Australia: Why Mr Rivkin has gone to jail

Richard Hoffman
7 June 2003

In the afternoon of April 24, 2001, Rene Rivkin, a prominent Sydney stockbroker, made a telephone call to a trader at his company's offices in Double Bay, a wealthy harbourside suburb in the eastern suburbs of Sydney. He instructed the trader to buy 50,000 shares in Qantas Airlines. Because of that act, Rivkin will spend nine months of periodic detention in Silverwater prison for the criminal offence known as "insider trading".

Rivkin is conspicuous in Sydney's financial circles and Jewish community. He has always been viewed as something of an establishment outsider. Outspoken, arrogant and brash, Rivkin typifies the "greed is good" ideology of the nouveau riche for whom accumulation of wealth, possessions and fame is everything.

It is fair to say that he does not strike an attractive figure. But there is little that is unique about him when it comes to the world of money making. His character, particularly his greed, hardly marks him out for special attention.

Rivkin bought the shares following information that he was given about the likely takeover by Qantas of a small regional airline named Impulse Airlines. The owner of Impulse, Gerard McGowan, told Rivkin of the takeover in the course of a discussion regarding his possible purchase of Rivkin's $A8 million home in one of Sydney's richest suburbs, Bellevue Hill. Shortly after the conversation with McGowan and the real estate agent acting on the sale, Rivkin placed the order for the shares. The real estate agent was also charged with insider trading as he similarly purchased Qantas shares after the conversation.

Rivkin sold the Qantas shares before the takeover was announced publicly and, therefore, did not benefit from the upward movement in the share price that followed. He sold the shares for a trifling personal gain of around $300. His company made a profit of $2,664.94. It was hardly a corporate crime worthy of the name.

Insider trading is a crime concerning the trading of securities on the basis of price sensitive information that is not generally available to the market. People in the corporate and securities world, when speaking candidly, admit to the practice as being widespread.

There is even a body of opinion holding the view that insider trading increases the efficiencies of the market by ensuring the immediacy of the relationship between price movements in securities and actual events occurring in the marketplace. The argument goes like this: if insider trading is restricted, information will be more slowly disseminated and thus slower in reflecting the true worth in the company share price.

Some market experts consider this to be a brake on the efficient operation of capital markets, since capitalist societies rely on market forces to allocate resources. (See, e.g., H. Manne, "In Defence of Insider Trading" *Harvard Business Review*, Dec, 1966; D. Carlton & D. Fishchel, "The Regulation of Insider Trading", *Stanford Law Review*, Vol. 35 number 3, 1983). In any case, insider trading is of a different order compared to other forms of social behaviour proscribed by the criminal law that directly cause injury or loss.

There have been very few prosecutions for insider trading in Australia—and even fewer successful ones. Most significantly, a jail sentence has only been handed down in four cases considered serious; with seriousness viewed in terms of the amount of profit reaped by the transaction and the level of deception and elaborateness employed by the purchaser in carrying out and concealing the transaction.

For example, in 2001, Simon Gautier Hannes, a young executive at Macquarie Bank was sent to jail for two and a half years for insider trading. Hannes had netted millions through his unlawful conduct and had gone to extraordinary lengths to perpetrate and conceal the transaction. These involved the use of false identities, false bank accounts, forgery and dozens of breaches of legislation requiring declarations of cash transactions,. The inside information concerned matters in which Macquarie Bank was involved. Hannes was an "insider" in the true sense, unlike Rivkin, who was a third party to the deal in question. At all times Rivkin acted in a purely private capacity.

The Australian Securities and Investment Commission (ASIC) pursued Rivkin as though he had perpetrated the swindle of the century. No expense was spared in the prosecution. ASIC's zeal was noted by many who pointed to the trivial size of Rivkin's gain as compared to the vigour with which it was prosecuted.

If the history of corporate collapses and scandals in Australia over the last 20 years is any indication, ASIC has failed spectacularly as a regulator to ensure a stable environment for investors, free of scandals, scams and directors' "excesses", and thus create a marketplace characterised by corporate "good citizenship".

Tens of thousands of investors have lost billions of their savings and thousands of employees their livelihoods as a result of corporate collapses in which mismanagement and/or outright fraud have played a significant role. The list is endless: Spedley, Tricontinental Bank, Estate Mortgage, OneTel, HIH, AMP, Ansett, National Textiles—to name just a few. The supervisory and regulatory authorities, by overseeing the activities of the marketplace, are formally charged with preventing such events.

The deepening crisis of capitalism is plainly not the product of inadequate regulation. Moreover, acceptance of the market principle inevitably entails the drive to minimise regulation. The market, as Karl Marx pointed out, means anarchy.

ASIC's credibility has been seriously eroded over the last two decades by its failure to protect the public from the predations of "corporate crooks", a term used to describe not just directors engaged in outright criminal conduct, but the layers of corporate managers and "leaders" motivated not by the desire to manage companies prudently, to ensure their stability and future prosperity, but rather by a desire for quick and vast personal enrichment.

ASIC's public and aggressive pursuit of Rivkin was motivated by its need to recover credibility and legitimacy in the eyes of an increasingly skeptical public. It made regular public announcements regarding the case, stressing on each occasion the importance of the matter.

Upon the sentencing of Rivkin, ASIC chairman David Knott declared: "The decision of Justice Whealy to impose a sentence of nine months imprisonment to be served by periodic detention is the decisive judgement on the seriousness of Mr Rivkin's offence. By operation of law he is now banned from managing any corporation for the next five years, except by permission of the court.... In the light of today's sentencing by Justice Whealy ASIC will review the status of any license held by Mr Rivkin or

any company in which he has a relevant interest."

The prosecutor, presumably upon the instructions of ASIC, sought a jail sentence for Rivkin from the Supreme Court, submitting quite openly that Rivkin should be made an example of. ASIC urged the court to hand down a jail sentence to act as a "deterrent" to Rivkin and others.

The social significance of the Rivkin case is far greater, however, than ASIC's objective of winning the confidence of a disillusioned public. After all, ASIC did not pass the jail sentence—the Supreme Court did. Given the circumstances of the crime, which were unexceptional and minor in legal terms, it is necessary to consider the deeper social processes lying behind his jailing.

In the Common Law legal system, the process of sentencing upon conviction for a crime involves consideration of two elements: the "objective features" of the criminal acts and the "subjective factors" of the individual concerned. The first element is predominant in the weighing up of the two aspects—that is, the overriding consideration is the degree of seriousness, or "objective criminality" of the acts in question. The subjective matters usually go to the issue of whether there should be some reduction in the sentence, for example the accused has "made a valuable contribution to the community". But subjective factors cannot have the effect of increasing a sentence.

Considering the acts committed by Rivkin in insider trading generally and, more particularly, a comparison of his acts with other cases, the objective features of his crime, even taking on board his occupation as a stockbroker, could not justify a prison sentence. There were no gains to speak of; the shares were sold before the expected favourable price movements occurred, and there was no elaborate plan or deception involved. It is worth quoting from the judgment in order to appreciate the political character of the decision.

Justice Anthony Whealy declared: "... To my mind, [leniency because it was his first offence] would be completely inadequate in the circumstances of this matter to reflect the criminality of Mr Rivkin's actions assessed objectively...

"I have earlier said and I repeat that I regard the circumstances of this offence in some respects as tending towards the lower end of the range. But notwithstanding that finding, there are some serious components of the offence principally related to Mr Rivkin's position in the market and as a trader generally; and secondly in that context, related to Mr Rivkin's deliberate decision to cause the acquisition of these shares fully knowing the price sensitivity of the information he had received and knowing that he had been warned not to make a trade in those shares because of the confidential nature of the circumstances in which the information was passed to him. In my view, the community generally would be rightly outraged if a sentence other than imprisonment were imposed."

The elements described by the judge as serious components of the offence in fact made Rivkin's conduct virtually indistinguishable from any act of insider trading: deliberation, knowledge, confidentiality and price sensitivity being the normal components. They were certainly not special features rendering this case exceptional. Rivkin's defence counsel, reflecting that fact, sought a dismissal of the charge or discharge of Rivkin without a conviction, in addition to the fact that this was Rivkin's first-ever criminal charge.

The judge was clearly incensed by Rivkin's deliberate act of greed. He was also unimpressed with the arrogance Rivkin displayed toward the prosecution. He considered that Rivkin's arrogant attitude "probably explained Rivkin's actions in insider trading". Notwithstanding those views, the judge said "I make it absolutely clear that no aspect of the imposition of penalty is designed to punish the offender because he is, on occasions, an arrogant man or because he is 'different'...."

It is difficult to avoid the conclusion, however, that the judge's views about the character of Rivkin found some expression in the sentence.

Over the last 20 years, social inequality has widened to unprecedented levels. Recent statistics show that over one million children in Australia live in families where neither parent has a job (in a total population of 20 million). Millions of people with full-time jobs live below the poverty line and real wages have not increased in Australia since 1983. Social services are being destroyed and the national health system, Medicare, is following state-funded tertiary education into extinction. The spectacle of wealth, luxury and corruption within this generalised sea of poverty is reminiscent of Ancient Rome in the period of its disintegration.

The jailing of Rene Rivkin amounts to an attempt to appease the social anger and resentment seething beneath the surface of Australian society. Media coverage of the trial was incessant, demagogically portraying Rivkin as the embodiment of greed and corruption. Whatever the personal contempt felt by the judge toward him, Rivkin became a scapegoat for a social system on the brink of collapse.

The whole affair was aimed at disguising the real causes of social inequality in the capitalist system itself, and its relentless drive for profit. For the most conscious sections of the ruling elite, sending Rivkin to jail serves the vital function of legitimising the class system by perpetuating the myth that the problem lies simply in the rottenness of certain corrupt individuals and not in the socio-economic system itself.

Anatole France once remarked wryly upon "the majestic equality of the law under which it is a crime for any citizen to sleep under the bridges of the Seine."

Formally, the law applies equally to all citizens, irrespective of wealth or status. The social reality of course is completely different. The law enshrines and entrenches social inequality through the law of freedom of contract, the wage relationship and the protection of private property. Moreover, in practice, wealthy citizens can manipulate the legal process and use it to their advantage. Poverty, as Anatole France also observed, inevitably leads to crime. So, in reality, criminal law is directed against the poor.

By sending one of the richest men in the country to jail we are all, presumably, supposed to feel reassured that "the system" is fair and clean. The sentence is aimed at casting the rule of law, one of the great legitimators of the capitalist system, in a positive light.

But this is a deception. Rivkin is simply one product of a social order that is premised, along with the whole edifice of the legal system, on the foundation principle of individual accumulation at the expense of others. The Rivkin trial and sentence is an expression of a very deep crisis in its legitimacy.