THE INVESTIGATION AND PROSECUTION OF FRAUD ON THE COMMONWEALTH: A PROSECUTION PERSPECTIVE

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I. INTRODUCTION

Fraud prosecutions occupy a significant proportion of the work of the Commonwealth Director of Public Prosecutions (hereafter "DPP").[1] The enormous amounts of money to which the Commonwealth Government is entitled by way of taxation and other financial imposts as well as those which it is obliged to pay by way of benefits, subsidies and other entitlements make it an attractive target for fraud.[2]

Depending upon the circumstances of its commission, an instance of fraud on the Commonwealth may be dealt with, in a number of ways: Firstly, as an offence under the Crimes Act 1914 (Cth) (hereafter "the Crimes Act") or

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1 The term "Fraud" is used generally to cover a variety of offences usually requiring a dishonest act or omission and actual or potential detriment to the Commonwealth.

2 Taxes, fees and fines etc received by the Commonwealth in 1988-1989 totalled $148,121 million whilst personal benefit payments to residents and subsidies total $33,420 million, *Australian National Accounts Summary Tables*, 1988-1989, AGPS.

secondly, as an offence specifically referable to a particular Department's area of interest or thirdly, by way of administrative penalty or arrangement.

The Crimes Act contains a number of offence provisions aimed at what might generally be described as fraudulent conduct directed at the Commonwealth. Prosecutions are regularly brought under the following provisions of the Crimes Act:

- False pretences (s.29A)
- Imposition (s.29B)
- Fraud (s.29D)
- Forgery and related offences (ss 65-69)
- Stealing or receiving (s.71)
- Falsification of books and records (s.72)
- Bribery (ss 73, 73A)
- Conspiracy to defraud (s.86(1)(e) or s.86A)

These offences carry penalties ranging from 2 years imprisonment (imposition under s.29B) to 20 years imprisonment and/or a fine of $200,000 (conspiracy to defraud under s.86A). Section 86A was enacted in 1984 when it became obvious that the three year penalty for conspiracy to defraud was inadequate in the light of the massive amounts defrauded through "Bottom of the harbour" tax schemes.[3] Offences of "money laundering" and "organised fraud" have been created under the Proceeds of Crime Act 1987 (Cth) (hereafter the "POC Act").[4]

Apart from the Crimes Act, a number of Commonwealth Acts include offence provisions specifically related to conduct associated with the carrying out of a particular legislative purpose. For example, offence provisions have been created by legislation relating to Social Security, Taxation, Customs, Health Insurance, Postal Services and Telecommunications. Whilst a number of the offences created under such legislation are based on conduct that would generally be regarded as fraudulent, they carry lesser penalties than do comparable offences under the Crimes Act. For example, many of the offences established by the Taxation Administration Act 1983 (Cth), whilst requiring evidence of deliberate dishonesty, provide monetary penalties only for a first offence. (Conviction for certain subsequent offences will render an offender liable to a penalty of imprisonment).

The offences created by the Crimes Act provisions mentioned above, being general offences, will usually encompass the type of conduct proscribed by the narrower offence provisions contained in specific purpose legislation such as

3 For example in *R. v. Beames*, Supreme Court of Victoria, unreported, 23 September 1985, Fullagar J. in reference to the penalty under s.86(1)(e) of the Crimes Act, said at 88: "I think the scale [of fraud] was of an order undreamt of by those who seventy years ago fixed a maximum penalty ... of 3 years imprisonment."

4 For a critique of these provision see M. Weinberg Q.C. "The Proceeds of Crime Act 1987 - New Despotism or Measured Response" (1989) 15 *Monash University L Rev* 201.

the Social Security Act 1947 (Cth). Consequently fraud on the Social Security system may be prosecuted under the Crimes Act or as one of the offences created by section 139 of the Social Security Act. In practice, an organised scheme to defraud the Social Security system will be investigated by the Australian Federal Police (hereafter "AFP") and its participants prosecuted under the Crimes Act whilst cases regarded less seriously (such as continuing to receive a Social Security benefit after entitlement has ceased) will be dealt with as an offence under the Social Security Act.[5] In other words, prosecution of fraud as an offence under the Crimes Act is generally reserved for the more serious cases.[6]

Administrative penalties are regularly imposed in respect of suspected fraudulent conduct as an alternative to prosecution. For example, administrative penalties are a feature of the way in which the tax legislation is enforced by the Australian Taxation Office (hereafter "ATO"). Their use can be a realistic and appropriate response to the relatively minor but numerically large instances of evasion by individual tax-payers.[7] As Mr Frank Vincent Q.C. (now Mr Justice Vincent of the Victorian Supreme Court) said in the context of an inquiry into the law enforcement practices of Telecom:

> Although it is relatively easy to state that all crime should be prosecuted and all persons detected should be brought before the courts, in fact this has never happened and a very strong argument can be made that indeed it should never happen. I regard the operation of the criminal justice system as being merely one of the devices available to our society to control socially undesirable behaviour. It is clearly not the only device.[8]

II. ACHIEVING CONSISTENCY IN THE INVESTIGATION AND PROSECUTION OF FRAUD

One important objective of an effective prosecution service is the maintenance of a consistent approach to the prosecution of criminal conduct of a similar nature. The 1981 report of the U.K. Royal Commission on Criminal Procedure expressed this objective by posing the question:

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5 Guidelines between the AFP and Department of Social Security provide in effect for serious cases of suspected Social Security fraud to be referred to the AFP for investigation.

6 See paragraphs 2.22 and 2.23 *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (1990).

7 For example, in 1985 there were 74000 instances of undeclared dividend and interest and other income (including false spouse rebates); see Income Tax Ruling 2246 at paragraph 6.24.

8 F. Vincent, *Review of Matters Affecting the Australian Telecommunications Commission: Report to the Special Minister of State* (1984), AGPS, and see paragraph 2.12 *Prosecution Policy of the Commonwealth.*

> Is the system fair... in that it does not display arbitrary and inexplicable differences in the way that individual cases or classes of cases are treated locally or nationally?[9]

The DPP strives to achieve a uniform approach to the decision to prosecute in those cases referred to it by various Commonwealth Investigative agencies. The DPP seeks consistency in its decisions by applying the criteria contained in the Prosecution Policy of the Commonwealth as well as internal guide-lines and directions. DPP lawyers advise during the course of fraud investigations and have in the past been part of task forces established to investigate suspected organized frauds. However, the DPP does not itself investigate. It is dependent upon investigative agencies referring to it briefs of evidence for consideration as to prosecution. A fair system of law enforcement requires a uniformity of approach to both the investigation and prosecution of suspected crime.

Ideally, where it is suspected that the Commonwealth has been defrauded of a significant amount of money, the matter should be investigated with a view to criminal prosecution. That should be so irrespective of which Commonwealth Department is the "victim" of the fraud. However, it has to be conceded that in practice a person who is suspected of defrauding the Commonwealth may be dealt with differently depending upon which Department has been defrauded and what alternative remedies are available to that Department. The following comments of Arie Freiberg are relevant in this context:

> ...a factor influencing the nature of enforcement is the availability of alternative methods short of prosecution. Revenue agencies have always been armed with a plethora of techniques including negotiation and compounding of penalties, seizure of goods, cautions, citations and penalty notices. An agency pressed for resources will seek those enforcement techniques which are the most resource efficient and which will produce the best short term political results for the least investment. Criminal prosecutions rarely meet these criteria.[10]

The report of the *Review of Systems for Dealing with Fraud on the Commonwealth*,[11] (hereafter "the Fraud Review Report") recognised that large scale fraud should be investigated by the AFP but that otherwise agencies should accept responsibility for investigating routine instances of Fraud against them, (Recommendations 1 and 2, para 3.2.12).

The AFP has statutory responsibility for the provision of police services in relation to the laws of the Commonwealth.[12] In practice, the AFP has primary responsibility for investigating suspected Crimes Act offences. In addition, a number of Commonwealth departments maintain their own investigative units. These include The Australian Customs Service, ATO, Australia Post, Telecom and the Department of Social Security. The legislation governing the

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9 Note 6, *supra*, 1.4.

10 A. Freiberg, "Enforcement Discretion and Taxation Offences" (1986) 3 *Australian Tax Forum* 55 at 68.

11 1987, AGPS.

12 See s.8 Australian Federal Police Act 1979 (Cth).

operations of these departments contain a regime of offences many of which are unique to the department's area of concern. For example, the investigation of offences under the Taxation Administration Act is undertaken by investigators within the ATO. Additionally, agencies such as the Health Insurance Commission and the Trade Practises Commission maintain investigation units which have the primary responsibility for investigating offences under the legislation governing those agencies. The development of a variety of discrete Commonwealth investigate units has the potential to impede the establishment of a uniform and consistent approach to Commonwealth Criminal law enforcement.

It is not unnatural for the investigative unit attached to a Commonwealth Department to see its role as primarily one of ensuring the enforcement of the citizen's obligations under the legislation administered by the Department.

This limited investigational focus was noted by Freiberg when he expressed the view:

> If the primary agency responsible for law enforcement is the Police Force it is more likely that criminal prosecutions will follow than if a regulatory agency is involved. The major difference between the Police Force and regulatory agencies is that the latter do not see their task as "catching criminals" but as containing deviants. They do not seek to prosecute and stigmatise their subjects but rather to obtain compliance through negotiation. Most crucially, for non police bodies, the criminal law is regarded as a last resort.[13]

The Fraud Review Report noted "...for practical reasons, certain conduct which may be criminal - in this case fraud - need not be investigated by police and need not be dealt with by criminal proceedings."[14]

The Fraud Review Report also noted that police are rarely involved in tax or customs investigations and cited two main reasons: firstly, the historical development in each area and its legislative recognition particularly in giving tax and customs investigators special powers and secondly, that the detection and investigation of tax and customs fraud may be "... inextricably woven into the assessment process ..." performed by tax or customs staff.[15]

However, the Fraud Review Report did recognise that a Department's particular regime of offences may not be appropriate where there appears to be a high degree of criminality involved.

For example, the Customs Act contains a series of offences covering conduct which involves the understatement of the value of goods for the purposes of Customs duty. These offences are enforced by proceedings for the recovery of a pecuniary penalty only. An importer who commits a fraud on Customs by, for example, presenting false invoices to evade Customs duty will be liable to proceedings for the recovery of a pecuniary penalty. However, the importer

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13 Note 10 *supra*.

14 Note 11 *supra*, paragraph 3.2.5.

15 *Id.*, paragraph 3.2.4.

may also commit an offence against one of the fraud provisions of the Crimes Act and be liable to be dealt with under that Act.

The Fraud Review Report noted:

> While it is acknowledged that remedies which are traditional in the Customs area (civil proceedings resulting in pecuniary penalties and possibly forfeiture and condemnation of goods) can be effective deterrents to fraudulent activity, the Report notes the very different and arguably more salutary consequence which may follow a prosecution for tax fraud of identical scale - ie imprisonment.[16]

Since the report was compiled most evasions of customs duty have continued to be dealt with under the Customs Act but a number of cases, where the degree of criminality involved has been high have been dealt with as fraud prosecutions under the Crimes Act.

Ultimately, then, the various Commonwealth agencies potentially subject to large scale fraud are themselves responsible for bringing suspected fraudulent conduct to the attention of the AFP or DPP.

The AFP has settled guidelines with a number of Commonwealth Agencies aimed at ensuring that the more serious cases of suspected fraud are referred for AFP investigation whilst the more routine matters remain to be dealt with by the Agency's investigators.

The DPP has an oversighting role in relation to all prosecutions of offences against Commonwealth laws and may give directions or furnish guide-lines to investigators.[17] No guidelines have been given and the DPP has preferred to regularly meet at regional and head office levels with agencies to monitor prosecution work. The DPP maintains statistics of prosecutions it conducts. Some Commonwealth agencies themselves prosecute the more routine summary offences. For example in the 1986-1987 financial year ATO officers prosecuted 1569 defendants for taxation offences (excluding prosecutions for non-lodgment of income tax and sales tax returns).

In the same year 288 cases were referred by ATO to DPP for prosecution; the largest category being appeals from decisions of magistrates. Apart from the investigation and prosecution of a number of promoters of allegedly fraudulent sales tax schemes there have been few referrals by the ATO to the AFP of large or complex suspected tax frauds. The 1987-1988 financial year is the last year for which the ATO made details of tax prosecutions publicly available. No details of prosecutions handled by ATO were included in its 1988-89 Annual Report.

The Commonwealth has recently acquired responsibility for the regulation of Companies and Securities. Consequently, the DPP has become responsible for the prosecution of a range of offences relating to Companies and Securities. A number of the more serious of such offences require proof of a fraudulent intent. In prosecuting Companies and Securities offences the DPP can expect to

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16 *Id.*, paragraph 1.1.12.

17 See s.11 Director of Public Prosecutions Act 1983 (Cth).

encounter a number of the problems referred to later in this article in the context of revenue prosecutions.[18]

The remainder of this article canvasses issues mainly relevant to the larger scale fraud investigations and prosecutions. In the Commonwealth sphere, the initial catalyst for these issues was the so called "bottom of the harbour" investigations and prosecutions.[19] In recent years, similar issues have arisen in the prosecution of alleged sales tax fraud and customs fraud.

III. THE PROOF OF FRAUD

The proof of an intent to defraud is an essential element of the offences created under the Crimes Act by s.29D (defraud) and s.86A (conspiracy to defraud).

In the Victorian case of *Steven v. Abrahams*,[20] Hodges J. defined an intent to defraud the revenue as an intent "to get out of the revenue something which was already in it, or to prevent something from getting into the revenue which the revenue was entitled to get". This passage was cited with approval by Jackson J. in *Parker* v. *Churchill*.[21] The meaning of defraud was amplified by Viscount Dilhorne in *Scott v. The Metropolitan Police Commissioner*[22] when he said:

> To defraud ordinarily means in my opinion to deprive a person dishonestly of something which is his or something to which he is or would be or might, but for the perpetration of the fraud be entitled.

Most of those allegedly involved in large scale fraud on the Commonwealth have been prosecuted under s.86(1)(e) of the Crimes Act. That section provided: "a person who conspires with another person ... to defraud the Commonwealth shall be guilty of an indictable offence." The penalty was three years imprisonment. The offence is a statutory form of the common law offence of conspiracy to defraud. In *R. v. Landy* it was said:

> [w]hat the prosecution had to prove was a conspiracy to defraud, which is an agreement dishonestly to do something which will or may cause loss or prejudice to another.[23]

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18 For an overview of the issues involved in this area, see Mark Weinberg Q.C., "The Prosecution of Corporate Crime", Paper presented by the Continuing Legal Education Department of the College of Law, 23 February 1991.

19 For a comprehensive review of these matters see A. Freiberg, "Ripples from the Bottom of the Harbour: Some Social Ramifications of Taxation Fraud" [1988] *Crim LJ* 136. Details of the results of "Bottom of the Harbour" prosecutions appear in Chapter 4 of the *Annual Report of the DPP 1988/89*, AGPS.

20 (1902) 27 VLR 753.

21 (1986) 17 ALR 442.

22 [1975] AC 819.

23 [1981] 1 WLR 355, 365.

Whether the accused acted dishonestly is a question for the jury. The English Court of Appeal in *R. v. Feely* said:

> In their own lives they have to decide what is and what is not dishonest. We can see no reason, when in a jury box, [members of a jury] should require the help of a judge to tell them what amounts to dishonesty ... it will be sufficient if the trial judge instructs the jury that the Crown must prove that the accused acted dishonestly.[24]

Leaving the jury uninstructed as to the meaning of dishonesty has been criticised in a line of Victorian cases.[25] However in *R. v. Smart*,[26] the Full Court of the Victorian Supreme Court followed *R. v. Glenister*[27] in which the New South Wales Court of Criminal Appeal said:

> It is unnecessary for [the trial judge] to go further and define dishonesty.
> It is enough if he informed the jury that in deciding whether an application was or was not dishonest they should apply the current standards of ordinary decent people.[28]

In *R. v. Ghosh*,[29] the court formulated a two stage test to determine whether a defendant had acted dishonestly: (1) whether, according to the ordinary standards of reasonable and honest people what was done was dishonest; and (2) if it was dishonest by those standards, whether the defendant himself must have realised that what he did was by those standards dishonest. The *Ghosh* formulation has been followed in a number of Australian jurisdictions.

In applying the test enunciated in *R. v. Ghosh* the jury is required to have regard to the standards that existed at the time of the alleged offence. In *R. v. Tarisznyas*, a prosecution for conspiracy to defraud the Commonwealth, Loveday J. charged the jury:

> ... in so far as the Crown is required in this case to prove fraud and so far as that requires proof ... of a dishonest action, then it is important for you to remember that the standard of honesty that you apply is the standard which was current in that era, 10, 11, 12 years ago.[30]

The vast majority of prosecutions for conspiracy to defraud the Commonwealth contrary to s.86(1)(e) of the Crimes Act have been taken against the promoters of income tax schemes. Those schemes have ranged from the blatantly fraudulent "bottom of the harbour" variety in which the taxpayer companies were stripped of any ability to pay tax and then "dumped" to those in which an untested tax scheme was applied whilst at the same time the taxpayer

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24 [1973] QB 537.

25 See G. Niemann, "Defining the Elements of Fraud", a Paper Delivered at the Third International Criminal Law Congress in Hobart, 1990 and E. Griew, "Dishonesty: The Objections to *Feely* and *Ghosh*", [1985] *Crim L Rev* 341.

26 [1983] VR 265, 294.

27 [1980] 2 NSWLR 597.

28 *Id.*, 607.

29 [1982] QB 1053.

30 Unreported, Supreme Court of New South Wales, 19 February 1990, transcript, 12.

companies were deprived of any ability to pay tax, if assessed. Prosecution of the promoters of the latter category of schemes has been criticised.[31]

In either type of case the prosecution must establish beyond reasonable doubt the accused knew that the scheme deprived the taxpayer companies of any ability to pay tax and knew that those companies would or might become liable to pay tax.

For example, in *R. v. Mackey*[32] Studdert J. charged the jury as follows:

> Now the accused has given evidence to the effect that he did not consider he was doing anything dishonest in this case. He says that he believed that the tax otherwise payable by these companies was going to be avoided ultimately by those who bought the target companies. If you accept that the Crown must fail on the first and second counts, (charges of conspiracy to defraud the Commonwealth) because the accused on your finding would not have acted dishonestly. If he genuinely believed that the tax was going to be avoided there would be no fraud here and no conspiracy.
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> Remember however that the accused does not have to prove his innocence. The Crown must prove beyond reasonable doubt that the accused acted dishonestly.
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> The Crown must persuade you beyond reasonable doubt that you should reject the accused's assertion of honest belief ... the Crown must prove beyond reasonable doubt that the accused entertained no honest belief that the tax liability in these companies was going to be avoided by some appropriate scheme.

In *R. v. English*,[33] Graham D.C.J. directed the jury in the following way:

> In order to establish its case the Crown must establish knowledge on the part of the accused that he was taking part in a scheme by which companies with current year profits and sufficient assets to meet their contingent tax liability were stripped of their assets so that, if they did have an actual tax liability, they would not have the money to pay that tax and, if the accused knew, by the ordinary standards of reasonable and honest people, that that was dishonest, then the jury is entitled to convict.
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> It seems to me, however, that the Crown must also exclude beyond reasonable doubt the possibility that the accused believed that there would be put in place a scheme which he believed would be effective to eliminate tax on the company's current year profit.

In *Mackey* and *English* the defence was essentially the same i.e. that each believed that any tax liabilities of the companies would be eliminated by another person or persons (Mackey was convicted; English acquitted). In each case the evidence demonstrated that no attempt had been made to legally eliminate the companies' profits.

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31 See M. Weinberg, "Prosecuting Tax Promoters - a New Growth Industry", paper delivered at the International Criminal Law Congress, Adelaide, 1985.

32 Unreported, Supreme Court of New South Wales, 27 July 1989.

33 Ruling, unreported, District Court of New South Wales, 5 October 1988, 12.

IV. THE SIGNIFICANCE OF LEGAL ADVICE CONCERNING SUSPECTED FRAUD

Determining whether the available evidence is sufficient to be likely to satisfy a jury as to the second aspect of the Ghosh test can be difficult in cases where the suspect claims to have acted honestly and in reliance upon legal advice. The prosecution will have to carefully consider the circumstances in which the advice was sought and the extent to which the terms of the advice relate to the arrangement under which the Commonwealth was allegedly defrauded. The full picture can be elusive. Advice may have been taken from different lawyers on various aspects of the arrangement. The advice may be said to have been received orally in part and partly in writing. Written advice may have been provided to investigators, but not the instructions on which it was said to be based.

Fraud on the Commonwealth is often committed under the guise of ostensibly legitimate commercial arrangements. Many of the incidents of a legitimate business may be present: The employment of staff, the presence of company and trustee structures; a relationship with financial institutions, accountants and legal advisors. The suspected fraudulent activity may be incidental to the carrying on of an otherwise legitimate business or such activity may be the only purpose for which an organization is established. At the outset, it is necessary for investigators to determine the context in which the suspected fraud has been carried out. Investigators may become aware that those suspected of fraud claim to have obtained legal advice in relation to the suspected fraudulent arrangement. Whether legal advice has been obtained (and if so, its nature and extent) will be fundamentally relevant to the question of fraudulent intent. The way in which advice has been given can add a further complication. For example, a practice apparently developed amongst some lawyers of providing the promoters of "tax minimisation schemes" with an "internal" opinion and a "marketing" opinion, the purpose of the latter being to help "sell" the scheme. Evidence of this practice (but not of its propriety) was admitted in the trial of *Collie and Edwards* on charges of conspiracy to defraud the Commonwealth.[34]

Differing views have been expressed as to whether a lawyer exposes himself to criminal liability by giving advice on arrangements, the implementation of which has the potential to defraud the revenue. Justice McHugh, in an ex curial context, said in relation to conspiracy to defraud:

> Once the statements or acts of the professional adviser are capable of the inference that he is assisting to effectuate a common design, he is liable to be charged if the

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34 *R. v. Collie & Edwards*, unreported, Full Court of the Supreme Court of Victoria, 6 July 1987, Young C.J., Kaye and Nathan JJ.

> design or its implementation is regarded by public enforcement officials as dishonest.[35]

In relation to aiding and abetting, McHugh J. said:

> Knowledge of a client's activities together with advice which assists in the execution of a prohibited transaction readily becomes the basis of a charge of aiding and abetting the client in a breach of the law.[36]

Roger Gyles Q.C. expressed a different view:

> The authorities establish that a lawyer has a proper professional role in advising clients as to the lawfulness or otherwise of proposed action, and in drafting documents to effect transactions regarded as lawful, the exercise of that professional function cannot, without more, amount to any purposive association or any evidence of it. The simplistic argument that says that the client would not proceed if the lawyer advised that the course of action was unlawful, and that therefore a lawyer's advice that it is not unlawful is a cause of the client's actions and thus associates the giver of advice in purpose with the client is, it is submitted, both bad in logic and in law. In short, a lawyer giving bona fide advice, and drafting documents to give effect to that advice, does not in any relevant sense cause the client to act in accordance with the advice.[37]

However, Mr Gyles concluded that counsel who gave a "marketing" and an "internal" opinion could be held to be a participant with the promoters of the scheme. Mr Gyles said:

> ... if, looking at all the circumstances, a jury came to the conclusion that it was false or misleading to promulgate the unqualified `marketing' opinion knowing it would be used as such, then they would in my view be entitled to regard the counsel concerned as a party to the activities of the promoters of the scheme.

Of the 29 defendants against whom charges had been laid at the end of Mr Gyles' term as Special Prosecutor, nine gave their occupation as accountant or company director/accountant and one as solicitor. However, each was charged on the basis of his participation in the promotion of illegal tax schemes rather than on the basis of his having tendered professional advice in relation to the schemes.

In 1985, Mr Neil Forsyth Q.C. was charged with conspiracy with five others to defraud the Commonwealth. The charge against Mr Forsyth was ordered to be heard separately from and prior to the trial of the charges against his alleged co-conspirators.

In opening the Crown case to the jury the Crown Prosecutor stated that a tax scheme in its raw form had been submitted to Mr Forsyth for his advice and "...in conference, he modified it, finetuned it, provided his advice in relation to it and, the Crown contends, helped ... promote it".[38]

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35 The Hon. Justice M. McHugh, "Jeopardy of Lawyers and Accountants in Acting on Commercial Transactions" (1989) 5 *Australian Bar Rev 1*.

36 *Id.*, 35.

37 "Criminal Liability of Professional Advisers", [1988] Bar News (Summer Ed.) 23, 26.

38 *R. v. Forsyth*, unreported, Supreme Court of Victoria, 5 February 1990, transcript, 28.

The Crown Prosecutor also said to the jury in opening that they should acquit Mr Forsyth:

> If he did no more than provide proper legal advice in relation to an activity or scheme which would be illegal if implemented...

The Crown Prosecutor said that the jury would only convict if they found beyond reasonable doubt the accused had:

> provided advice in respect of a scheme ... which if implemented would be to his knowledge illegal, with the intent or knowledge that such advice and the fact that he provided it would be used ... to promote the scheme ...[39]

Mr Justice Hampel directed the jury to acquit Mr Forsyth. In the course of his ruling on the application for a directed acquittal Hampel J. outlined Mr Forsyth's role as follows:

> A scheme which became known as NIPAG (Norfolk Island Public Art Gallery) scheme was devised by one or more members of a group of promoters who were tax accountants and who were behind MTS (Metropolitan Taxation Services Pty Ltd). It was this scheme which was submitted to Mr Forsyth for his advice. His instructions were in writing ...
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> On the basis of those instructions Mr Forsyth wrote an advice ... Having done that, he then, at the request of MTS, and because of the need for confidentiality, without giving details of the scheme, advised on two occasions, once in conference and once in a telephone conversation both to the effect that the scheme was a lawful one. Such advice was given to directors of a company who were contemplating entering it into the scheme and to a solicitor who was concerned on behalf of others who were also planning to sell their companies to be processed through the scheme.[40]

In his ruling Hampel J. referred to the advice given by Mr Forsyth to the company directors and the solicitor for the intending scheme participants only in the context of it being confirmation of the written opinion and for the purposes of his ruling, Hampel J. does not appear to have regarded the giving of that advice as having any significance additional to that which he attributed to the giving of the written opinion.[41]

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39 *Id.*, 82, 83.

40 *Id.*, Ruling, 19 February 1990, 896, 897.

41 *Id.*, cf. the view of Wilcox J. in *Forsyth v. Rodda* (1988) 37 A Crim R 50, 62. In considering a challenge to the magistrate's decision to commit, Wilcox J. accepted as correct the prosecution analysis that "... the offence would be complete, so far as Mr Forsyth is concerned if, knowing of the promoters unlawful purpose, he joined with them in effectuating that purpose - by encouraging prospective participants - even though his participation was restricted to the giving of honest legal advice; that is honest in the sense that the advice not only stated what Mr Forsyth believed to be the correct legal position, but that it stated the whole of his relevant understanding". Wilcox J. noted that there was circumstantial evidence (but no direct evidence) as to Mr Forsyth's knowledge of the promoters' second and unlawful purpose i.e. of ensuring that no assets would be available to meet a tax liability if the deduction was not obtained. His Honour concluded: "Mr Forsyth was aware of the essential features of the scheme, including the fact that it would leave each

Mr Justice Hampel took the Crown case to be entirely dependent

> ... on the proposition that it is open for the jury to conclude that the written advice was dishonestly given because Mr Forsyth must have known that the scheme as it was outlined in his instructions was illegal on its face in that the promoters purpose was to defraud the Commissioner.[42]

His Honour noted that whilst the instructions upon which Mr Forsyth advised referred to the price paid to the vendor shareholders and to the declaration of dividend neither was "an essential step in relation to what his advice is concerned with, namely the objective of eliminating the tax liability in respect of the current year profits". He therefore concluded that:

> In my opinion the instructions on which Mr Forsyth was asked to advise and the way he interpreted his brief as appears from his written advice are not such as to be capable of fixing him with the knowledge that the promoters had an unlawful purpose.[43]

His Honour said that the case prosecuted at trial was different to that which had been the subject of consideration in a number of Federal Court proceedings. Then

> ... the emphasis appears always to have been on the artificial scheme surrounding the deduction itself which had the effect of donating the whole of the current year profit and by the very same step which removed those funds depriving the commissioner of the ability to recover the tax on the current year profits should the scheme be disallowed.[44]

At a subsequent trial, four of the promoters of the NIPAG scheme were acquitted by a jury of conspiracy to defraud the Commonwealth. Each made an unsworn statement to the effect that he believed the scheme to be legal because it had been approved by Mr Forsyth. For example one of the accused stated:

> We considered the [Forsyth] opinion to be sufficiently strong to justify our decision to implement the scheme. Mr Forsyth knew shortly after this that we had implemented the scheme as a result of further conferences we had with him. He never said or suggested that we should not do it or there was some risk in it that it would be unlawful in any way.[45]

Members of that jury were directed to take into account the `climate' concerning artificial tax schemes that existed at the time of the commission of the alleged conspiracy:

> In this case the dishonest intent is said to arise from complex artificial transactions and is said that their agreement involved a dishonest purpose.
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> So in considering whether the accused knew that what they were agreeing to do was dishonest by the standards of reasonable and honest people, it is relevant for

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of the CYP (current year profit) companies without the means to pay any tax which might ultimately be found to be due."

42 Note 40 *supra*, 897.

43 *Id.*, 905.

44 *Id.*, 907.

45 *R. v. Brown & Ors*, unreported, Supreme Court of Victoria, 12 June 1990, Hampel J. transcript, 2284.

> you to take into account that ... the most blatant and artificial transactions which in today's terms, of course, may be considered to be a sham and perceived to be totally unacceptable, were nevertheless regarded as effective in those days by the courts, including the High Court of Australia.
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> It is relevant for you to consider in that in respect of such schemes senior barristers of high integrity and Mr Forsyth is one of them - were advising that such schemes were lawful and efficacious.[46]

After mentioning that neither the then Treasurer or the Courts had suggested that artificial schemes were dishonest, Hampel J. said:

> So because you are concerned with that second aspect of the test of dishonesty, with what the accused knew, you are entitled to look at the climate of the time in which all this was happening to consider what the extent of their knowledge and understanding was at that time.[47]

The outcome of the prosecution of those involved in the NIPAG scheme demonstrates the difficulty in assessing whether a prosecution has reasonable prospects of success where the alleged offence involves the implementation in accordance with reputable legal advice of an allegedly dishonest revenue scheme. It may well be safe to conclude that a jury would be likely to find a scheme itself dishonest. However, there would generally be little prospect of satisfying a jury that the accused himself must have realised what he did was dishonest by the ordinary standards of reasonable and honest people where his legal advice is to the contrary and he has followed that advice in implementing the scheme.

That is not to say that there have not been successful prosecutions of promoters of artificial tax schemes applied in the course of companies being stripped of their assets. Generally, whilst the accused in such cases have contended that they relied on legal advice, the prosecution has been able to establish substantial departures from the terms of the advice or demonstrate that the advice was inapplicable to what was in fact done. For example, Gerard Sheehan and Barry Saunders were convicted of conspiracy to defraud the Commonwealth through the application of artificial depreciation and prepaid interest schemes to companies stripped of assets totalling $5.5 million. The prosecution case was that the accuseds' dishonesty arose from their having rendered the companies' unable to meet any tax, if assessed, irrespective of the efficacy or otherwise of the schemes.

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46 *Id.*, 221.

47 *Id.*, 222.

V. SOME COMMON PROBLEMS ARISING IN THE INVESTIGATION AND PROSECUTION OF FRAUD CASES

A. OBTAINING EVIDENCE UNDER SEARCH WARRANT: DEALING WITH A CLAIM OF LEGAL PROFESSIONAL PRIVILEGE

Under s.10 of the Crimes Act, a warrant may be issued authorizing the search and seizure of, inter alia, "anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of (an) offence" against Commonwealth law. In the case of suspected organized fraud warrants will usually be sought to enable the AFP to obtain all the relevant documentary and other material. The AFP may have reasonable grounds for suspecting that relevant evidence is being held by innocent third parties. For example, relevant financial records may be held by banks. Legal opinions may be held in solicitors offices or barristers chambers. There will generally be no special difficulty in executing a search warrant in relation to financial records. Any duty of confidentiality owed by a bank to its customer is overridden by a warrant issued under s.10. However, in the case of documents held in a legal adviser's premises there is a clear possibility that documents covered by the search warrant may attract legal professional privilege. Communications which were the subject of legal professional privilege were previously protected from disclosure only in judicial or quasi-judicial proceedings. The privilege was once held not to prevent reasonable search and seizure from a solicitors office of documents that would be privileged from production in judicial proceedings.[48]

However, in *Baker v. Campbell*[49] the High Court by majority decided that the doctrine of legal professional privilege is not confined to judicial or quasi-judicial proceedings and that the privilege applies to documents within the scope of a search warrant under s.10.

The nature of material protected from disclosure by the privilege was described by Murphy J. as being "... oral or other material brought into existence for the sole and innocent purpose of obtaining legal advice or assistance."[50]

Most importantly, the decision in *Baker v. Campbell* confirms that legal professional privilege does not attach to advice given in furtherance of a criminal offence. As stated by Murphy J.:

> It is not available if a client seeks legal advice in order to facilitate the commission of crime or fraud or similar offence (whether the advisor knows or does not know of the unlawful purpose).[51]

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48 See *Crowley v. Murphy* (1981) 34 ALR 496; cited with approval by the High Court in *O'Reilly v. State Bench of Victoria Commissioners* (1983) 153 CLR 1.

49 (1983) 153 CLR 52.

50 *Id.*, 86-87.

51 *Id.*, 86.

In this regard Dawson J. said:

> Communications which would otherwise be privileged lose their immunity from disclosure if they amount to participation in a crime or a fraud.[52]

In the result, the effect of the decision in *Baker v. Campbell* was that the documents evidencing communications which were properly the subject of legal professional privilege were protected from search and seizure under a s.10 warrant but not those documents which related to legal advice given in order to facilitate the commission of a crime. The application of these propositions in practice led to a dilemma. Where it was sought to execute a warrant in relation to documents concerning which a claim of legal professional privilege had been made, how was the validity of that claim to be tested? Could the documents be inspected by the warrant holder to verify the claim or would that result in legal professional privilege being waived? An application to restrain execution of a warrant purportedly authorising search and seizure of documents from a barristers chambers was considered at first instance by Sweeney J. in *Re Arno; Ex parte Forsyth*.[53] On the question of waiver Sweeney J. said:

> There is to put it at its lowest, a grave risk that if documents to which legal professional privilege attaches and in respect of which it would be otherwise maintained, are seized under a warrant, that privilege will be destroyed.[54]

Sweeney J. noted:

> It is plain from the nature of the applicants'profession, the fact that his professional chambers were to be searched and from the description of the things to be seized that the warrant was authorising the seizure of documents to which legal professional privilege would, prima facie attach.[55]

The warrant was held to be defective because, inter alia, there was

> ... nothing in it to suggest that the justice ever had his mind directed to the principle (in *Baker v. Campbell*) or to the alleged existence of any exception to it, or to show that he was satisfied ... that the documents covered by the warrant were within any such exception.[56]

The decision as to the invalidity of the warrant was affirmed on appeal by the Full Federal Court.[57] In the opinion of Lockhart J.:

> ... the justice who issued the warrant should not have done so unless he was satisfied either that procedures would be adopted to safeguard the rights of the respondent and of his clients in relation to documents to which professional privilege would be expected to attach or that it was likely that professional privilege did not render the documents immune from search and seizure. In either case the warrant should have been appropriately endorsed.
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> If the justice had been satisfied that it was likely that the documents were not immune from search (for example, being documents in furtherance of criminal or

52 *Id.*, 123.

53 (1985) 8 FLR 557.

54 *Id.*, 572.

55 *Id.*, 570.

56 *Id.*, 572.

57 *Arno v. Forsyth* (1986) 9 FCR 576.

> fraudulent activity ...) he should have ... made that clear on the face of the warrant.[58]

The expression of the views of Lockhart J led to the adoption by the Law Council of Australia and the Australian Federal Police of guidelines concerning the execution of search warrants on lawyers' premises. These guidelines were published on 7 November 1986.

On 7 June 1990, following the decision in *Landa v. Mitson*,[59] which involved the execution of a search warrant on premises occupied by the Law Society of South Australia, further guidelines were approved by the AFP and the Law Council. These guidelines supersede the guidelines published on 7 November 1986. The effect of the guidelines, in summary, is that, with the co-operation of the lawyer or Law Society, no member of the Police Search team will inspect any document identified as potentially within the warrant until the opportunity to claim legal professional privilege has been given. Where a claim is made in such circumstances no member of the police team will inspect any document, the subject of the claim, until either the claim is abandoned or waived, or the claim is dismissed by a court.

Where a member of the AFP in seeking the issue of a section 10 Search Warrant asserts that documents that might otherwise attract legal professional privilege are not covered by the privilege because they were used in furtherance of a Commonwealth offence he must provide material to support that claim. In *Attorney General (N.T.) v. Kearney* Gibbs CJ said:

> The privilege is, of course, not displaced by making a mere charge of crime or fraud, or, as in the present case, a charge that powers have been exercised for an ulterior purpose.[60]

This was made clear in *Bullivant v. Attorney-General (Victoria)*[61] and in *O'Rourke v. Darbyshire*.[62] As Viscount Finlay said in the latter case, "there must be something to give colour to the charge".[63] His Lordship continued:

> The statement must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact. The court will exercise its discretion, not merely as to the terms in which the allegation is made, but also to the surrounding circumstances for the purpose of seeing whether the charges made honestly and with sufficient probability of its truth to make it right to disallow the privilege of professional communications.

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58 *Id.*, 589-590.

59 (1988) 83 ALR 466.

60 (1985) 158 CLR 500.

61 [1901] AC 201.

62 [1920] AC 581.

63 *Id.*, 604.

The doctrine of legal professional privilege has recently been held to apply to documents which are the subject of a notice to produce under section 295 of the Companies (N.S.W.) Code.[64]

B. CHALLENGES TO DECISIONS IN THE PROSECUTION PROCESS UNDER THE ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT

In *Lamb v. Moss*[65] the Full Court of the Federal Court held that a decision by a magistrate to commit for trial on a Commonwealth offence is reviewable under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (hereafter "the ADJR Act").

Subsequent decisions have extended the principle in *Lamb v. Moss* to other decisions made by magistrates in the course of committal proceedings. For example, the decision of a magistrate to accept or reject evidence has been held to be reviewable under the ADJR Act.[66] A decision by a magistrate concerning an application to permanently stay committal proceedings for alleged abuse of process has also been held to be reviewable.[67]

The Federal Court has held that other decisions made during the prosecution process are reviewable. For example, the decision of the Commonwealth Attorney-General to consent to a prosecution was held to be reviewable in *Buffier v. Bowen*.[68] The decision of the Director of Public Prosecutions to institute a prosecution for a Commonwealth offence as well as his decision under section 6 of the Director of Public Prosecutions Act 1983 (Cth) to carry on a prosecution for a Commonwealth offence are reviewable.[69]

The Federal Court has held that an applicant will need to demonstrate exceptional circumstances before the Court will interfere with decisions made by a magistrate in a committal hearing or with decisions made by a Commonwealth officer in the course of the prosecution process. Relief has actually been granted in only a small number of cases. However, the making of an application and the court's consideration of it will of themselves have the effect of delaying the prosecution process. This is particularly the case when further reviews are sought through the exercise of rights of appeal.

Delays to the prosecution process of up to two years have been experienced as a result of applications made under the ADJR Act seeking review of decisions made in the course of the prosecution process.

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64 *Yuill & Ors v. Corporate Affairs Commission*, unreported, New South Wales Court of Appeal, 21 August 1990, Kirby P., Mahoney and Handley JJA.

65 (1983) 49 ALR 533.

66 *Shepherd v. Griffiths* (1985) 60 ALR 176.

67 *Emmanuelle v. Cahill & Dau* (1987) A Crim R 115.

68 (1987) 72 ALR 256.

69 *Newby v. Moodie* (1988) 83 ALR 523.

Application of the ADJR Act to decisions made during the process of prosecution of Commonwealth offences has produced a situation where those accused of Commonwealth offences are treated differently from those accused of State offences. The New South Wales Law Reform Commission made the following comment in relation to that situation:

> This commission is not charged with the task of examining Commonwealth laws but we should note that, in our view, it is unsatisfactory that different remedies for the review of committal proceedings conducted by magistrates in New South Wales should be available depending on whether the prosecution has been launched by the State or the Commonwealth.[70]

The exceptional circumstances that would need to exist to warrant the intervention of the Federal Court in relation to a review of a magistrate's decision to commit for trial were described in the following terms by the Chief Justice of the High Court in *Yates v. Wilson & Ors*:[71]

> It would require an exceptional case to warrant the grant of special leave to appeal in relation to a review by the Federal Court of a magistrate's decision to commit a person for trial. The undesirability of fragmenting the criminal process is so powerful a consideration that it requires no elaboration by us. It is factor which should inhibit the Federal Court from exercising jurisdiction under the Administrative Decisions (Judicial Review) Act and as well inhibit this Court from granting special leave to appeal.

C. SECRECY PROVISIONS

A variety of Commonwealth Acts provide that a person shall not (except in the course of duty and for the purpose of the particular Act) divulge any officially acquired information about another person. There will usually be no statutory inhibition on divulging information about a person for the purpose of his investigation and prosecution in relation to an offence under the Act under which the information was obtained. Such use will usually be an exception under the Act. However, a problem arises where the information is required for the investigation and prosecution of an offence against an Act other than that which contains the secrecy provision. For example, a person may be suspected of claiming unemployment benefits whilst employed. An investigation and prosecution would be greatly assisted by information that the person had lodged income tax returns for the same period he claimed unemployment benefit. The release of that information for use as evidence is restricted by section 16 of the Income Tax Assessment Act (hereafter the "ITA Act").[72]

Under s.3E of the Taxation Administration Act the ATO may disclose certain tax information to an authorised law enforcement agency officer for prescribed

70 New South Wales Law Reform Commission, *Procedure from Charge to Trial*, Criminal Procedure Discussion Paper 14, Vol.1, paragraph 7.45.

71 (1989) 86 ALR 311.

72 See Ian Temby Q.C., "Impediments to Tackling Fraud", Paper from the 1988 Autumn Seminar "Ethics, Fraud and Public Administration" at the Australian National University.

investigative purposes. Section 3E does not permit the use of such information as evidence in a prosecution except for a tax-related offence.

VI. SOME AIDS TO THE INVESTIGATION AND PROSECUTION OF FRAUD

A. USE OF INFORMATION ACQUIRED BY COMPULSION OF LAW

Prior to any investigation by the AFP, the Department concerned may have obtained documents by the use of statutory power during the course of its own enquiry.[73] For example, in a taxation enquiry the ATO may have acquired documents by use of its powers to compel production under section 263 of the ITA Act.

The ATO may also have obtained a record of conversation between tax officers and a taxpayer under section 264 of the ITA Act. If the ATO later suspects that criminal offences have been committed and refers the matter to the AFP, use can be made of the compulsorily acquired material in any criminal investigation and prosecution. The fact that documents have been compulsorily obtained under section 263 of the ITA Act will not of itself be a ground for excluding them as evidence.[74] Section 264(1)(b) of the ITAA has been held to exclude the privilege against self incrimination. Statements made by a taxpayer under proper compulsion of the section 264 power will be admissible in a prosecution of that person.

However, it would not be a proper use of section 264 to compel admissions for the purpose of a contemplated prosecution. The section is designed to elicit information relevant to "a person's income or assessment".

Similarly, in a prosecution for conspiracy to defraud the DPP was held not to be precluded from adducing evidence of an interview conducted under section 23 of the Sales Tax Administration Act between tax officers and the accused.[75]

B. THE USE OF COMPUTERS AS AN AID TO THE PRESENTATION OF LARGE FRAUD PROSECUTIONS

Proving complex fraud can involve the tendering of evidence comprising many thousands of documents. Where the fraud has been committed under the guise of a large scale business operation, it will frequently be necessary to use evidence which has the effect of reconstructing the business operation for the judge and jury. In the case of some large scale frauds, documents have been

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73 See D. Sweeney & N. Williams, *Commonwealth Criminal Law* (1990), for a description of the information collecting powers of various Commonwealth Government Departments.

74 *Stergis v. Boucher* (1989) 86 ALR 174.

75 *R. v. Yates*, unreported, District Court of New South Wales, 14 September 1990, Knoblanche D.C.J. An appeal has been lodged against this decision.

generated by offenders for the purpose of obfuscation. For example, in *R. v. Simmonds & Ors*[76] it was said:

> [o]nly too often charges of defrauding the revenue (be it of purchase tax or other tax) involve months of complex investigations: This is especially the case when, as here, several individuals and several companies are concerned, and proper records have either not been kept at all or are so kept as to present an incomplete or false picture.[77]

In demonstrating the nature and extent of an allegedly fraudulent operation, the prosecution generally relies on a large amount of documentary material. In the absence of concessions from the accused, the prosecution has of course, to lay a proper foundation for the admission of the documents as evidence.

The prosecution will face the problem of presenting a large volume of documentary material efficiently and in a way in which its significance can be appreciated by the jury. The traditional method of exhibiting and numbering documents individually is quite inappropriate and impracticable in this kind of case. The courts have recognized the practical difficulties involved in the presentation of a large volume of documentary evidence and have approved the development and use of schedules. For example, *R. v. Simmonds and ors* concerned an appeal from convictions by four accused for offences concerning fraud on the revenue. Mr Justice Fenton-Atkinson said:

> Such are the complexities of these fraudulent schemes and the devices used in them that only too often the only way that the interests of justice can be served is by presenting to a jury with the aid of schedules an overall picture of the scheme and charging a conspiracy to cheat and defraud.
>
> Obviously every effort should be made to present instead to the jury a relatively small series of substantive offences - but that cannot always be done and this case is one of those where only a conspiracy charge can provide for the protection of the interests of the community when once the legislature produces intricate laws.[78]

His Honour expressed the view that it was "the duty of prosecuting counsel in the interests of justice as a whole to see that the case is prepared so that it can be presented to a jury in as simple a way as is practicable".[79]

The use in appropriate cases of schedules and charts has been approved by the courts in Australia. In *R. v. Mitchell*[80] the Full Court of the Victorian Supreme Court said in relation to argument directed to the admissibility of a chart prepared on behalf of the prosecution:

> The chart was nothing but a convenient record of a series of highly complicated cheque transactions which had been proved by other evidence, and was likely to be of considerable assistance to the jury.[81]

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76 [1969] 1 QB 685.

77 *Id.*, 690.

78 *Ibid.*

79 *Id.*, 691.

80 [1971] VR 46.

81 *Id.*, 59.

The Full Court added:

> The use of such charts and other time saving devices in complicated trials of this kind is a usual and desirable procedure and is encouraged by the courts.[82]

The approach of the Full Court in *R. v. Mitchell* was endorsed by the High Court in *Smith v. The Queen.*[83]

A practical aid to a more efficient and effective system of presentation of evidence in large fraud cases has been developed and utilised by the DPP. It involves, in essence, a computerised exhibit register system. Once prosecution lawyers in consultation with investigators have determined the parameters of the prosecution case and the classes of documents to be used as evidence, work can be started on preparing the register. It is unnecessary to be aware of every piece of evidence prior to establishing the system as long as a determination has been made as to the categories of documents and how they are to be interlinked in presenting the case.

In general terms, the system works as follows: each document to be tendered is assigned a classification number and a pre-printed tag is affixed. At the same time short details of the document are recorded on a data entry sheet. The data entry sheet will contain information such as the type of document, its date, the identity of the witness through whom it is proposed to be tendered and a short description of its contents and their significance. These details are entered into the computer and ultimately a print-out of all proposed exhibits will be available. The system is capable of producing a variety of lists such as a list indicating all documents to be tendered through a particular witness and all documents to be tendered against a particular accused in respect of a specific allegation. In a conspiracy prosecution the Exhibit Register is utilized in formulating the overt acts alleged to form the basis of each defendant's participation in the conspiracy.

The effectiveness of the Exhibit Register system is enhanced where the Exhibit List together with copies of all documentary exhibits and schedules are furnished to the defence prior to committal. Much court time can be saved by the defence having had an opportunity to consider the proposed evidence prior to its tender. As documents are tendered during a hearing, the date and result of the tender are manually noted on the register. This information is input into the computer on a daily basis and results in a fresh print-out of the register being available each morning for the court and for the defence. The final Exhibit List will, of course, be a compilation of these daily print-outs. The same Exhibit Register as was used at committal is used if and when the case goes to trial.

In summary, the main features of the Exhibit Register system are:

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82 *Id.*, 60.

83 (1970) 121 CLR 572, 577. See also clause 27(3) of the Evidence Bill 1991 (N.S.W.) which if passed, unamended will provide "Evidence may be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid its comprehension of other evidence given or to be given".

1. The pre-numbering of all exhibits.
2. The input into a computer of selected information from each documentary exhibit and the generation of a computerised Exhibit List.
3. The daily updating of the Exhibit List during the hearing so that the following information is always available: the status of each document (for example - exhibited, marked for identification, or conditional tender), the identity of the witness through whom the document was tendered and any other witnesses who gave evidence concerning it.
4. The production of a schedule showing the name of each witness called and all documents tendered through that witness.

C. OBTAINING OVERSEAS EVIDENCE

The activities constituting fraud do not recognise jurisdictional boundaries. This is particularly the case in Customs, Trade and Taxation matters. Accordingly, in order to prosecute those involved in such conduct, it is sometimes necessary to obtain evidence located in a foreign country. Investigatory agencies such as the AFP have an international network enabling the gathering of information in respect of suspected fraud. However, generally such information has only been of use for intelligence purposes. That is, unless the institutions or the witnesses located in the foreign country have been prepared to provide assistance voluntarily, there has been no mechanism by which assistance could be enforced.

In 1988 the Commonwealth enacted the Mutual Assistance In Criminal Matters Act 1988 (hereafter "The Act") in an endeavour to address these inadequacies. The Act provides a mechanism whereby foreign jurisdictions can make requests of Australia through the Commonwealth Attorney-General, in respect of evidence located in Australia that may be relevant to criminal proceedings being conducted in their jurisdictions The assistance covered by the Act is search and seizure, taking evidence before a magistrate and enforcement of orders similar to those contained in the Proceeds of Crime Act 1987 (Cth). The Act also makes provisions for similar requests by Australian law enforcement and prosecution agencies, through the Commonwealth Attorney-General, to a foreign jurisdiction. It should however, be noted that where a foreign country makes a request for assistance in respect of any of the above-mentioned matters, such assistance can only be given, with one exception, where there is an arrangement in existence between Australia and the requesting country. The exception is where there is a request for the taking of evidence in Australia before an Australian court in respect of criminal proceedings in the requesting foreign country.

The Act does not contain a similar limitation in respect of requests by Australia. As a general rule however, the foreign country of which Australia makes a request generally has similar limitations contained in its legislation.

Accordingly, arrangements being entered into by Australia with foreign countries ar generally on a reciprocal basis.

While the Act has provided a means by which evidence from overseas may be obtained, the Act does not of itself make such material admissible as evidence in the Australian proceedings. That is, the general rules of evidence still apply. As fraud matters generally involve documentary evidence the provisions of the relevant State business record provisions will in many instances apply. In New South Wales the provisions under Part IIC of the Evidence Act 1898 will apply.

There will be cases where witnesses relevant to proceedings in Australia are located overseas and are not prepared to come to Australia to give evidence or produce documents. Part IIIB of the Commonwealth Evidence Act 1905 contains provision that may facilitate the examination of such a person in the foreign country where they are located. These provisions also provide that where evidence is obtained by such means that evidence, subject to some safeguards, is admissible in the Australian proceedings. Again, although these provisions exist, they can generally only be used where the foreign country in which the evidence is to be taken has the necessary legislation to give effect to such provisions and that country is prepared to provide the assistance when requested.

Finally, the Act also makes provision for the Attorney-General to make a request to a foreign country that a person in custody in that country be transferred to Australia to give evidence in criminal proceedings in Australia. While this provision has not yet been used in fraud matters it has been used in a number of prosecutions for drug offences. There is also provision in the Act for Australia to make persons in custody in Australia available to give evidence in criminal proceedings in a foreign country.

These avenues for obtaining evidence overseas together with the increased number of arrangements between Australia and foreign countries will significantly assist not only in the investigation but also in the prosecution of fraud offences where such offences involve conduct occurring in a foreign jurisdiction.

IV. CONCLUSION

Those who have considered the question of how best to deal with fraudulent conduct agree that those suspected of perpetrating complex commercial or revenue frauds on a large scale should be investigated with a view to prosecution[84]

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84 Fraud Review paragraph 1.2.2 and see "Fraud Trials", a report by Justice, 1984, London at page 3, "There ought to be a greater readiness to prosecute important and more complicated

There is also general agreement that whilst administrative penalties and other action short of prosecution have their place as a response to more routine and less serious fraud, they are an inappropriate response in dealing with serious fraud.[85]

Whenever possible there needs to be a greater reliance on substantive offences in preference to conspiracy charges. Where suspected fraudulent conduct is investigated and charged as a conspiracy there are disadvantages for the prosecution and the defence. The investigation will often tend to be wide ranging and lack the focus of an investigation aimed at determining whether specific proscribed conduct has occurred. Offences appropriate to deal with the most serious fraudulent conduct on the Commonwealth now exist under the Crimes Act and related Acts.[86]

The use of pre-trial review hearings before the proposed trial judge are important in establishing the evidentiary issues in contention. This process requires early disclosure of the case to be presented by the proseuction at trial and provision to the defence of the proposed indictment and any schedules and other illustrative aids it proposes to use. A contentious issue is whether the defence ought to be required to disclose its case prior to trial. Following the recommendations of the Roskill Committee, the Criminal Justice Act (UK) 1987 now requires an accused in a serious fraud case to make pre-trial disclosure of the general nature of the defence case and the areas in which the prosecution case is disputed.[87]

Finally, in order to achieve a consistent approach to the prosecution of fraud there needs to be an effective degree of co-ordination and co-operation between the various Commonwealth Departments and law enforcement agencies having responsibility for the detection and investigation of serious fraud.

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frauds, despite the expense and the many difficulties known to exist in the conduct of the trials".

85 The Report by Justice at page 6 states in relation to fraud on Customs: "...there is no doubt that many important customs and excise cases involve very large sums indeed. The offenders are frequently intelligent, well educated people who have no excuse for their conduct, which is activated purely by greed. It would be quite wrong if such people were not prosecuted merely because of the difficulty and expense involved.

86 Conspiracy to defraud or defeat Commonwealth law were the only appropriate Commonwealth charges available against allegedly fraudulent tax promoters. The substantive offence of "fraudulent avoidance of tax" under s.231 of the ITA Act carries a maximum penalty of a $1,000 fine.

87 *Fraud Trials Committee Report*, London, 1986.