1998 CHURCHILL FELLOWSHIP

FINAL REPORT

Sarah M McNaughton

INDEX

1998 CHURCHILL FELLOWSHIP 1

INDEX 2

INTRODUCTION 3

PROJECT DESCRIPTION: 4
FELLOWSHIP HIGHLIGHTS 4
PLANS FOR THE FUTURE 4

PROGRAMME: 5

SAN FRANCISCO 5
MIAMI 5
NEW YORK 6
WASHINGTON DC 6

MY FELLOWSHIP – DESCRIPTION AND LESSONS LEARNED 7

SAN FRANCISCO 7
MIAMI 9
Bourjaily decision 10
NEW YORK 13
Co-operation and assistance: practical ramifications 16
Rules relating to Discovery 22
WASHINGTON DC 25
The RICO statute. 25
Interview with Frank Marine 32
Interview with Jim Alsup 35

CONCLUSION 36

RECOMMENDATIONS 38

INTRODUCTION

My Churchill Fellowship was undertaken from March to June 1998 for the purposes of studying the conduct of complex prosecutions in the United States. I visited San Francisco, Miami, New York and Washington DC, spending the majority of my time in New York, particularly in Brooklyn.

I was based in the United States Department of Justice and was mostly accommodated in the offices of the United States Attorney in the various districts I visited. I was able to observe the conduct of Federal prosecutions, and talk to a number of Federal prosecutors and investigators. I also met and talked to a number of defence attorneys, and several Federal Court judges.

I would like to acknowledge the generosity of the Churchill Trust in funding my study, together with the help and support it offered in arranging the trip.

Executive Summary for

Sarah Megan McNaughton
345A Great North Road, Abbotsford, NSW, 2046
Barrister

Telephone: (02) 9713 8121 (home) 0419 161 329 (mobile)
(02) 9390 7777 (chambers) E-mail: sarah@zeta.org.au

Project Description:

The study of complex prosecutions in the USA, focussing on strategies which have been developed there to cope logistically, procedurally and philosophically with the growing sophistication and international basis of complex crime and prosecution work.

Fellowship Highlights

I visited San Francisco, Miami, New York and Washington DC, spending the majority of my time in New York, particularly in Brooklyn.

Miami provided me with a good insight into the US prosecution techniques of serious crime of several types. I would recommend it as a place worthy of a visit by others interested in studying large scale crime. Whilst Miami was the most technically advanced of the places I visited, I was interested to note that they were still behind Australia in their use of technology in their litigation. They had only just started to use CD ROMS to record their telephone intercepts, whereas Australia had started several years earlier. The use of databases by lawyers also appeared to be less widespread than in Australia. I met two Federal judges in Miami, one of whom, Judge Hoeveler, had presided over the prosecution of General Noriega. He provided me with some current publications of the Federal evidence and procedure law, together with a book produced by the American Bar Association Resource Team for High Profile Trials, entitled *Managing Notorious Cases.*

The seven weeks that I spent in New York provided me with an opportunity to see some complex trials for an extended period. I was based in the US Attorney's Office of the Eastern District of New York, which was located in Brooklyn. They provided me with office accommodation, and I was placed in the Organised Crime and Racketeering Section, headed by Mark Feldman. He was approachable and helpful, and made regular times available to discuss issues. He also made available copies of indictments and other pertinent documents. Some other lawyers in the office were also generous with their time, and I gained some useful insights into the similarities and differences between Australian and American complex prosecutions.

One of the major lessons I learned from my fellowship is that the best Australian prosecutors are world leaders in their use of technology and organisation of data.

Plans for the future

I have already given one lecture about the lessons learned from my trip to the Sydney office of the Commonwealth Director of Public Prosecutions, and plan to give a further talk there soon. I also plan to write some detailed articles for legal publications, and provide copies of my report and other relevant material I collected to the State and Federal police and prosecuting authorities.

Programme:

San Francisco

I was based in the US Attorney's Office in San Francisco, in their OCDEFT section (Organised Crime and Drug Enforcement Taskforce) for one week. I observed a number of court hearings, including short matters, sentences and trials. I also sat in on some meetings between investigators and prosecutors and interviewed some police officers. The following people were particularly helpful:
Tom Fox, Internal Revenue Service, attached to the United States Drug Enforcement Administration;
Catharine Bostick, Assistant United States Attorney;
Jeffrey Cole, Assistant United States Attorney;
Alex Seddio, Internal Revenue Service.

Miami

I was based in two different sections within the US Attorney's Office in the Southern District of Florida. For the first half of the week, I was in the Narcotics Section, and the second half of the week, I was placed in the Economic Crime Unit, which dealt with large scale fraud, mainly Medifraud. I observed some trials and some sentences. I interviewed a number of different Assistant United States Attorneys, and spoke to two judges.
I am particularly grateful for the assistance of the following people:
Tom Scott, United States Attorney, Southern District of Florida;
Carol Di Battiste, Deputy United States Attorney, Southern District of Florida;
John Roth, Chief, Narcotics Section, Assistant United States Attorney;
Randy Hummel, Assistant United States Attorney;
Jena King, Assistant United States Attorney;
Paul Pelletier, Chief, Economic Crime Unit;
Louise Peres, Assistant United States Attorney;
Judge Hoeveler, Federal Court Judge;
Judge King; Federal Court Judge.

New York

I was based in the United States Attorney's Office in the Eastern District of New York, located in Brooklyn, for seven weeks. I observed parts of a number of long trials, one in particular being a racketeering trial in which four young men were being prosecuted in relation to a crack cocaine gang and multiple murders. I also saw a number of jury empanelments, sentence proceedings and arraignments. In addition, I saw a "proffer conference" where it was decided whether or not an offender would be accepted by the prosecution as a prosecution witness in other matters. In addition to attending court in the Eastern District, I also spent some time observing trials in the courts of the Southern District of New York, in lower Manhattan. One of the trials I observed involved the prosecution of some Wall Street brokers, and another one involved the prosecution of the boxing promoter, Don King, for insurance fraud.

The following people were particularly helpful:
Mark Feldman, Chief, Organised Crime and Racketeering Section, Assistant United States Attorney;
Bridget Rohde, Deputy Chief, Organised Crime and Racketeering Section, Assistant United States Attorney;
Steven Kelly, Assistant United States Attorney;
David Porter, Assistant United States Attorney;
Judge Gleeson, Federal Court Judge;
Phil Kirschen, IRS, responsible for the High Intensity Drug Task Area (HIDTA);
Ben Campbell, Assistant United States Attorney.

Washington DC

I was not located within an office in Washington, but set up appointments for interviews with various people. The following people generously gave up their time for me:

Jamie Orenstein, Office of General Counsel, Office of the Attorney General; (part of the Oklahoma bombing prosecution team);
Frank Marine, Deputy Chief of the Organised Crime and Racketeering Section, Department of Justice;
George Walker, FBI;
George Venizelos, FBI;
Jim Alsup, Narcotic and Dangerous Drug Section, Department of Justice

MY FELLOWSHIP – DESCRIPTION AND LESSONS LEARNED

San Francisco

My first destination was San Francisco. As this was the first time I had ever been to the United States, I was not sure what to expect. I was picked up at the airport by Tom Fox, an IRS agent working with the US DEA. I had met him a few years previously when he had visited Australia in relation to an investigation. He gave me a quick tour of the city and dropped me off at my motel. During my week there he either collected me every morning and dropped me off every night, or arranged someone else to do the same.

I was based in the San Francisco US Attorney's office. The week I spent in San Francisco was a good introduction to the US Federal criminal system, as the Assistant US Attorneys (Katharine Bostick and Jeff Cole) with whom I was placed, were working on the American end of a large prosecution I had had carriage of in Australia. This provided me with a convenient way to compare the American and Australian evidence laws relating to conspiracy law and hearsay. The role of the grand jury and the US method of initiating prosecutions was also made clear to me. The week I was there Ms Bostick and Mr Cole were preparing for a grand jury appearance, from which I was excluded as a matter of law.

Apart from speaking to these people, I spent some time observing some of the proceedings of the Federal courts (which were located in the same building as the office of the US Attorney) including several sentencing proceedings. The sentencing proceedings appeared to be very similar in feel and procedure to Australian sentencing proceedings, although there were a couple of differences. One difference was the existence of a mandatory minimum term which differed depending on the amount of drugs involved. In one case I observed, this mandatory minimum term was waived at the instigation of the prosecution as the defendant had assisted the authorities. He got 59 months (not 60 - otherwise he would be liable to deportation).

Another matter of interest was that the prisoner was on bail and when he was sentenced he was not imprisoned straight away - he was given a "surrender date".

That means that he had to present himself to a designated prison. This not only allowed the prisoner to get his affairs in order, it also allowed the prison authorities to know that the man was a responsible prisoner because he turned up on time. That in turn allowed the prison to classify him as a medium or low risk prisoner. This struck me as a sensible idea, and one which the Australian authorities should consider.

In the United States, the Federal judiciary deals with all Federal civil and criminal matters. This notion of a specialised judiciary to deal with Federal criminal matters seemed to work well there. Even though Australia has a separate Federal court, that court does not, in the main, deal with criminal matters. Given that Federal matters in Australia, as in the United States, are routinely more complex than the average State prosecution, it seems sensible to have a dedicated and specialised judiciary, to deal with such matters. This is also something which the Australian authorities should consider.

I also observed two sentences in front of a female judge called Judge Fern Smith. They involved co-accused, who had been a couple at one time. The man got just under 10 years for two armed robberies involving a weapon, but only involving about $3000 in one instance and a couple of hundred dollars in another instance. He had a criminal history. The sentencing guidelines required the classification of a number of matters, for instance they classified the seriousness of the criminal history, the seriousness of the offence and a number of other matters and ended up with a formula of how to reach a particular sentence figure. In exceptional circumstances the judge could "depart" from the otherwise predetermined formula, but the case had to be outside of the "heartland" of cases.

The other co-accused was a female who looked to be a middle class ex heroin addict. She was extremely upset and had her mother and cousin with her and she was shaking the whole time. It was highly emotional. She only got 15 months - and the judge recommended she serve that in a half way house - though it was up to the prison authorities. The probation officers had a much larger part to play in the sentencing process and appeared to recommend exactly what range of sentencing should be given, as did the prosecutor who could agree or not with the recommendation of the parole officer.

San Francisco did not strike me as a very busy court environment. On many occasions I tried to find a court that was sitting so I could observe it, but there were none in session. The benefit of that for me was that I could spend some time looking at some of the office materials on legal issues. For example I could see that there was a manual that the judges used which set out standard trial directions on various legal issues. I copied those on conspiracy and racketeering. In Australia, there are various guides around now as to appropriate trial directions, but nothing of the more mandatory forms which these appeared to be. I deal below with some of the law on these areas in more detail.

Miami

From San Francisco I went to Miami. I started my first day in the office being formally introduced to the US Attorney and the Deputy US Attorney themselves. This was the only office to arrange this for me. I was then taken to the Narcotics section, where I was to spend the next two and a half days. The first thing I saw in court was the final addresses of the prosecution and defence in a crack cocaine trial. The presiding judge ran a very strict court and only wanted twenty minutes from each side. I heard later that the jury convicted the defendant.

I was taken around to meet many of the prosecutors in the office. Some of them were handling particularly interesting cases. One was the prosecution of a gang which had systematically robbed tourists who had hired cars from the airport. I also met two lawyers who were prosecuting the retrial of a case involving a corrupt judge. I learnt that a number of the State judges in Miami had been prosecuted for corruption – accepting bribes. A number had pleaded guilty, some had been acquitted, and this one had had a hung jury.

I then learnt from my guide, Assistant US Attorney Randy Hummel, the reason for the ease of adducing evidence in American conspiracy trials. The reason for that was the decision of *US v Bourjaily* 483 US 171. I found the text of this decision, and realised for the first time why it was easier for the American prosecutors to prosecute conspiracy cases than it was for Australian prosecutors.

Bourjaily decision

> *In essence, Bourjaily allows a court to consider the hearsay statements of co-conspirators in determining whether a person is a member of a conspiracy. Once that has been determined positively, the hearsay statements can then be used to assist the prosecution to prove the offence beyond reasonable doubt. This can be compared to the Australian law in Tripodi v R (1961) 104 CLR 1 and Ahern v R (1988) 165 CLR 87. In those cases, in order to decide whether or not a person is a member of a conspiracy, only direct, non-hearsay evidence may be used. It is only once this is established that hearsay evidence can be used to prove the conspiracy.*

In Miami I also talked to a prosecutor, Neil Stephens, who, like me, had been working on a matter involving large numbers of telephone intercepts. We discussed the logistical problems associated with getting on top of such a volume of material. We agreed that there were no short cuts – one person had to get on top of all the material – it was not possible to divide up the job. What was interesting to notice though, was that he was not using any computer support in his task – simply pencil and paper. I told him what we were doing in Australia – with data bases of chronological summaries, linked to an embedded transcript, in turn linked to the audio of the transcript in “wav. files”.

The Miami lawyers were keen to tell me that Miami was leading the United States in that they had started putting their telephone intercepts onto CD ROM. I informed them that we had been doing that for several years. It would appear that Australia were the first in the world to do that. Word got around what Australia had been doing – and I got more than one comment that I should be showing them what we were doing, rather than the other way around.

I also saw Neil Stephen do a drug sentence in the afternoon where the defendant was sentenced to 30 years. He was the principal in a conspiracy involving over 5 people and over 1000 kilos of cocaine. The prosecution argued for life imprisonment. They would have got mandatory life for him if he had enough "points" under the sentencing guidelines, but they failed to prove to the court's satisfaction that the matter involved a firearm (one of the relevant factors in this case). They did prove various factors under the sentencing guidelines about victim intimidation, principal,

late plea which all increased the sentence. The range the judge had to deal with was 360 months to life.

I also found out that in federal prosecutions, they did not have to serve anything on the defence until the last minute in terms of witness statements. They could do it as late as when the witness entered the stand, but in fact often did it when they empanelled the jury, or at the beginning of the week, when they had to give the defence notice of who they would call, and the witness summaries. This was incredibly different to the Australian practice. It represents the quite different prosecution/defence balance at least in the Federal arm of prosecutions. It is not something Australia could or should emulate. I learnt in more detail about this in New York, and discuss it further below.

It was also brought to my attention that the evidence rules did not apply in relation to sentences, so they could get in hearsay etc, even without consent, at least in Miami. They could even introduce evidence into sentencing proceedings from trials of co-accuseds.

As a general comment, from a prosecutor's point of view, there was very stimulating work in Miami. In recent years, they had prosecuted Noriega; they had also run a large case where they prosecuted some Cali cartel members plus their lawyers; and another case where they prosecuted lawyers and judges. Another large case they were doing at the time involved the illegal sale of helicoptors to Iraq. This high level of criminal work, on such a consistent basis, would be hard to find elsewhere.

While in Miami I met the judge who presided over the prosecution of General Noriega, Judge Hoeveler. He was tall and thin and appeared to be very wise and was welcoming and friendly. He would have been over 70. Judges could retire at 65 but they were not obliged to. It was up to them what they did after that. He had his big English bull mastiff in his chambers as his wife was in hospital. He gave me some material as gifts - the evidence rules, the practice rules, and a "Manual for Managing Notorious Cases". He was on the committee nationally that was trying to work out a preferred procedure for dealing with such matters.

I also met another judge that afternoon, Judge King. The building in which the office was located was named after him, and his daughter, Jena, worked as an Assistant US Attorney for the Justice Department. She was very friendly and welcoming and

took me up to meet him. He told us during our discussion that prior to him meeting us he was hearing a case involving an allegation of prison beating.

On the Wednesday afternoon (other than meeting Judge King) I started at the Economic Crime Unit headed by Paul Pelletier. Paul was a very energetic man who told me about his plans for the section, as he had just started there as section head. There seemed to be the same sorts of problems as Australia in relation to running a section with matters which involved a great deal of paper. He was spending his own time clearing out rooms full of documents relating to matters which had long finished but that no-one had finalised.

I also talked to the lawyer running an enormous fraud involving people pretending to sell wholesale groceries but who were really embezzling the money. He had worked on it for years. There were over 30 defendants and some were going to trial shortly. I spoke to him about the organisation required in such a large matter. It was apparent that the police officers had been working closely on the matter with him and had entered most of the information into a database. The fraud area seemed to use databases more than the large narcotics cases, even though they would appear to be equally useful for both areas. It appeared to be the police officers and related workers, rather than the lawyers who were in charge of the databases.

The following day I spoke to an extremely loud and friendly prosecutor who showed me how he organised his large prosecutions. His name was Louis Peres and he was originally from New York. He talked about how he always told his agents to restrict their prosecutions to 5 people - more than that he says was unmanageable. That is an appealing approach, though, in my view, unrealistic.

His system was geared to the fact that lawyers in America became involved from the very beginning of an investigation (as opposed to the situation in Australia). He told me that he took notes of every meeting he had with the investigators, and made follow up meetings in 60 days. One practice he had which was extremely sensible, and one which I would endorse, was that he also had them start loading material into the database from the first meeting. He said that he told them that it was not optional, it was required. He also showed me their disclosure requirements. I deal with this further below.

I also found out that the Medi-Fraud problem was enormous there. In fact, according to some of the lawyers it was becoming a bigger problem than narcotics importations, with the number of medicare-type transactions in the United States being in the trillions, with all the related problems of detecting the fraud. I attended an interesting meeting where Deloitte & Touche consulting group (who were joined by some others) were trying to promote their "Detect" database - designed to assist in combating Medifraud. Part of the group was a man from Hobbs International - a firm apparently specialising in databases. There was also an academic, Malcolm Sparrow - who used to be a police officer but was now in academia. He was from the John F Kennedy School of Government, Harvard University and had written a book on the problem. He gave me a copy, entitled *License to Steal*.

The system demonstrated was a very powerful system - and very interesting. So far they had sold their systems to insurance providers and governments, who had the right to the information. Law enforcement had no such right - they had to suspect something first - so it probably had limited use in the prosecution area. Nevertheless it was great to watch. The people from Deloittes worked full time on Medifraud.

In Australia I don't think the industry or the problem would be big enough to justify a team from that firm for example to work full time in an area like that. That's where America's size makes a big difference.

On my last day in Miami, I did a bit of court hopping. I saw some sentences being done in front of a very forthright judge. I also saw a father and son defendant team who were meant to change their plea to guilty (to drug offences) but did not, even though the husband was told his wife would be arrested if he did not plead. He did not change his plea to guilty, and the wife who had been there, all of a sudden disappeared. There were FBI and DEA agents in court, and I had never seen officers move so quickly and quietly.

New York

Day 1 of New York was a day of concentration. I had studied the subway map in some detail, together with the instructions I got from Mark Feldman (the head of the Organised Crime and Racketeering Section where I was going), and got to the Brooklyn office of the US Justice Department with no problem. Many people got off

at the stations around Wall St and at Wall St, so by the time I got to my stop there weren't many people left. It was much quieter in Brooklyn than on Manhattan.

When I got to the office I had to wait over an hour before anyone came to get me. While I waited (on the 15th floor) the security man who was an ex police officer gave me a book he had written about a World War II disaster where a Belgian troop ship with 2200 American sailors on it was torpedoed on 24 December 1944, and there was a great loss of life. It was hushed up for some reason, and he had written a book about it which was rather interesting.

After I was taken up to my floor, and shown my office (overlooking lower Manhattan and the Statue of Liberty) I went to court. I watched two different trials - one involving a crack cocaine syndicate who had murdered three innocent people by mistake (as well as a number of others) and also another trial involving the murder of Haitians and supplying drugs. I ended up following the crack cocaine trial in some detail.

On only my second day in New York, in the very court house where I was based there was the remarkable coincidence of the sentencing of the man who murdered Yankel Rosenbaum, the Hassidic scholar from Melbourne. There was media and police everywhere, and the court room was crowded. I came early so I got a seat, amongst the Hassidic Crown Heights community, which was quite interesting. There were also quite a few African Americans there - particularly 5 tall men, some in African type dress, who, after the sentence gave the black power salute to the prisoner.

There were some preliminary matters prior to sentencing involving the constitutionality of the conviction. The matter had been retried Federally for a civil rights violation, after the perpetrators had been unsuccessfully prosecuted for murder by the state prosecutors. The defence were arguing that there was no civil rights violation as the perpetrators were not interested in preventing the victim from walking on the street (which was a necessary element). They were arguing they did not have the requisite intention. This was rejected, and the man was sentenced.

The prosecution team made very robust submissions. They talked several times about the knife going in its full length and other similar graphic details, and that it was a race crime and hence was very serious. Mrs Rosenbaum, the victim’s mother from Melbourne gave a speech to the court, which was prepared and many there had the

script. The prisoner also made a speech and said he did not do it and that he had been made the scapegoat. The judge gave hardly any reasons, and sentenced him to 19 years (235 months).

There were at least 2 Australian journalists - Ellen Fanning and a man from ABC TV. They looked busy so I didn't go up to them.

On my third day, I started to reflect on what I was noticing.

Although behind us in computer technology, the prosecutors used many charts as visual aids. I later discovered that the prosecution in the crack cocaine syndicate trial had spent over US$100,000 on their charts and photographs. One useful type of chart was one where they could stick up pictures mounted on some sort of light material on the larger chart, using a velcro type substance.

The prosecutors were younger in the United States than in Australia. I spoke to some of the prosecutors about this and they said that was because it was not paid well enough to stay when they could go to a private firm and earn more money. One of the young prosecutors I spoke to said that they made more mistakes because of their youth and inexperience. He also said that the judiciary, in the main, looked out for them, and balanced out the prosecutors' lack of experience.

From my observations, the large circumstantial cases we sometimes run in Australia are far more subtle than anything I saw in the States. In the United States they always seemed to have evidence from a co-offender, otherwise they did not seem to prosecute the matter. It would appear that they always had co-offenders willing to give prosecution evidence because their sentences were so high and that was the only way they could get much time off their maximum sentence.

I also noted that the prosecution were allowed a rebuttal after the defence closing.

I further noticed in a couple of trials that the jury did not get all the exhibits in the jury room when they deliberated - only the easily transported ones. For example, in one trial if they wanted to see video they had to ask. I thought that was a bit worrying, and I query if that is right.

In the court room, there was also the phenomenon of 'side bars' (where any issue which the parties could not discuss within the hearing of the jury, was discussed in a huddle around the judge). This in turn meant that the defendant could not hear what was happening(unless the defendant chose to go up, which was rare). I also noted that in cases involving the use of telephone intercepts, they played the tapes using headphones so the public could not hear. I do not imagine that any of that was actually constitutional, but everyone accepted it.

They also had alternate jurors who sat through the whole case. If they were not called on, when it came to the time for the jury to consider their verdict, they were discharged, even if they had sat there for weeks.

One useful thing I noticed was that in all cases the prosecution (and defence for that matter) marked their exhibits before the case started and the court used their exhibit numbers. The prosecution prepared the exhibit list. There did not appear to be the equivalent of a court officer. The idea of pre-marking exhibits is starting to happen in Australia in large cases, but it would seem sensible to adopt the practice more widely.

Whilst in New York, I considered the practical ramifications of the use of co-operating witnesses by the prosecution. I now set out a summary of my observations.

Co-operation and assistance: practical ramifications

One of the major matters I continued to notice was the extent of the use of co-operating prisoners by the prosecution. I did not see one prosecution conducted without at least one, and often several, prisoners giving evidence for the government. I consider the reasons for this elsewhere.

There are, however, practical ramifications which flow from such an extensive use of the practice of using co-operators. The main practical ramification is the formality which is associated with the various stages of the process of having a criminal co-operate with the prosecution authorities. I was given copies of the following documents:

- *Proffer agreement: an agreement to set up the preconditions for an initial meeting with the government, and the basis on which that meeting is*

held (there is no equivalent document in Australia to my knowledge, partly because in Australia, only the police are usually involved at this point);

- *Co-operation agreement: a detailed agreement setting out what the prisoner is expected to do, and if that is done, what the prosecution will do at that prisoner's sentence in terms of what will be recommended to the court for their sentence. As noted elsewhere, this is possible because (as opposed to in Australia) the prisoner usually fulfils all their co-operation responsibilities prior to being sentenced. The practice of sentencing a prisoner after they have finished co-operating is worth considering, especially in light of some of the problems which arise in breaching a prisoner in Australia for failing to adhere to their undertaking to co-operate.*
- *Plea agreement: This is not really a traditional "assistance" matter, though it is of course of assistance to the authorities when a prisoner pleads guilty, thus avoiding a trial. There is no equivalent in Australia to a written plea agreement, and it is unlikely that such a document would be introduced in the near future. The plea agreement is also very much predicated on the existence of the sentencing guidelines, which is again something we do not currently have in Australia.*

I am planning to provide a copy of these documents to the Commonwealth and NSW prosecuting authorities, and the Australian Federal Police, for their information.

In the Eastern District office of New York, they had a "5K committee" set up in the office. This was to provide some uniformity in decision making to decide if a defendant should get a 5K letter handed up to court. 5K letters relate to the assistance an offender has provided to the prosecution, and can lead to a discount, sometimes a substantial one, off their sentence. The guidelines in Eastern district office are that the defendant's assistance has to lead to arrest or a successful prosecution, otherwise, no matter what danger they're in etc they do not get a 5K letter. If they do not receive one, the defence can still raise the fact of their assistance and the judge can account for it under another sentencing guideline. In Australia, decisions of such a nature are normally made by the police, rather than the prosecutor's office. However, having the prosecutor's office involved in the assistance question in this systematic fashion, may be worth considering.

I went to the Court of Appeals in Manhattan several times. The standard of submission struck me as variable, sometimes quite poor. This was no doubt a result of not having specialist advocates.

I also observed a number of white collar fraud trials. In the first one I observed, the ex chief accountant who had been indemnified was giving evidence. Again, I noticed that the prosecutors were very young (early thirties), and in my view, a little bit out of their depth. The defence attorney was quite a bit older and very good.

After a few weeks, the stage was reached in the Rasor gang trial (the crack cocaine trial I was observing in some detail) for the closing addresses. The young female prosecutor, of only about 31 or 32 years of age, was doing the closing. It was quite shocking factually, with numerous murders. The evidence though stemmed from cooperators in the main, as corroborated by crime scene evidence and some civilians.

As discussed above, the use of such a large number of co-operators was fundamentally different to most of our trials. In my view, the large number of co-operators could be attributed to the large sentences the prisoners faced because of the RICO (Racketeering Influenced and Corrupt Organisations) legislation together with the sentencing guidelines. I consider the RICO legislation in some detail below.

I thought the prosecutor did a good job for the closing address – she went very fast, and had a good manner. She used sticky photos which they could stick up on a board. This was necessary to keep track of all the people mentioned and the locations of the various crimes. There were lots of guns in evidence too. It was awful to watch a little boy (of about 3 or 4) in court who clearly held up these incredibly violent men as heroes. Some of the victims' relatives were in court too and they were very upset.

The following day, I listened to the final defence closing and prosecution rebuttal and also some arguments over what the jury were to be told. In my view, the prosecution was quite close to the line, if not verging on inflammatory in their rebuttal. The defence asked for a mistrial on finishing, and I think the submission had at least some substance. I think the prosecution could have been a little more restrained, even taking into account we were in Brooklyn, New York.

Neither side addressed the law at all, and they were reprimanded if they did. The law submissions were solely up to the judge. However, the judge's closing charges were made available word for word prior to him giving it and the defence and prosecution both asked for (but did not necessarily receive) the changes they requested. This appeared to me to be most sensible, and is something we should consider in Australia.

I also had an interesting talk with Mark Feldman, the head of the Organised Crime and Racketeering section. We discussed whether Australia needed legislation like the RICO legislation. He said free societies worked out the balance between the severity of their laws versus civil liberties. In his view, the US had worked it out quite well. In my view, Australia did not need laws as far-reaching as the RICO laws. The longer I stayed in the United States and the longer I observed the conduct of some of the trials prosecuted under the RICO legislation, the more I felt that the legislation was far too powerful from a law enforcement point of view for Australia's needs.

There was another thing which was, on reflection, quite disturbing. I noted that during the Rasor trial that there were no journalists at court. If such a trial had occurred in Australia, it would have been a big media event - there it was routine. It would be interesting to speculate that if it the accused were white, the press would have taken more interest.

I heard and followed the judge's charge to the jury. It was very long, and the jury were given a typed copy in advance which they were following as they were reading. They were allowed to keep it. It looked as if it was about 100 pages long of widely spaced type.

The following day, I went across to the new Southern District Federal Court in Pearl Street - behind the enormous State Supreme Court. I found on the 12th floor a white collar crime case involving 3 defendants - all stock brokers. There was, as usual, a co-operator in the stand. He was there the next day too - he was being cross-examined by various of the defence lawyers. Again, nothing interesting was going on in presentation of evidence. The defence had some charts, but they were hand written only. I did not see the prosecution ones. In my opinion, I did not regard what they were doing was particularly clear for the jury.

On Thursday I went straight to the Court of Appeals in the morning - and heard a few different cases. The time limits on each advocate was good to see in practice. There were two men and one woman on the bench. The cases were both civil and criminal. One had a litigant in person - a very sorry-for-herself woman - probably with something of a case. The judges were good with her.

In the afternoon I came back to the office. They had moved my "office" around the corner – with a view of Brooklyn and Staten Island rather than Manhattan. In the Rasor case, the jury had come back with a few questions which the lawyers were working out a reply to.

The following morning I had a meeting with Phil Kirschen - from the IRS (Internal Revenue Service) who was responsible for the High Intensity Drug Task Area (HIDTA). In the IRS they did mainly tax cases, financial transaction reporting type cases and corruption cases. He said they were trialling a system in Cincinatti, which sounded interesting, where they would be integrating all their data collection and were trying to do paperless cases. He showed me their computer system which tracked work within the office - rather like the system within the Commonwealth DPP for file control. Other than that they did hard copy cases. The "reports" that they sent to the AUSAs with the evidence seemed pretty comprehensive, and they gave a full analysis of the evidence. That looked sensible. Often our police have made full analsyses of the situation, but they don't necessarily pass that on - as there is no institutional reason to do so.

After that I went into the famous court building which they use for many TV shows about criminal law. I discovered that was, funnily enough, only a civil court. I watched a very irritating civil matter for a short while - a trial, judge alone, which was quite chaotic. Then I had lunch in the Federal court cafeteria and over heard from Mr Jacobs, one of the defence attorneys in the Rasor trial that the jury had brought in its verdicts. There were 2 acquittals (his client and another accused) and two convictions - but not on all matters I later learnt. Ronald Stanley was convicted. He received a mandatory life sentence.

After lunch I eventually found a case which was proceeding in the Southern District Federal court building which was the insurance fraud case of boxing promoter Don King - an amazing looking man, with lots of supporters. One of his lawyers spoke to me during the break. After that I came back to the office and spoke a bit about the

acquittals with the prosecutors of the Rasor trial. They were of the view that the jury could not have understood the matter properly, as some of their verdicts were inconsistent. They not only had to come to a verdict on the actual charges, but also reach agreement as to the relevant predicate acts being relied upon. This was a highly complicated task. The prosecutors felt that the jury had simply reached a compromise.

Later in the week I spent some more time watching the Don King insurance fraud trial - involving him as a boxing promotor. I talked to his lawyer briefly (Peter Flemming) and was also introduced to Don King himself and the rest of the defence team. They were all very friendly. I later discovered that Don King is a very famous person. Just as well I didn't know at the time, otherwise I probably wouldn't have talked to his team the way I did. The lawyer seemed to think that it was an improper decision to prosecute in the first place. From what I could follow, it seemed to be a very subtle case. Once I returned to Australia, I was informed that he was acquitted.

The following morning I saw a bit of the Don King trial again - but it was boring video testimony of evidence taken from some London insurance people. Later I found another racketeering trial – it was presided over by a very impressive female judge called Judge Scheindlen, a woman in her late 40s. She really controlled the cross-examination. It involved about 6 defendants - mainly Hispanic. They were charged in relation to large-scale drug supply and murder. There was a co-operator in the box who was a very good witness. The jury were very attentive. It was good to see the judge so much in control. Again the prosecutor was very young.

Towards the end of my time in New York, I started to read *Turnaround* by William Bratton - the New York Police Commissioner credited with turning around the crime problem in New York. I also had a talk to Mark Feldman about his thoughts about Bratton and his reforms. Mark Feldman was well placed to have pertinent views as he had been a State prosecutor in Queens for many years, as well as, more recently, a Federal prosecutor. He said some of the turnaround started in David Dinkins time as mayor - when they started the community policing initiative and employed more police and got them on the street. He also said that the downturn in the crack epidemic helped - with the younger generation not finding it a drug of choice. He said crime has improved nationally not just in New York. He also thought that good economic times had also probably helped.

I also spent some time watching a trial conducted by one of the AUSAs called David Porter. He was prosecuting 4 people in a "chop shop" - a stolen car racket where they took apart stolen cars for their parts. Two good things which I noticed from other trials - one was the prosecution read the "stipulations" (equivalent to our agreed facts) when they wanted to - which were already marked as prosecution exhibits. The other thing is a matter I have addressed already – that all the exhibits were always pre-marked - as "government exhibit whatever" or 'defence exhibit whatever".

I also spent some time in Brooklyn watching a civil trial where the computer company, Digital, was being sued by some of its ex-workers for Repetitive Strain Injury. They were using imaged documents and the jury had access to the documents via computer screens. This was one of the most technically advanced trials I saw in the US. This was hardly surprising, given one of the parties was a computer company. It is worth noting though, that Australia is using the same technology in some of the bigger document cases.

I also finally managed to have a long talk with Stephen Kelly, one of the prosecutors in the Rasor trial. He had time on his hands given that the Rasor trial was over – and the discussion was very useful. We mainly discussed the rules which governed the prosecution's obligation to hand over material to the defence, called generically "discovery". I can summarise what I learnt as follows:

Rules relating to Discovery

*The first rule they have to comply with is **Rule 16 of the Criminal Procedure Rules**. The material which falls under this has to be served within the first 2 weeks or month after an indictment is laid. Indictments can be done in two different ways - one is by putting all the evidence before the Grand Jury by way of testimony. The other is to prepare an information which grounds the arrest, and then after the arrest the Grand Jury simply rubber stamps the indictment after someone reads the information onto the record.*

So, the material which falls under rule 16 is:

a. all statements of defendants to police and defendants material from wire taps - so any admissions and any statements of defendants;

b. the criminal record of the defendant;

c. any physical evidence - documents, weapons, guns, search warrants etc - either served or made available for inspection;

d. reports of experts; notice of expert witnesses.

The major category of material not served are the witness statements (which are rarely taken) or notes from agents about what the witness will say (more common).

*The second major statutory obligation in relation to service is **Rule 3500** of Title 18 of the US Code. It is known as the Jencks Act, as its provisions overruled the effect of a common law case by that name. It only obliges the prosecution to serve "after a witness called by the United States has testified on direct examination" any statement of the witness in the possession of the US which relates to the subject matter as to which the witness has testified. In practice this includes agent notes of conferences with a witness - as they seem not to produce statements in the sense they do in Australia. It also includes witness notes and grand jury testimony.*

However, in practice these materials are handed over before trial starts - about 2 - 3 weeks before. Its a matter within the prosecutor's discretion - although I heard more than one pre-trial hearing where the judge was inquiring as to whether the "3500 material" had been handed over.

Overlaying all this are two Supreme Court cases which have a major impact - one is Brady (Brady v. Maryland, 373 U.S. 83 (1963)) and the other is Giglio (Giglio v. United States, 405 U.S. 150 (1972)).

Brady material is exculpatory material (not impeachment material unless it is so relevant or critical as to in effect exculpate the witness- for example, the

witness's evidence is the only evidence against the person and he's lied on that point). That should be handed over in a "timely" fashion.

Giglio material is impeachment material – for example, the witness lied previously; leniency has been given as result of a plea of guilty; misconduct by the witness; or prior bad acts done by the witness. The timing of this is controversial - but clearly if it had to be served early, it would override the effect of the 3500 law. Recently there was a decision to say it had to be handed over prior to a guilty plea - but all the US Attorneys in the relevant Appeals district put in a request for a rehearing of this point and it was modified so now it is, I understand, how it was before. In other words, it is left to the discretion of the individual attorney - normally Giglio material is handed over when the 3500 material is handed over.

Another highlight of my visit was when I met Judge Gleeson for about an hour. He was serving as a Federal court judge for the Eastern District. Prior to becoming a Federal court judge, he prosecuted the successful trial of mafia boss John Gotti. He was even only now in his early to mid forties.

We discussed the management of big cases - he said he learnt from the first (unsuccessful) Gotti trial that they played too many tapes (not to mention that the defence had bribed a juror). In that case, the jury acquitted Gotti.

He said in the successful second trial they had divided the tapes into topics - which matched the different “predicate” acts in the indictment. He said it took months and months to listen to them all and decide what to use. The police had taped the main club area where John Gotti frequented (from which they only used a few minutes in the trial) the hallway (only a few more minutes), and in the upstairs “secret” apartment they'd taped about 7 hours and used about 5 hours. Of course, in that trial, they also had the testimony of Sammy (‘the Bull’) Gravano. According to Judge Gleeson, they would have succeeded without that testimony.

I asked him about sentencing, and asked if he thought judges had enough discretion and he said no. He liked the idea of some guidelines but not as minutely crafted as the federal guidelines. He thought the benefit was that it provided more uniformity. The down side was that judges did not have enough room to move. If the guidelines

were broadened, he said the appeals court could fix up any problem. As it was, the appeals court hardly had any role to play at all.

Washington DC

On my first day in Washington DC I went to meet Jamie Orenstein at the Main Justice building on Pennsylvania Avenue, opposite the FBI headquarters. His name had been given to me by people in the New York office. He had worked in New York (including on the Gotti trial, with Judge Gleeson). He had also worked on the trial of the Oklahoma bombing case. We talked about the Oklohoma bombing case. He said that the FBI looked after the over 10,000 exhibits - though the US Attorneys office also used a data base of their own. A paralegal maintained the database, and Jamie used it the most. He said they didn't use all the exhibits that they'd chosen. He said what really sped everything up was the imaging equipment they had - they'd scanned all the documents in and could draw on them, to point out the most significant parts of them.

The court room was specially built for the trial which allowed them to use innovative technology - otherwise Jamie said it wasn't possible. He said they had an unlimited budget, and the technology used was well above the standard he had seen used anywhere else. That also accorded with my observations.

The next port of call was a tour of the national FBI headquarters. The tour was quite interesting - to see what the FBI wanted to show the public - history, exhibits, the labs - DNA, paint, etc. It ended with a gun demonstration. One of the memorable moments was when someone asked our guide if the ‘X files’ were real.

The next interview I conducted was with Frank Marine, the Deputy Chief of the Organised Crime and Racketeering Section, Criminal Division. It was another highlight of my trip.

To make sense of my summary of our discussion, I will now outline the main features of RICO law.

The RICO statute.

The RICO statute was enacted Oct 15, 1970, as Title IX of the Organized Crime Control Act of 1970, and is codified at 18 USC 1961-1968. It has been

amended a few times since. In passing the statute Congress mandated that the Courts interpret it broadly to effect its remedial purpose.

What is RICO?

The statute provides powerful criminal and civil penalties for persons who engage in a "pattern of racketeering activity" or "collection of an unlawful debt" that has a specified relationship to an enterprise" that affects interstate commerce. The statute defines "racketeering activity" to include state felonies involving murder, robbery extortion, and several other serious offenses, and more than thirty serious federal offenses, including, for example, extortion, interstate theft offenses, narcotics violations, mail fraud, and securities fraud. A "pattern" consists of two or more of these state and federal crimes that occur within a statutorily prescribed time period. An "unlawful debt" is a debt that arises from illegal gambling or loansharking activities. "Enterprise" is defined to include any individual, partnership, corporation, association, or other legal entity, and any group of individuals associated in fact although not a legal entity. For example, an arson-for-profit ring can be a RICO enterprise, as can a small business or government agency.

Four different criminal violations, including conspiracy, are proscribed by RICO. Section 1962(a) makes it a crime to invest the proceeds of a pattern of racketeering activity or collection of an unlawful debt in an enterprise affecting interstate commerce. For example, a narcotics trafficker violates this provision if he purchases a legitimate business with the proceeds of multiple drug transactions.

Section 1962(b) makes it a crime to acquire or maintain an interest in an enterprise affecting interstate commerce through a pattern of racketeering activity or collection of an unlawful debt. For example, an organized crime figure violates this provision if he takes over a legitimate business through a series of extortionate acts or arsons designed to intimidate the owners into selling out.

Section 1962(c) makes it a crime to conduct the affairs of an enterprise affecting interstate commerce "through" a pattern of racketeering activity or collection of an unlawful debt. For example, an automobile dealer violates

this provision if he uses the facilities of his dealership to operate a stolen car ring.

Section 1962(d) expressly makes it a crime to conspire to commit any of the three substantive RICO offenses.

Section 1963 provides a strong maximum criminal penalty for violating any provision of Section 1962: 20 years in prison and a fine of $25,000 or up to twice the gross profits of the offense in addition to forfeiture of the defendant's interest in an enterprise connected to the offense, and his interests acquired through or proceeds derived from racketeering activity or unlawful debt collection. In addition, in 1988 the statute was amended to provide for a life sentence "if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment".

Section 1961(1) defines "racketeering activity" to mean any crime that is enumerated in subdivisions A,B,C,D,or E of this subsection. That list contains all of the offenses that may constitute racketeering activity; no crime can be part of a RICO "pattern of racketeering activity" unless it is expressly included in this subsection. The listed crimes are often informally called predicate crimes because they make up the predicates for a RICO violation.

The act renders criminally and civilly liable "any person" who violates the subsections above.

Pattern of racketeering activity

A pattern of racketeering is defined as consisting of at least two acts of racketeering, one of which must occur after the statute was passed and within ten years of the prior act. In *Northwestern Bell Telephone Co* the Supreme Court did not precisely define "pattern of racketeering activity" it stated that "what a plaintiff or prosecutor must prove is continuity of racketeering activity or its threat. The Court explained that the required "continuity" is "both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition".

Enterprise

An enterprise can be an illegal enterprise ie an enterprise in fact (as opposed to a legally recognizable enterprise)– associations of people for a criminal purpose eg drug groups, organised crime; burglary rings; gambling operations; prostitution rings affecting interstate commerce; gangs; chop shop organizations; arson for hire groups.

The term “enterprise” includes “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” 18 USC 1961 (4). Initially, several courts refused to extend RICO to the activity of organizations whose purpose was exclusively criminal, on the ground that congressional intent enacting RICO was to eliminate the infiltration of legitimate business by organised crime. It is now settled that the term “enterprise” for purposes of RICO encompasses both legitimate and illegitimate enterprises: *United States v Turkette* 452 US 576 (1981). Prosecution under RICO, however, does not depend on proof that the defendant or the enterprise is connected to organized crime.

At page 583 the Court stated “In order to secure a conviction under RICO, the Government must prove both the existence of an “enterprise” and the connected “pattern of racketeering activity”. The enterprise is an entity, for present purposes of group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is on the other hand, a series of criminal acts as defined by the statute. The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by participants in the enterprise.”

An association in fact enterprise may, however, change its membership during the course of its activity. The issues of ongoing organization, continuing membership, and separate existence are factual ones for the jury, subject tot he same review on appeal as any other factual determination.

Congress stated that the purpose of the RICO statute is “the elimination of the infiltration of organised crime and racketeering into legitimate organizations

operating in interstate commerce. However, it has been held that the statute is sufficiently broad to encompass any illegitimate enterprise affecting interstate or foreign commerce.

As the court in *Riccobene* explained (709 F.2d at 222-23)

The "ongoing organization" requirement relates to the superstructure or framework of the group. To satisfy this element, the government must show that some sort of structure exists within the group for the making of decision, whether it be hierarchical or consensual. There must be some mechanism for controlling and directing the affairs of the group on an on-going, rather than an ad hoc, basis. This does no mean that every decision must be made by the same person, or that authority may not be delegated.

The second necessary element for an enterprise under RICO is that "the various associates function as a continuing unit….This does not mean that individuals cannot leave the group or that new members cannot join at a later time. It does require, however, that each person perform a role in the group consistent with the organizational structure established by the first element and which furthers the activities of the organization.

The third and final element in establishing the enterprise is that the organization must be "an entity separate and apart from the pattern of activity in which it engages." … As we understand this last requirement, it is not necessary to show that the enterprise has some function wholly unrelated to the racketeering activity, but rather that it has an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses. The function of overseeing different predicate offenses and other activities on an on-going basis is adequate to satisfy the separate existence requirement.

It is only necessary that either the RICO enterprise or the pattern of racketeering have an economic goal.

The prosecution in the Rasor prosecution which I observed at some length in New York alleged that the enterprise in question was the crime group itself, ie an enterprise in fact. That's why the prosecution had to go to some trouble to

characterise the group as the "Rasor organisation". They then had to prove the murders were racketeering acts by alleging they were in furtherance of the enterprise. The prosecution alleged the enterprise and the individual acts all together, and in my view, it was a bit circular, because if the enterprise weren't proved, neither would the racketeering acts and vice versa. The defence did not seem to have contested too much the existence of the enterprise, except in general terms. In my view, they could have made more out of this aspect.

Miscellaneous

The court in Turkette noted that for organized crime the primary sources of revenue and power were illegal gambling, loan sharking and illicit drug distribution.

Criminal RICO prosecutions go through an intensive review at the Department of Justice in Washington DC – as compared to civil RICO matters. Not every case that meets the technical requirements of a RICO violation will be authorised for prosecution. For example, the Department of Justice Prosecutors Manual outlines that a RICO count should not be added to a routine mail or wire fraud indictment unless there is a special reason for doing so. RICO should only be invoked in those cases where it meets a special need or serves a special purpose that would not be met by prosecution only on the underlying charges. The Manual states that prosecutors should use discretion in requesting RICO authorization, and should seek to include a RICO violation in an indictment only if one or more of the following requirements are present:

1. RICO is necessary to ensure that the indictment adequately reflects the nature and extent of the criminal conduct involved in a way that prosecution only on the underlying charges would not;
2. A RICO prosecution would provide the basis for an appropriate sentence under all of the circumstances of the case;
3. A RICO charge could combine related offenses which would otherwise have to be prosecuted separately in different jurisdictions;
4. RICO is necessary for a successful prosecution of the government’s case against the defendant or a co-defendant;

5. Use of RICO would provide a reasonable expectation of forfeiture which is proportionate to the underlying criminal conduct;
6. The case consists of violation of state law, but local law enforcement officials are unlikely or unable to successfully prosecute the case, in which the federal government has significant interest;
7. The case consists of violations of state law, but involves prosecution of significant political or government individuals, which may pose special problems for the local prosecutor.

A drafting problem which arises when using RICO legislation is the issue of multiplicity. Multiplicity is the charging of a single offense in several counts. This issue arises when defendants are charged with substantive violations of RICO, RICO conspiracy, and committing the underlying predicate offenses. The danger in a multiplicity of charges is that it may lead to multiple sentences for a single offense or may prejudice the defendant by creating the impression that several offenses were committed where they may have been but one violation. The test for determining whether one offence or separate offence are charged is whether each count requires proof of a fact which the other does not. Courts have repeatedly held that RICO and RICO conspiracy charges require proof of different elements from any underlying predicate offenses. Therefore, such charges are not multiplicitous, and separate convictions and sentences are proper for each charge.

Prejudicial spillover

In *United States v Le Compte* 599 F.2d 81 (5th Cir 1979) two defendants argued on appeal that they were the victims of prejudicial spillover from testimony concerning the acts of co-defendants. The appellate court affirmed their convictions, holding that "the Constitution does not require that in a charge of group crime a trial be free of any prejudice but only that the potential for transferability of guilt be minimized to the extent possible"

However, in *United States v Winter* 663 F.2d 1120 (1st cir) the court reversed the convictions of two defendants on two substantive counts after reversing their convictions on the RICO conspiracy count. The court found that it was too prejudicial to the defendants, whose involvement in the enterprise was

limited, to be tried on the two counts as part of a massive race-fixing conspiracy.

Special Verdicts

Special verdicts have come to be useful and sometimes even crucial in RICO cases. The viability of a RICO conviction on appeal often hinges on being able to determine the number of separate predicates which support the RICO charge. If one or more of the predicates are reversed on appeal, the RICO conviction will also fall if the appellate court cannot be assured that the RICO charge is still supported by at least two predicate offenses. If there is no way to establish the basis of the RICO verdict, the appellate court may feel obliged to assume that the verdict was based on the stricken charges. Thus even though special verdicts are generally not favoured in criminal prosecutions, their use has been endorsed in RICO cases.

Interview with Frank Marine

Frank Marine had been a prosecutor since 1972. He said that even though the RICO legislation had been introduced in 1970, that it took a while (a) for the crimes to be committed which would fit within the RICO guidelines, and more importantly (b) for people to become familiar and comfortable with the new legislation. Until then, the Federal government did not have much jurisdiction over crime. The impetus was, he thought, the increase in crime caused by the increasing population and the increase in drug problems after the Vietnam war. According to him, the population of the United States has increased from 170 million in 1970 to 260 million now.

The three big areas federal crime fighting brought were:

1. RICO,
2. Title 3 - electronic surveillance; and
3. witness protection.

The three main groups the Organised Crime Section of the Department of Justice focused on was the LCN (La Cosa Nostra); Asian organised crime and Russian (meaning eastern bloc) organised crime. The big push against the LCN (which for a long time was not acknowledged to exist) was with the first co-operator in about 1963. The LCN were very powerful, as they had

tremendous control over the labour unions which in turn gave them economic control.

The benefit of the RICO laws was that as the LCN were also involved in gambling, extortion, murder, robbery and arson etc, they could be prosecuted for all these things, instead of taking each criminal activity out of context. The RICO legislation also provided for much higher sentences than were otherwise available at the time - ie 20 years. Marine also said that the RICO laws facilitated the prosecution of the 'higher ups' because

1. the whole enterprise was before the jury
2. the jurisdiction could include state offences; and
3. the comprehensive prosecution shored up the cooperators - ie it made it easier to get many cooperators - even though they may all be testifying about different aspects of the enterprise - they coudl all corroborate the enterprise (even though legally they did not need to be corroborated.)
4. the context was important - if, for example, only a gambling offence was on trial - and gambling was the money earner for the LCN, if not put in context, the jury were liable to acquit for lack of interest. However, if it were seen to be the critical component of an enterprise which also engaged in murder and extortion, the whole criminality was more accurately portrayed.

Far from there being prejudicial spillover, it would be unrealistic to portray the case in any lesser way.

He said that Asian organised crime was not organised in the same sense as LCN – it was mainly made up of youth gangs which were loosely structured and relatively new – there were only about 10 years old. This could be compared to LCN. Unlike the LCN the Asian gangs were not going to get a head start of 30 years. Marine said that the exporting of cars was a big crime problem.

Russian organised crime involved people from the former soviet bloc. Marine said it was more tied to overseas operators, especially to large organised groups in Europe. There was a massive capital flight - while it partly resulted from gem and mineral sales, there were wire transfers of lots of money and no-one was sure at this stage where it was coming from - therefore it could

not be seized as illegal because they could not prove the SUA (specified unlawful activity).

I asked Marine about the CCE ("continuing criminal enterprise") laws. He noted that that law was only narcotics related - though you could have CCE murder - and in his view, for narcotics cases involving murder CCE was to be preferred.

As to sentencing he thought that the sentencing guidelines led to more definite and longer sentences - but that the judges were too liberal. He also thought the guidelines were too complicated and complex.

Marine, at my request, arranged for me to meet two FBI agents - George Walker and George Venizelos. I met them later that day at FBI headquarters. They worked on Russian organised crime. They say the FBI had one big database, and also subset databases. They said the movement of money was a big mystery for them at the moment. The money was not just from drugs, but from some sort of fraud - but they did not know exactly what. The international co-operation between law enforcement was increasing - through their legal attaches and also through working groups set up with representatives of different countries to share information and techniques.

The main techniques they used for investigating crime (helped by the RICO legislation) was the use of informants, co-operators, wiretaps and consensual monitoring and physical surveillance.

The following day I went to the Supreme Court and heard a lecture and a film (including joint interviews with the justices) and then saw an exhibition about the building of the court in 1935 (by the same person who designed the Woolworth building). I then I walked to the Library of Congress and spent some time looking around.

I also paid a visit to the National Portrait Gallery which was another great experience. There were portraits of lots of great 20th century people as well as others, including the gallery of presidents. I saw a couple of portraits of Sir Winston Churchill.

Towards the end of my final week I spoke to Terry Schubert, Betsy Burke and Jeffrey Bullwinkel, of the Department of Justice International section – they were interested

in finding out about Australia, as they did extradition work with our Attorney-General's Department.

They set up a meeting with the person from their narcotics section who had written the manual on the CCE legislation, and had been in the Department for many years. His name was Jim Alsup, of the Department of Justice's Narcotic and Dangerous Drug Section. As luck would have it he was the perfect final person to interview for my Fellowship.

Interview with Jim Alsup

In his view, the use of racketeering charges was only appropriate where the criminality involved was not just drug activity with some related murder. In his view, there should be non-drug related criminal activity as well, for example, infiltration of legitimate business, by way of, for instance,the use of transportation or storage facilities in the course of the crime. He said that RICO was going out of style (with a few exceptions) - though only because the current targets were not deserving of RICO.

He said that the narcotics prosecutor's best friend was s846 - the straight conspiracy section for narcotics (for which it is necessary to allege 3 overt acts). If there was other non-narcotic activity, the appropriate section was Title 18 s371 - but the maximum penalty was only 3 years. If the criminality was bad enough – he thought it was appropriate to use s848 (CCE) for the top people.

He said that RICO was designed for the LCN - to cover multiple crime problems including extortion, gambling, prostitution, labour unions etc. He agreed with me that the federal prosecutors were on the whole too inexperienced and a bit less restrained than the ideal. He also agreed that there was overuse of RICO. He reported to me that the man who wrote the RICO legislation had said its use had gone way too far.

In his view, CCE should be the drug prosecutor's tool.

He said that most RICO litigation has been brought in Chicago and New York, in the 7th and 2nd circuits - where the LCN has been the most powerful.

CONCLUSION

My fellowship to the United States was designed to study the methods used by American prosecutors to arrange the mass of information in complex trials. The conclusion I have reached is that it seems that in the majority of their matters American prosecutors do not need a sophisticated way to arrange their evidence as they have so much "co-operative" testimony. They simply adduce the evidence chronologically from the co-operating witnesses and then corroborate the co-operators' testimony. The American prosecutors invariably seem to have direct testimonial evidence available against an accused - not a mass of circumstantial evidence which large Australian prosecutions often consist of.

Their conspiracy law is also more "relaxed" than in Australia. In Australia, to use the co-conspirator's rule (where the otherwise hearsay acts or declarations of one co-conspirator can be used against another conspirator), there has to be sufficient direct evidence to show that a defendant is a participant in the conspiracy. In the United States, the decision of *Bourjaily* allows hearsay statements of co-conspirators to be considered at the preliminary stage of determining whether or not a person is a member of a conspiracy, and whether or not the hearsay statements can be used against them in the ultimate question of guilt. Whilst this may seem to be an obscure legal point, it has wide practical ramifications for the organisation of complex prosecutions. In the United States, unlike Australia, there does not need to be a painstaking exercise of classification of each piece of evidence in order to show, as a preliminary question, whether a person is actually a member of a conspiracy, by reference to only the direct evidence available against them. In the United States, all evidence can go in for all purposes.

Their wiretap cases can also be distinguished from Australian cases involving telephone intercepts. In the United States, it would appear that they do not seem to have to base a case on phone calls alone, rather, their electronically intercepted material seems to just corroborate their co-operating witnesses.

My impression of the large complex American cases mainly involved the racketeering cases, with multi-count complex indictments. These cases involve a mass of evidence, all of which is let in against most of the accused people on trial, and most

of which (in my view) has spillover prejudicial effects, at least against some of the accused.

The main physical preparation the prosecution seemed to do was to prepare enormous charts, and also pre-label all the exhibits.

A major lesson I learnt was of more general significance. As in Australia, in the United States what was achieved in any large matter appeared to depend on the actual person or people working on the matter. If the person involved was energetic and imaginative, great work was being done. If not, less exciting results were being achieved. So in Miami, as a result of just a couple of tenacious investigators and prosecutors, amazing results were achieved. This gave me great confidence for the continuing innovations which could be provided by Australians, despite our distance from many of the major world centres.

In summary, I expected to take home ideas which would offer improvements for Australian complex prosecutions of a more profound nature. However, because of a number of structural and legal differences, the same problems did not always arise. Where they did, it appeared Australia had come up with rather more innovative solutions than I witnessed in the United States (specifically in handling prosecutions based on telephone interceptions).

Despite this slight disappointment of expectations (but a great confidence boosting exercise for Australia), there were still some aspects of the process which seemed to be worth emulating here. I summarise those in the Recommendations section.

Overall though, the differences and the similarities were highly thought provoking and stimulating. I would like to further disseminate my thoughts by writing some articles for a legal audience, one journalistic in style, the other more academic. I have already delivered a talk to the Sydney office of the Commonwealth DPP, and received a good turnout and a very interested reaction. I also plan to disseminate a shorter version of this report, together with relevant copies of documentation I obtained, to the State and Commonwealth prosecuting authorities, the Australian Federal Police, the NSW Police Commissioner,

RECOMMENDATIONS

1. In a jury trial, the prosecutor and defence should only address on the facts. The address on the law should be left up to the judge, though the judge should seek assistance from counsel in preparing what he or she will tell the jury. The charge to the jury should be prepared in advance, in consultation with the parties, and should be in writing, and be provided to the jury in writing.
2. The jury should be told not to deliberate until they are directed to after the very end of the case. I noticed that each time a jury left for a short break, or a break over night, they would be told every time "don't discuss the case". This seemed to be sensible, given they should only be deliberating on the totality of the evidence.
3. A committee based on the model of the Eastern District's "5K committee" is an option worth considering. This would provide some uniformity in decision making when deciding whether the prosecution authorities should recommend whether a prisoner should get a discount on sentencing for assistance to the authorities. At the moment, this is up to the police. It may be worth considering whether a central decision making body in the prosecutor's office would be beneficial for uniformity and consistency.
4. In relation to sentencing, it would seem sensible to consider that when a prisoner is on bail and is sentenced to a period of imprisonment, he or she need not be imprisoned straight away - he or she can be given a "surrender date". That means that the prisoner has to present him or herself to a designated prison on a certain date. This not only allows the prisoner to get his or her affairs in order - it also allows the prison authorities to know that the person is a responsible prisoner - because they turned up on time. That allows the prison to classify the prisoner as a medium or low risk prisoner.
5. The notion of a specialised judiciary to deal with Federal criminal matters seemed to work well in the United States. Even though Australia has a separate Federal court, that court does not, in the main, deal with criminal matters. Given that Federal matters in Australia, as in the United States, are routinely more complex than the average State prosecution, it seems sensible to have a specialised judiciary. Using the Federal courts for all Federal criminal matters is also something which Australian authorities should consider.
6. The idea of pre-marking exhibits is starting to happen in Australia in large cases, but it would seem sensible to adopt the practice more uniformly.

7. The police should forward over with their briefs to the DPP an analysis of the case. Whilst this would obviously not bind the prosecution, it would provide a helpful insight into the matter.

Sarah McNaughton

6 October 1998