Justice takes its time

By Frank Adoranti

Mum pinches my tear stained cheek and assures me "cheats never prosper". I wish she was right 'cos right about now I just don't believe it.

Before school, in the secret boy's corner of the playground, Johnny produces a small package and shows us the king size firecrackers he has carefully assembled with the help of his big brother. All the boys are cooing "Wow! Whatcha goin' to do with them Johnny?"

At little lunch, the teachers, the students, the ladies at the tuck shop, hear it, an almighty explosion so loud our ear drums split.

Curious, I run to the site of the blast and am the first to arrive. All that remains of what was once the school letterbox, emblazoned with the school's crest, is a dense cloud of smoke, scattered debris and various pieces of charred metal and wood. As the crowds start to gather, I feel the long arm of the law (or at least of the School Principal) wrenching me backwards, "Come with me, boy."

I have never been to the Principal's office before. Under the harsh stares of my interrogators, I cannot speak. "Be nice," Mum always says. "Never talk back to your superiors." I stand trembling. Head down, eyes staring intently at my shoes.

My silence during my "trial" costs me dearly – it was then that I learnt the meaning of *quï tacet consentit* (Latin for "silence implies consent") – my first taste of legal studies, at the tender age of 6.

I actually thought I was going to hang. I'd seen enough westerns to know how this was done—although there were no horses or large trees in the schoolyard.

The verdict was given: I was to be punished to the fullest extent, as a deterrent to other junior school terrorists-in-training. Vigorous assaults on my behind with a long ruler followed, combined with detentions during lunch hour, and every dog-detail schoolyard job going. As I picked up half eaten bananas from the ground, I looked up and saw little Johnny, sticking his tongue out at me and sniggering. I never forgot that vision.

Long after the stinging on my butt subsided, I would dream of revenge. I would picture the strap coming out, Johnny's face grimacing, as he tasted the sting of the majestic vengeance of justice on his bare skin.

Many a time I wondered how Johnny eventually made out. Based on Mum's words, I figured that little Johnny's cheating was paving the way for a life of misery and discontent.

As time passed, the sharpness of the memories of Johnny softened. I started thinking about studying, earning my law degree and working. When I got a job I crammed in an endless succession of 80-hour weeks shackled to my desk in a 30-storey megaplex, sharing my fate with other corporate souls, billing in six-minute increments. On occasion, I

would steal some of those six-minute units, with a wistful gaze, wondering how my dear wife and children were making out – I missed them, even though we (on paper, at least), shared the same address.

One day, I walked into the grandiose corner office to meet the new chief executive officer of our largest client. My jaw dropped to the floor as that familiar grin hit me between the eyes. Bloody hell, it's little Johnny! Wearing enough diamonds to make Cleopatra grimace, and barely able to lift his left arm due to the weight of his gold watch, Johnny leaned over and said "Well, if it isn't old Freddy boy!"

"Actually, the name's Frank."

From that moment, I just knew that my Toyota could fit into the boot of his Bentley, with enough room left over for the entire Mormon Tabernacle Choir. The realisation strikes me that my spouse might also be wrong—perhaps size really does matter.

Now it all becomes as clear as Swarovski crystal; stealing lollies, bullying smaller kids for their pocket money and, of course, blowing up that damned letterbox and standing by smugly, while someone else was being blamed, were the perfect preparation for a life as a corporate chieftan.

My entire moral paradigm is shifting. Am I systematically ruining my children's futures by *not* teaching them to become amoral, conniving, selfish despots?

While I have been content to eke out my little life of quiet compliance, Johnny has become a flamboyant captain of industry. Getting away with it has become his inalienable right. How did this happen?

But then, I think of the others, those that didn't get away. A parade of the executive hall of horrors, including the Brad Coopers and Rodney Adlers of the world, all making the headlines for their infamous activities—now enjoying the relief of the much lighter workload of making car number plates and helping out in the prison laundry.

However, I feel the winds of change—justice just might be blowing this way. Twelve good men and women listened to months of evidence in the celebrated Enron trial. They retired and for five days, considered all of the evidence, made their assessments and delivered their verdicts on 25 May 2006. They found Enron's former CEOs, Jeffrey Skilling and Kenneth Lay, guilty of numerous counts of wire fraud, securities fraud, and conspiracy charges.

The evidence that emerged from the trial gave us an insight into how a financial behemoth could be sustained on lies, accounting trickery and doublespeak for such a long period.

Why were many so-called experts and Wall Street pros fooled for so long? A number of professional analysts who admitted they didn't really understand the business or how Enron made its money, still confidently penned their "buy" recommendations.

Few, apparently, found it unusual for a publicly listed entity like Enron to rigidly maintain a wall of secrecy over information; indeed, Enron was often called the Goldman Sachs of energy trading. As an example, consider the first question a potential investor might want to ask: How does Enron make its money? Good question, you might think. And here was the good answer: details were scant due to "competitive reasons".

Enron is credited with pioneering a unique form of buying and selling gas and electricity. The company variously described its business operations as "wholesale energy operations and services" and, later, went on to adopt a more cryptic summary of its business activities—helpfully describing it as "the financialisation of energy."

Very few finance professionals managed to see beneath the dense shroud of smog that Enron had so skillfully created for itself—which it used to great effect in concealing mountains of debt (about US$32 billion) and conducting other transactions off the books.

Enron was brilliant at creating numerous new ways of hiding losses, even making losses look like revenue, by creating separate off-the-books entities to hide liabilities and losses manipulating earnings estimates, in order to meet market expectations. Whenever they did meet those expectations, the stock price went up even further and they were all hailed as geniuses. Hundreds of millions of dollars passed through, minus the exorbitant commissions that Enron's CFO, Andrew Fastow, and his cronies, would conveniently siphon off. What's more, the transactions appeared to have been blessed by Arthur Andersen and a horde of other well-paid advisors.

In fact, keeping the company impenetrable to outsiders was the very reason why Enron survived for so long, on the house-of-cards foundations it had constructed for itself.

During the trial, the defence often used the terms "shining star" and "business as usual" whenever referring to the company. There is no dictionary in the world that includes "house of cards" in the definition of "shining star". More appropriate would have been the term "mudguard"; shiny on top and all crud underneath.

The problem was not just caused by incompetence, but by an inherent conflict of interest. Many executives had a personal incentive to keep the company's share price high (or artificially higher than it should have been) because their wealth was tied up in the company's shares.

Therefore, there was every incentive for them to do whatever it took to keep that share price up in the stratosphere. Yet another case of "synergies" rather than "conflicts of interest"!

In cases such as the Enron trial, a lawyer aims to give the jury a snappy slogan that diverts their minds from the volumes of evidence—so that they always come back to that "jingle" or slogan when forming their ultimate opinion. Who could forget trial lawyer Johnny Cochrane's sterling effort in the OJ Simpson case: "If it doesn't fit (referring to the infamous glove), you must acquit".

In such long and complex trials, it is vital to get that "jingle" just right, because sometimes, that may be all that a jury will be able to

remember after weeks of mind-numbing torture, wishing they were all off fishing.

In the Enron case, the prosecution adopted the mantra "lies and choices". Choosing not to come clean about the company's real financial position and deciding it was okay to lie about it.

Into the trial, we gained a slightly clearer insight into the characters of the former CEOs, Jeffrey Skilling and Kenneth Lay, up close and personal, when they submitted themselves for cross examination.

The Skilling defence team painted their client as a "tortured soul".

The prosecution's star witness was former CFO, Andrew Fastow, who had already pleaded guilty to charges of securities fraud, in exchange for what was expected to be a 10-year sentence. Fastow gave evidence that the company hid losses and artificially inflated profits, in an attempt to maintain investor confidence, and to present an image to the market that the company was in much better health than it was —when the reality was that it was badly haemorrhaging and in need of intensive care, if it wasn't already terminal. Defence moves to attribute all of the company's woes solely on Fastow failed.

When it came to other government witnesses, the defence strategy was to paint them as unwilling participants who were railroaded into testifying to save their own hides, by the government's strong-arm tactics.

Indeed, one attempt by the defence to publicly discredit one witness' testimony seemed to have badly backfired. This came to light during the cross examination of Lay. One of the lawyers in Lay's defence team had told reporters that former Treasurer of Enron, Ben Glisan was a "monkey". Yet, Lay was seen wishing Glisan well in the men's room. The prosecution's killer punch: "So, one message for the outside world, one message for the inside?"

When it became abundantly clear that the company's position was indeed terminal, Lay nevertheless, still made public statements that all was well in fantasyland. His justification? He was being optimistic: "most people don't like to follow pessimistic leaders". So it wasn't fraud, lies and deceit that were being perpetrated, it was just optimism.

On the sixth day of jury deliberations, the star defendants, Kenneth Lay, former Chairman and founder of Enron and Jeffrey Skilling, former CEO were found guilty of conspiracy and fraud. In a separate trial without a jury, Lay was also found guilty of fraud and making false statements.

The convictions are definitive public affirmations that the company misled the public about the true state of its financial position and represent a major win for government prosecutors, determined to close what is perhaps the landmark case of corporate fraud in the annals of American business. The Enron debacle has been the catalyst for change in the corporate regulatory environment worldwide. Those effects are being also clearly felt here in Australia—which is why the Enron case carries such importance for us.

The verdicts may be the tangible signal to the corporate community that CEOs cannot simply sit back and claim the "Seargent Schultz defence" that "I know nothing!"

So, could Mum have been right after all? Does justice eventually catch up, no matter how excruciatingly slow the process? Does it mean that you first have to endure years of having to watch Little Johnny riding the crest of the wave, with that arrogant little smirk on his face, before having the satisfaction of witnessing the moment that eventually gets him dumped, face first into the poo?

Well, the Enron trials aren't over just yet. Shortly after news of the convictions broke, Skilling and his lawyer had already announced their intention to appeal. There were also similar ruminations coming from Lay's indignant defence team. However, their focus shifted after the sudden death of Ken Lay—they are said to be working to have the convictions of their client overturned.

At the time of writing, Skilling was yet to be sentenced—pundits were predicting a prison stretch of up to thirty years. By the time you read this, that news should be out.

Enron's former Chief Financial Officer Andrew Fastow, was sentenced in late September 2006 to a term of six years imprisonment.

Interestingly, Fastow had cut a deal with prosecutors to assist them in their case against Lay and Skilling—in return he had agreed to serve ten years in the slammer. Now he only gets six—from a Judge who said that he deserved leniency: "Prosecution is necessary, but persecution was not."

Some former Enron employees believe that Fastow's position differs from that of Lay and Skilling—in contrast to the defiant righteousness displayed by Messrs Lay and Skilling, Fastow admitted guilt and was "taking his medicine". He is also assisting prosecutors in the numerous civil suits against a number of banks, which could ultimately lead to the recovery of billions of dollars more from the Enron ashes.

Stay tuned for Round Two, coming soon to a courtroom near Houston, Texas…

LAST WORD

Laughter is an instant vacation.

MILTON BERLE (1908 - 2002)