spouses living in rented accommodation. Mr. Smithson said that he had undertaken personal guarantee for the premises of ICTAA and Tolana, and that is where his money went on bankruptcy.

The power to examine and freeze assets varies depending on the type of organisation involved. Where a company is under investigation, there are provisions in the *Companies Code* for the purpose of investigating the nature and extent of the property of individuals. A provisional liquidator, under section 541, may apply for and obtain an order of the court that a person attend before the court to be examined on oath on matters relating to the corporation concerned.

The situation is not as clear in relation to the investigation of an association. Under section 573, which relates to the powers of a receiver, there is no similar provision to section 541. In refusing permission to the receiver to examine the personal assets of Mr. Smithson and Mr. Maxwell, Waddell J. stated, *inter alia*:

> It is clear that the absence of any statutory provisions to assist a receiver appointed under section 573 in identifying and collecting the property of the person in respect of whom he has been appointed must be regarded as a deliberate omission. The legislature must have considered that the purpose of the section would be sufficiently served if a receiver appointed pursuant to it had the powers and remedies ordinarily accorded to a receiver appointed by the court for purposes such as the preservation of property with, perhaps, any modifications which might be necessary because of the express terms of the section.[8]

Waddell J. did suggest, however, alternative methods which might have been employed for the appointment of a receiver of all of the property of a relevant person:

> Such an order (s.573) should, I think, ordinarily be accompanied by an order having the effect of requiring the relevant person to file in court an affidavit listing all his property and a further order having the effect of requiring him to transfer or deliver all of it to the receiver. If the relevant person fails to comply with such orders proceedings could be taken

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[8]20/12/84, No. 4314 of 1984, p. 9.

> against him for contempt of court or, in my opinion, an order could be made under Pr.43 r.1 for him to attend before an officer of the court and be orally examined on such questions concerning or in aid of the enforcement of the order as may be specified in the order for examination... An alternative remedy..... is that the Commission might make an application for an inquiry to be held before the Master as to the identity of the assets of the defendant.[9]

In both alternatives, Waddell J. suggested that the applications should be made by the Commission. It seemed inconsistent that a receiver should institute any application of that kind in his own name, and because the remedy of appointing a receiver under section 573 may have severe effects on a defendant, it should be the responsibility of the Commission.

Finally, therefore, this raises an important emphasis on the tracing of assets, and to whom this task should be allocated. The DPP prosecute, and do not consider investigation to be their responsibility. The receiver, meanwhile, even if he or she had adequate resources, should be a neutral party. The Corporate Affairs Commission, however, have to investigate and deter alleged corporate crime. The tracing of funds after liquidation might not be necessary to establish the case in question, but it is of assistance in sentencing and is arguably of useful general deterrence value. The motivation for corporate crime is financial gain, and potential offenders need to know there is a real likelihood of funds being recovered. Investigators have the requisite skills and training, and they should be given the time and resources to draw up statements of account, although this may add considerably to the resources required by the CAC.

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[9]Ibid.

Chapter 6

CONCLUSION

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This report, in providing an analysis of two major fraud cases prosecuted during 1988 by the CAC, has allowed the identification of a number of significant issues with respect to the prosecution of corporate crime. Prosecution has been used in its broadest sense: to identify concerns of the Crown; the defence; the court process generally; and, importantly, victims who are often overlooked in discussions of corporate crime.

The focus of the report has been on directors and principals, and allegations of fraud. The report raises a number of questions about the powers and responsibilities of those involved in the detection and investigation of such offences. The two cases discussed have illustrated different approaches to investigation. It is not the purpose of this report to evaluate which strategy is the most effective. However, the different approaches used highlight the need for further analysis of the powers and resources available to agencies charged with the investigation of corporate crime, and the interrelation between such agencies to ensure effective enforcement.

In the event of prosecution, problems have been identified both for individuals and the court process. For the offenders, there is the concern that nothing is 'black and white', and in order to secure convictions on existing legal definitions the complex realities of corporate transactions are simplified. Victims, meanwhile, have recognised the importance of bringing offenders to justice, but do not consider that their losses have been addressed in the criminal justice process. For most, this situation could be improved by the successful examination of assets at the time of liquidation or receivership.

The length of time taken for these cases to come to court is clearly an issue for the criminal justice process. Arguably, pre-trial conferences and a system of meaningful 'call-overs' can assist in reducing unnecessary delay. Likewise, a review of the rules of evidence, facilitating the giving of evidence by interstate and international witnesses, could be effective in improving cost effectiveness and use of court time. While it is true that this study only examined two cases of organisational fraud, it should be remembered that these amount to two-thirds of such cases prosecuted by the CAC in one year and, between them, accounted for some twenty-three weeks of higher court time (excluding committals). While there is no evidence to suggest these trials were particularly atypical, further research is required in order to establish how common some of the problems mentioned actually are, and thus, how useful the proposed remedies might be.

BIBLIOGRAPHY

ADBY, K.J., (1979), 'White-Collar Crime: The Special Investigation as a Method of Enforcement of Company Law Use and Utility'. Report to the Criminology Research Council.

BEQUAI, A., (1978), White-Collar Crime: A Twentieth Century Crisis. Lexington, Mass.: Lexington Books.

BLACK, D.J., (1975), 'The Mobilization of Law'. Journal of Legal Studies, Vol. 2, pp. 125-149.

BOX, S., (1983), Power, Crime, and Mystification. London: Tavistock.

BRAITHWAITE, J., (1982), 'Enforced Self-Regulation: A New Strategy for Corporate Crime Control'. Michigan Law Review, Vol. 80, pp. 1466-1507.

BRAITHWAITE, J., (1984), Corporate Crime in the Pharmaceutical Industry. London: Routledge & Kegan Paul.

BRAITHWAITE, J., (1985a), 'Corporate Crime Research: Why Two Interviewers are Needed'. Sociology, Vol. 19(1), pp. 136-138.

BRAITHWAITE, J., (1985b), To Punish or Persuade. Albany, NY: State University of New York Press.

CAIN, M., (1975), 'Rich Man's or Poor Man's Law'. British Journal of Law and Society, Vol. 2, pp. 61-62.

CHIBNALL, S. and SAUNDERS, P., (1972), 'Worlds Apart: Notes on the Social Reality of Corruption'. British Journal of Sociology, Vol. 28, pp. 138-153.

CLINARD, M. and YEAGER, P., (1980), Corporate Crime. New York: Free Press.

CLINARD, M., YEAGER, P., BRISSETTE, J., PETRASHEK, D. and HARRIES, E., (1979), Illegal Corporate Behaviour. Washington, DC: Department of Justice.

COLEMAN, J.W., (1987), 'Toward an Integrated Theory of White-Collar Crime'. American Journal of Sociology, Vol. 93, pp. 406-439.

DENZIN, N.K., (1970), The Research Act in Sociology - A Theoretical Introduction to Sociological Methods. London: Butterworths.

DOUGLAS, J.D. and JOHNSON, J.M., (eds.), (1977), Official Deviance. Philadelphia: Leppincott.

EDELHERTZ, M. and ROGOVIN, C., (eds.), (1980), A National Strategy for Containing White-Collar Crime. Toronto: Lexington Books.

ERMANN, D.M. and LEINDMAN, R.J., (eds.), (1982), Corporate and Governmental Deviance. Oxford: Oxford University Press.

FEUER, M., (1974), Personal Liabilities of Corporate Officers and Directors. Englewood Cliffs: Prentice Hall.

FINDLAY, M. and DUFF, P. (eds.), (1988), The Jury Under Attack. Sydney: Butterworths.

FISSE, B. and BRAITHWAITE, J., (1983), The Impact of Publicity on Corporate Offenders. Albany, NY: State University of New York Press.

FRAUD TRIALS COMMITTEE, (1986a), Report. London: HMSO.

FRAUD TRIALS COMMITTEE, (1986b), Improving the Presentation of Information to Juries in Fraud Trials: A Report of Four Research Studies. London: HMSO.

FREIBERG, A., (1987), 'Abuse of the Corporate Form: Reflections from the Bottom of the Harbour'. University of NSW Law Journal, Vol. 10(2), p. 67.

GEIS, G., (1984), 'White-Collar and Corporate Crime'. In R. Meier, (ed.), Major Forms of Crime. California: Sage.

GRABOSKY, P.N. and BRAITHWAITE, J.B., (1986), 'Corporate Crime and Government Response in Australia'. In D. Chappell and P. Wilson, (eds.), The Australian Criminal Justice System, The Mid 1980s. Sydney: Butterworths.

GRABOSKY, P.N., BRAITHWAITE, J.B. and WILSON, P.R., (1987), 'The Myth of Community Tolerance Toward White-Collar Crime'. Australian and New Zealand Journal of Criminology, Vol. 20, pp. 33-44.

GRABOSKY, P. and BRAITHWAITE, J., (1986), Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies. Melbourne: Oxford University Press.

HAGAN, J. and PARKER, P., (1985), 'White-Collar Crime and Punishment: The Class Structure and Legal Sanctioning of Securities Violations'. American Journal of Sociology, Vol. 50, pp. 302-316

HALL, T., (1979), White-Collar Crime in Australia. Sydney: Taylor Type Publications.

HOPKINS, A., (1977), A Working Paper on White-Collar Crime in Australia. Canberra: Australian Institute of Criminology.

JONES, K. and CASSIDY, B., (1986), Review of B. Fisse and J. Braithwaite, 'The Impact of Publicity on Corporate Offenders'. International Journal of the Sociology of Law, Vol. 14(1), pp. 77-87.

LEIGH, L.H., (1982), The Control of Commercial Fraud. London: Heinemann Educational Books Ltd.

LEIGH, L.H., (ed.), (1982), Economic Crime in Europe. London: Macmillan.

LEVI, M., (1981), The Phantom Capitalists: The Organisation and Control of Long-Firm Fraud. Aldershot: Gower.

LEVI, M., (1987), Regulating Fraud - White-Collar Crime and the Criminal Process. London: Tavistock Publications.

NSW LAW REFORM COMMISSION, (1986a), 'The Jury in a Criminal Trial'. (Report No. 48).

NSW LAW REFORM COMMISSION, (1986b), 'The Jury in a Criminal Trial: Empirical Studies'. (Research Report No. 1).

PURVES, R.N., (1979), Corporate Crime: A Consideration of Crime, Corporations and Commercial Morality in Australia. Sydney: Butterworths.

REIMAN, R., (1984), The Rich Get Richer and the Poor Get Prison. 2nd edition, London: Wiley.

RENFREW, C., (1977), 'The Paper Label Sentences: An Evaluation'. Yale Law Journal, Vol. 86, pp. 590-618.

ROSKILL, Lord, (1986), 'Fraud Trials Committee Report'. London, HMSO, 1.

SHAPIRO, S., (1983), Wayward Capitalists. New Haven: Yale University Press.

SILK, H.L. and VOGEL, D., (1976), Ethics and Profits: The Crisis of Confidence in American Business. New York: Simon & Schusher.

SIMON, D.R. and EITZEN, S.D., (1982), Elite Deviance. Boston: Allyn & Bacon.

SUTHERLAND, E.H., (1949), White-Collar Crime. New York: Holt, Rinehart & Winston.

SUTTON, A.J., (1978), Company Investigations 1975 - 1977. Sydney: NSW Bureau of Crime Statistics.

SUTTON, A.J., (1985), 'Small Business: White Collar Villains or Victims?' International Journal of the Sociology of Law, Vol. 13, pp. 247-257.

SUTTON, A.J., (1983), Company Crime in NSW - A Sociological Perspective. University of NSW, Thesis.

SYKES, T., (1988), Two Centuries of Panic: A History of Corporate Collapses in Australia. Sydney: Allen & Unwin.

ZERVOS, K., (1988), 'Prosecution of Fraud on Government'. Australian Institute of Criminology seminar.

TABLE OF CASES

Hedley Byrne v. Heller *(1964) A. C. 465.*

Bolton (H.L.) (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd. *(1956) 1 All E.R. 799.*

Henshall (John) (Quarries) v. Harvey *(1965) 1 All E.R. 725.*

Nicholson v. Permakraft (N.Z.) Ltd. (in liq) *(1985) 3 A.C.L.C., p. 453.*

R. v. I.C.R. Haulage Ltd. *(1944) 1 All E.R. 691.*

Re City Equitable Fire Insurance Co. Ltd. *(1925) Ch. 407.*

Re London and Globe Finance Corp. Ltd. *(1903) 1 Ch. 728.*

Tesco Supermarkets v. Natrass (1972) *A.C. 153.*

TABLE OF STATUTES

Companies (Acquisition of Shares) (N.S.W.) Code; 1980.

Companies (Acquisition of Shares) (N.S.W.) Regulations.

Companies (NSW) Code, 1981.

Companies (NSW) Regulations.

Criminal Justice Act (England & Wales) 1987.

Evidence Act 1898, No. 11.

Formal Agreement (Schedule to National Companies and Securities Commission Act) 1978;

- First Amending Agreement, 1981.
- Second Amending Agreement, 1983.
- Third Amending Agreement, 1986.

Futures Industry (NSW) Code, 1986.

Futures Industry Regulations.

Jury (Amendment) Act, 1987.

National Companies & Securities Commission, ACT, 1979.

National Companies & Securities Commission, Regulations.

NSW Corporate Affairs Commission Act, 1981.

Securities Industry (NSW), Code, 1980.

Securities Industry (NSW), Regulations.