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Memo to ASIC: keep it short and well defined

The One.Tel case and two failed UK prosecutions have lessons for the regulator, writes Toby Boys.

Government and the public expect regulatory bodies, such as the Australian Securities and Investments Commission, to run and win high-profile cases and deter others from engaging in similar conduct in future.

But often a regulator's investigation ends in very expensive and unwieldy "mega litigation".

Justice Robert Austin's criticism of ASIC's approach in the One.Tel litigation is reminiscent of the assessment of two disastrous cases run by UK authorities that led to embarrassing failed prosecutions.

In 1992, the UK Court of Appeal overturned convictions of four defendants in the Blue Arrow fraud case, which arose out of Blue Arrow's proposed takeover of the US-based Manpower. The Crown prosecuted 14 corporate and individual defendants for conspiracy to defraud investors and took on a hugely complicated, detailed case that ran for 188 days over a period of 21 months. In agreeing with the defendants that their convictions were unsafe, the Court of Appeal noted:

"The awesome time scale of the trial, the multiplicity of issues, the distance between evidence, speeches and retirement and not least the two prolonged periods of absence by the jury (amounting to 126 days) could be regarded as combining to destroy a basic assumption... that a jury determine guilt or innocence upon evidence which they are able as humans both to comprehend and remember, and upon which they have been addressed at a time when the parties can reasonably expect the speeches to make an impression upon the deliberation."

The Court of Appeal also commented that "the complexity of the indictment was proved to be unnecessary for there was within the Blue Arrow affair a central issue which involved eight defendants" and the prosecution should have concentrated on trying to show fraudulent intent by a smaller number of defendants in a period of just two days, rather than that of 14 defendants over months.

In 2005, the UK government suffered another embarrassing blow in the Jubilee Line fraud matter, after the trial of six defendants accused of conspiring to corrupt officials and gain insider information in connection with the Jubilee Line extension to the London Underground was aborted. The case had cost the taxpayer £25 million and had lasted 21 months at the Old Bailey when it became so unmanageable that the prosecution threw in the towel.

An inquiry into the disaster found that the reasons the trial had to be aborted were that it went on too long, mistakes were made and a jury would have been unable to return a conviction.

The problems in the UK cases, particularly the Blue Arrow prosecution, are mirrored in Austin's comments as to the reasons for the length of the One.Tel proceeding: "This was not a case confined to a relatively small number of allegedly misleading events, including some misleading market announcements. The gist of the case was proof of the true financial circumstances of a large corporate group over a period of four months.

"There is a real question whether ASIC should ever bring civil proceedings seeking to prove so many things over such a period of time as in this case. A case might have been brought focusing attention on One.Tel's financial condition at a particular point in time, for example by invoking a cause of action based on the allegation that a particular One.Tel media release was misleading." (For example, the April 4, 2001, ASX announcement.)

While the parties and public might expect a significant difference between the abilities of a jury (as in the UK cases) and such an experienced judge as Austin to understand and analyse complex facts, the principle is the same. Long, complex proceedings are, by their very nature, difficult to run and fraught with danger for the regulator.

ASIC chief Tony D'Aloisio rightly points out that Austin's decision gives ASIC important guidance on how to run similar matters in the future. ASIC is likely limit the size and scope of investigations and subsequent prosecutions. More defined, "surgical" cases are easier to control and more likely to be successful.

For example, ASIC was recently successful in a narrower case against James Hardie directors, while the UK Financial Services Authority and US Securities and Exchange Commission secured large penalties against Shell for misleading the market about its proven oil reserves in the lead-up to a 2004 correction.

So far, the signs are good for pending ASIC actions, such as its case against Centro directors. It focuses attention on alleged misrepresentations in the 2007 accounts, rather than conduct over an extended period of time.

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