

SUBMISSION TO THE SENATE INQUIRY INTO CRIMINAL, CIVIL AND ADMINISTRATIVE PENALTIES FOR WHITE COLLAR CRIME

Presented by Colin. E. Penter
Coordinator Nemesis Project

“As crimes pile up they become invisible”

Bertolt Brecht

‘Corporate crime poses a significant threat to the welfare of the community. Given the pervasive presence of corporations in a wide range of activities in our society, and the impact of their actions on a much wider group of people than are affected by individual action, the potential for both economic and physical harm caused by a corporation is great.

Law Reform Commission of New South Wales

We welcome the opportunity to make a submission. We note the Terms of Reference focus on inconsistencies and inadequacies of current criminal, civil and administrative penalties for corporate and financial misconduct or white collar crime.

This submission places the penalties for corporate and white collar crime in a broader context of an epidemic of corporate and business crime in Australia. We argue that political failure and lack of action by government and the responsible authorities has contributed to failures in regulation, investigation and enforcement, which in turn are a major cause of inadequate penalties for corporate and white collar crime.

1. DEFINING TERMS

What is white collar and corporate crime?

1.1 There is considerable debate about the definition of ‘white collar’ crime. We encourage use of the term ‘corporate crime’ over the term ‘white-collar crime’.

1.2 White-collar crime is crime committed by an individual or group of individuals, usually with the intention to benefit themselves, in the form of monetary rewards, goods and services. The concept of white-collar crime often positions the corporation or business as a victim of crime.

1.3 Corporate crime is unlawful or illegal acts committed by a corporation or business entity, or agents of that entity, against others in society, usually customers, employees, investors, shareholders, citizens or the communities they operate in, for the benefit of the corporation and its shareholders. It includes white-collar crime. In

Senate Inquiry into Penalties for White Collar Crime

corporate crime, the offender is the corporation or business entity and/or individuals acting on its behalf.

1.4 We draw on the broad definition contained in the recent *ASIC Report Penalties for Corporate Wrongdoing*¹ which defines corporate wrongdoing as:

‘...misconduct that occurs in the corporate, financial market or financial services sectors. This type of misconduct generally breaches corporate, financial market or financial services laws. It may involve the misuse of a professional position or information obtained in a professional capacity.’

1.5 Corporate and business crime may include:

- Bribery and corruption- kickbacks, public corruption, political corruption
- Financial crimes- fraud, theft, ponzi schemes, embezzlement, superannuation and investment fraud, bankruptcy fraud, health care fraud, credit card fraud, telemarketing fraud, shonky financial advice, counterfeiting
- Insider trading
- Tax evasion
- Identity fraud
- Shonky & unlawful supply chains
- Cartel conduct
- Corporate killing
- Unlawful selling
- Computer fraud
- Money laundering
- Anti-trust violations
- Environmental crimes
- Healthcare malpractice
- Intellectual property
- Making of unsafe products
- Dangerous work environments and OSH crimes and violations
- Violation of statutory law
- Unlawful employment practices- underpayment, deprivation of wages, entitlements and superannuation
- Blackmail
- Corporate and business espionage
- Use of sham contractors, underpayment and deprivation of wages, leave entitlements, superannuation and other entitlements
- War profiteering, war crimes, crimes against humanity & genocide.

¹ Australian Securities and Investments Commission, Report 387, *Penalties for corporate wrongdoing*, 20 March 2014, <http://www.asic.gov.au/asic/asic.nsf/byHeadline/14-055MR%20ASIC%20reports%20on%20penalties%20for%20corporate%20wrongdoing?opendocument>.

Senate Inquiry into Penalties for White Collar Crime

1.6 A focus only on white-collar crimes committed by individuals ignores the more significant crimes committed by corporations and business. We urge the Committee to focus on corporate crime, as well as white collar crime.

1.7 For the purpose of this submission we use the term corporate crime to include crimes and unlawful misconduct by corporations and business, as well as white-collar crime committed by individuals.

2. THE EXTENT OF THE PROBLEM

2.1 Corporate crime is notably under-reported and there is a lack of systemic documentation of its incidence, unlike many other forms of conventional and street crime.²

2.2 Over the last two decades in Australia (and globally) we have witnessed an epidemic of corporate and financial unlawful conduct, malfeasance and criminality. On all indications, the 21st century has seen crime waves of unprecedented proportions.³ The roll call of corporate crime and unlawful conduct is routine and ever more brazen.

2.3 On a daily basis we find pervasive evidence of a corporate and business crime wave. A regular reader of the financial press encounters daily reports of outrageously damaging and unlawful conduct, malfeasance and criminality by corporations and business and their owners, managers and executives and staff.

2.4 Australian corporate law scholar and legal academic Harry Glasbeek notes the high number of corporate collapses in Australia that occurred in circumstances that were highly questionable and dubious. He compares Australia with the US, where 60% of Fortune 500 companies committed violations of the law.⁴ Glasbeek writes:

*“It is misleading to see this corporate behaviour as a marginal, comparatively insignificant phenomenon.... policy makers, regulators and legislators tend to treat corporate deviance as aberrational, not worthy of serious punishment.. Corporations constitute a criminal segment of the population not matched by any other identifiable sector of the population, either numerically or in the toll inflicted”.*⁵

2.5 One estimate is that corporate crime costs Australia more than \$8.5 billion per year. Some estimates are that it accounts for approximately 40 per cent of the total cost of crime in Australia.⁶ The recent inquiry into Australia’s financial system

² Barak, G (2015) *The Routledge International Handbook of the Crimes of the Powerful*

³ Barak, G (2015) op cit: Michael West (2014) Watchdog shies away from enforcement, *Sydney Morning Herald*, March 1, 2014.

⁴ Glasbeek, H (2012) Controlling Corporations, *Dissent*, Spring 2012: Glasbeek, H (2002) Shielded by the Law” Why Corporate wrongs and wrongdoers are privileged, *University of Western Sydney Law Review*, 2002, <http://www.austlii.edu.au/journals/UWSLRev/2002>

⁵ Glasbeek, H (2012) op cit

⁶ Figures taken from Attorney Generals Department (2016) *Improving Enforcement Options for Serious Corporate Crime: Consideration of a Deferred Prosecution Agreement Scheme in Australia*. Public Consultation Paper, Australian Government, March 2016.

Senate Inquiry into Penalties for White Collar Crime

estimated that in that industry alone poor financial advice or misleading information had affected more than 80,000 people, with losses of more than \$5 billion. We suggest these figures are a significant underestimate, as they only include certain types of corporate crime, not the full list of crimes described in 1.5.

2.6 Corporate and white collar crime is more serious than many types of conventional crime. Corporate offending causes more injury, death, financial loss and serious harm to individuals, families and societies on a much larger scale than harm than conventional crimes. As Lauren Snider and Frank Pearce note, corporate crime inflicts massive harm on societies, employees, consumers, workplaces, the environment and the economy.⁷ The harms caused by corporate and white collar misconduct and lawbreaking are more devastating than crimes usually associated with the criminal justice system.⁸

2.7 In addition, the general public perceives many types of corporate crime as more serious when compared to conventional crimes, such as burglary and theft.⁹

2.8 Despite the scale of corporate and business crime, these crimes remain largely beyond the reach of the legal, policing and criminal justice systems and are of marginal concern to the corporate and mainstream media.¹⁰

3. CORPORATE CRIME IS AN EVERYDAY OCCURRENCE

‘The proliferation of business crime in recent years could be easily attributed to the excessive growth of the financial as opposed to the productive sector in advanced economies. Making profit quickly and constantly requires cutting corners, along with giving an appearance of good economic performance through the increasing value of shares against a background of poor productive performance.’

Vincent Ruggiero¹¹

Corporations are criminogenic and corporate crime is built into the corporate form

3.1 Australian corporate law scholar Harry Glasbeek argues that anti-social and criminal behavior is endemic to the structure of corporations. Similarly, Steve Tombs and David Whyte show that corporate and business environments contribute to

⁷ Snider, L & Pearce, (1995) *Corporate Crime: Contemporary Debates*

⁸ Spalek, B (2007) Knowledgeable Consumers? Corporate fraud and its devastating impacts, *Journal of Contemporary Criminal Justice*, 2013, Centre for Crime and Justice Studies.

⁹ Pat Carlen (2013) A Real Equality before the Law, *Journal of Contemporary Criminal Justice*, 2013, Centre for Crime and Justice Studies.

¹⁰ Tombs, S & Whyte, D (2015) Introduction to the Special Issue on the Crimes of the Powerful, *The Howard Journal of Criminal Justice*, 54(1):pp 1-7, February 2015

¹¹ Ruggiero, V (2013) *The Crimes of the Economy: A Criminological Analysis of Economic Thought*. London: Routledge.

Senate Inquiry into Penalties for White Collar Crime

cultures and practice where criminality is more likely.¹² Corporations, they argue, are criminogenic,¹³ in that they have routine and taken-for-granted cultures, structures and practices that encourage, reward and tolerate violations of the law. David Friederichs argues similarly.¹⁴

3.2 The dominant economic policy and philosophy of market fundamentalism (or neoliberalism) creates many more opportunities, sites and incentives for corporate and business crimes, such as financial crimes, banking fraud, false accounting, money laundering, tax evasion, theft of other people's money, insider trading etc. The neoliberal framework extols the virtues of corporations and business, while downplaying or ignoring the debacles, disasters and wreckage they create by their activities and their unlawful conduct, malfeasance and criminality.

3.3 Tombs and Whyte argue that corporate crime is an effect of neoliberal capitalism, as well as a means by which corporations achieve profitable ends. They suggest that corporations actively collaborate with governments in the production of corporate crime and use highly-sophisticated strategies, supported by a complexity of ideological justifications, for their unlawful conduct and criminality.¹⁵

3.4 Glasbeek argues that the activities permitted and the privileges provided by the law to those who create and control corporations undermine the personal and legal responsibilities that are traditionally espoused by corporate and political leaders.¹⁶

3.5 Two doctrines that make corporations and business more likely to behave badly and engage in unlawful conduct, malfeasance and criminality are the concepts of *limited liability* and *primacy of profit*.

3.6 Limited liability is the notion that investors in a corporation should not be liable for bad things the corporation or business does. In effect, the corporation is a legal invention or fiction that allows individuals to personally profit from the activities, without being full liability for unlawful or illegal activities or activities that do harm.

3.7 Legal scholar Kent Greenfield writes¹⁷:

¹² Tombs, S and Whyte, D Eds (2003) *Unmasking the Crimes of the Powerful: Scrutinizing States and Corporations*, New York, Peter Lang: Tombs, S & Whyte, D (2015) *The Corporate Criminal*, London Routledge.

¹³ Joel Bakan (2005) *The Corporation: The Pathological Pursuit of Power and Profit*

¹⁴ Friederichs, D () White Collar Crime in a Post Modern Globalized World

¹⁵ Tombs, S & Whyte, D (2015) Introduction to the Special Issue on the Crimes of the Powerful, *The Howard Journal of Criminal Justice*, 54(1): pp 1-7, February 2015: Tombs, S & Whyte, D (2015) *The Corporate Criminal*, London Routledge.

¹⁶ Glasbeek, H (2002) "Shielded by the Law": Why Corporate wrongs and wrongdoers are privileged, *University of Western Sydney Law Review*, 2002 <http://www.austlii.edu.au/journals/UWSLRev/2002>

¹⁷ Greenfield, K (2011) Reforming limited liability law, *the Nation*, June 27 2011 <http://www.thenation.com/article/reforming-limited-liability-law>

Senate Inquiry into Penalties for White Collar Crime

“When someone does not have to pay for bad behavior, it increases the likelihood and severity of bad behavior. Corporate subsidiaries drilling for oil in the Arctic, making shoes in Vietnam or harvesting hardwood in the Amazon will be more likely to spill oil, exploit child labour and destroy virgin jungle”

3.8 Greenfield says that limited liability:

“...is a subsidy for corporations paid not out of government coffers but from the pockets of those hurt by corporate malfeasance. It’s an avoidance of responsibility.”

3.9 Limited liability gives the legally constructed corporation protection from personal liability from unlawful conduct and criminality.

3.10 The reason corporations exist is profit maximization. The primacy of profit arises because the corporation has a legal obligation to maximize profit for owners, shareholders and investors. The corporate structure is structurally criminogenic, because profits are legally defined as taking precedence over all other things.¹⁸

Corporate and white collar crime is a failure of law and politics

3.11 Over recent decades legal and regulatory systems have been dismantled or loosened to remove constraints against corporate and investor profit-making and profit-taking.

3.12 Corporate and white-collar crime is traceable to a gross failure of the law. Legal constraints have been cast aside or not applied to their fullest. Corporations and business groups have worked to limit the effectiveness of efforts to stamp out corporate crime. They make it more difficult to prosecute crimes.

3.13 The rule of law has allowed corporate and political elites to enjoy growth at the expense of many, particularly those in vulnerable economic circumstances. Corporations and business have actively subverted the law, as well as government regulation and ethical standards, in order to maximize their profits and ensure that resources flow to them. We believe there has been a pervasive legal and political failure to control unlawful conduct by corporations and business.¹⁹

3.14 Corporations use their wealth, power and influence to manipulate social and political actors. This ability to influence the political process enables them to evade punishment for the harm that results from their relentless pursuit of profit.²⁰

3.15 The corporate and financial elite (along with their political supporters) hold our economic destiny in their hands, yet they have engaged in grossly negligent misconduct, lawlessness, malfeasance and criminality that has largely gone unpunished.²¹

¹⁸ Bittle, S & Snider, L (2013) Examining the Ruggie Report: Can Voluntary Guidelines tame Global Capitalism, *Critical Criminology*, May 2013.

¹⁹ Schwab, A, (2010) *Pigs at the Trough: Lessons from Australia’s Decade of Greed*, John Wiley.

²⁰ Blankenship, M (1995) *Understanding Corporate Criminality*

²¹ Schwab, A, (2010) *Pigs at the Trough: Lessons from Australia’s Decade of Greed*, John Wiley; Sydney Morning Herald (2010) Where are They Now? *SMH*, June 12, 2010.

Senate Inquiry into Penalties for White Collar Crime

3.16 Among the corporate and political elite the most profound criminal and unlawful behaviour and actions are not just tolerated, they are often enabled and protected by our legal and political systems. Corporate and business offenders emerge not only with their reputations intact; they also retain the gains of their criminality, often with minimal loss of economic, financial and political power. ²²

Governments, politicians and regulators have failed to act

3.17 There has been a serious failure and lack of commitment by governments, politicians, corporate Australia and business groups and regulatory authorities to investigate and take action against corporate and white collar crimes.

3.18 For decades in Australia, corporate regulators and law enforcement authorities and politicians have been unwilling to take serious action against corporate criminals who knowingly swindle and harm ordinary Australians. ²³

3.19 The dominant response to corporate and business offending has been regulation rooted in co-operation. This is primarily self-regulation. These strategies work predominantly to the advantage of powerful corporate and business interests.

3.20 There has been limited regulatory action and few significant prosecutions for some of the most egregious corporate crimes imaginable, in which ordinary Australians lost their life saving, housing, retirement incomes, marriages and their own health and wellbeing. Examples include Firepower, ABC Learning, Storm Financial, Allco, Rubicon, Babcock and Brown, MFS, RAMS, Opes Prime, Westpoint, Great Southern Plantations, Timbercorp, various financial planning and mortgage broker scandals and financial planning scandals involving various banks and financial institutions, to name just a small number.²⁴

3.21 Governments are reluctant to pass, enforce and administer meaningful regulation, and investigate and prosecute lawlessness, unlawful conduct and criminality by corporations and business:

- Corporations and business groups lobby to eliminate or prevent any measure that attempts to address the conditions that lead to corporate and white-collar and business crime.
- Corporations are allowed to defy even mild controls of consumer protection, health laws and environmental law.
- Corporations get away with poisoning food, water, air and people get sick and die with few consequences.
- People lose their life savings, their jobs and livelihoods and are wiped out by unlawful corporate behaviour, but those responsible are rarely held to account.

²² Schwab, A, (2010) *Pigs at the Trough: Lessons from Australia's Decade of Greed*, John Wiley; Sydney Morning Herald (2010) Where are They Now? *SMH*, June 12, 2010

²³ Schwab (2010) *ibid*; West, M (2014) Watchdog shies away from enforcement, *Sydney Morning Herald*, March 1 2014.

²⁴ Schwab, A, (2010) *op cit*; Sydney Morning Herald (2010) Where are They Now? *SMH*, June 12, 2010.

Senate Inquiry into Penalties for White Collar Crime

- Taxes for ordinary people are higher and governments cut back services for ordinary people because corporations hide money offshore, aided and abetted by financial institutions and accounting firms also engaged in unlawful conduct.
- Governments have failed to take action against phoenix activity by corporations and business, by which we mean the intentional and deliberate cyclic liquidation of related trading entities to avoid unpaid wages, superannuation, taxation, employee entitlements and other obligations.
- Governments have done little to address the use of sham contractors, underpayment and deprivation of wages, leave entitlements, superannuation and other entitlements by corporations and business and have done little to address the unlawful exploitation of workers, even protecting employers who break the law.

3.22 As David Whyte writes, the moral and political priority given to the freedom of the capitalist system, along with the importance attached to non-intervention in any corporate activities that might restrict profit-making, work to constrain and restrict government action and enforcement against corporate crime.²⁵

3.23 In many cases, politicians and governments turn a blind eye or allow many types of corporate crime. Corporate crime and criminality are largely marginal to the dominant political, legal, enforcement and policing agendas about crime. The reporting and analysis of crime gives little attention to the ways that powerful corporations and business institutions engage in unethical, unlawful and destructive criminal behavior.

3.24 This has resulted in a serious lack of public confidence in the legitimacy of political, regulatory, business and legal systems that have failed to respond adequately to corporate and white collar crime.

Australia is a paradise for corporate and white collar crimes and penalties are grossly inadequate

3.25 We agree with the recent statement by ASIC Chairman Medcraft that Australia is:

'... is a bit of a paradise, Australia, for white-collar frankly...The thing that scares white collar criminals is going to jail and that's what scares them everywhere in the world. The penalties, particularly civil penalties, in Australia, for white collar offences are basically not strong enough, nor tough enough. All you're doing is giving them a slap on the wrist [and] that is not deterring people. You have to lift the fear and suppress the greed.'^{26 27}

²⁵ Whyte, D (2007) Victims of Corporate Crime from Wacklate, S (2007) *Handbook of Victims and Victimology*

²⁶ Sue Mitchell (2014) Australia a 'paradise' for white collar criminals, says ASIC Chairman Greg Medcraft, *Sydney Morning Herald*, October 21 2014

Senate Inquiry into Penalties for White Collar Crime

3.26 Interestingly, Chairman Medcraft backed away from his statement after a phone conversation with Finance Minister Mathias Cormann.²⁸

3.27 Nationals Senator John Williams has been calling for a Royal Commission into white Collar Crime for years

*I've said for five and a half years that we should have a royal commission into white-collar crime because I believe Australia is, today, a paradise for white-collar crime.*²⁹

3.28 Ian Ramsay, Director of the Centre for Corporate Law and Securities Regulation at the University of Melbourne notes that white-collar crime is 'the tip of the iceberg':

"There's a whole lot of stuff that inevitably goes undetected"

3.29 Directors, owners and managers are rarely charged and convicted of wrongdoing. Unlawful and illegal practices by corporations and business are more likely to be labelled as civil wrongdoing and regulatory violations than criminal behaviour.

3.30 When people commit a serious crime they go to jail. When corporations and business commit a serious crime they get off, or at worst they negotiate an agreed penalty involving a fine, suspended fine or deferred penalty. Corporations can't be jailed.

3.31 The current system does not provide deterrence to corporate and white collar misconduct and lawlessness. We agree with the recent ASIC report which notes that Australia is too soft on white collar and corporate crime and that the rewards of corporate crime outweigh the light penalties, because the penalties of corporate crime are small in comparison to the proceeds.³⁰

3.32 There has been an increasing reliance on civil penalties (a second rate penalty regime) in high profile corporate crime cases, where civil penalties are used against corporate directors and executives. These do not deliver the same culpability as criminal sanction and the victims of corporate and business crime and the community are rightly outraged by the leniency of these civil penalties. There has been a tendency among regulators and authorities to settle rather than litigate enforcement actions in corporate and business crime and to rely on fines linked to deferred agreements.

3.33 Law Professor Rena Steinzor is highly critical of the regulatory 'pyramid' model of enforcement, with compliance programs at the bottom of the pyramid and

²⁷ Gilligan, G, Ali, P, Goodwin, A and Ramsay, I (2015) Understanding penalties regimes for corporate wrongdoing in Australia and implications for the teaching of corporate law, Corporate Law Teachers Association (CLTA) Annual Conference, 1-3 February 2015.

²⁸ *ibid*

²⁹ *ibid*

³⁰ Peter Ryan (2014) Australian penalties for white collar crime too soft, ASIC says, *ABC News*, 21/3/2014 <http://www.abc.net.au/news/2014-03-21/asic>

Senate Inquiry into Penalties for White Collar Crime

criminal prosecutions as a last resort.³¹ Steinzor argues that the ‘pyramid’ has crumbled and ought to be flipped on its head. The solution she argues is to criminally charge more corporations and their executives and directors. We agree wholeheartedly with Steinzor. She writes:

*“Criminal investigations scare people to death. And when you bring it home to managers who are responsible for creating these conditions, you will really make them pay attention and change the relentless cost cutting, the rewards of speed no matter what hazards are encountered or the browbeating of employees to cut corners”.*³²

3.34 Even when enforcement is strong, penalties are miniscule when compared to the damage caused by corporate and business crime. Indeed penalties are often so low they are easily absorbed as a normal cost of doing business.

3.35 As Frank Adams writes, white-collar crimes tend to receive much lower criminal sentences than other crimes, such as armed robbery or assault. Adams writes:

*“The major enforcer is the Australian Securities and Investments Commission (ASIC) working with the prosecutor, the Commonwealth Director of Public Prosecutions (DPP). Although ASIC has been successful in over 90% of litigation, in the last five years an average of just 14 people were sent to jail each year for all corporate crimes.”*³³

3.36 More than half of the ‘white-collar criminals’ convicted in Australia in the last 2 years escaped jail sentences, receiving non-custodial sentences, or fines. They walked away with suspended sentences, good behaviour bonds or intensive correction orders. Other received small fines.³⁴

3.37 Former Federal Court judge Ray Finkelstein is highly critical of the sentencing approach of the judiciary, criticising them for being too soft on white-collar and corporate crime, saying lenient sentencing creates the impression of one law for the rich and another for the poor.³⁵

3.38 Finkelstein suggests that judges tend to view imprisonment as a ‘last resort’ for corporate and white-collar criminals, as they believe the humiliation and loss of a job and status is sufficient punishment and they prefer short, weekend or suspended sentences and penalties. They also believe the ability to make restitution as a factor that eliminates the need for a prison sentence.

³¹ Steinzor, R (2014) *Why not Jail? Industrial Catastrophes, Corporate Malfeasance and Government inaction*, Cambridge University Press

³² *ibid*

³³ Adams, M (2015) Seven Year sentence for insider trading unlikely to deter others, *The Conversation*, March 18, 2015 <https://theconversation.com/seven-year-sentence-for-insider-trading-unlikely-to-deter-others-38916>

³⁴ Urban, R (2015) Corporate criminals escaping jail time, *The Australian*

³⁵ Butler, B (2012) Law too soft on white collar crime says former judge Finkelstein. *Sydney Morning Herald*, March 23, 2012, <http://www.smh.com.au/federal-politics/political-news/law-too-soft-on-white-collar-criminals-says-former-judge-finkelstein-20120322-1vmbx.html#ixzz43KMw9tn1>

Senate Inquiry into Penalties for White Collar Crime

3.39 Justice Finkelstein suggests that for some white-collar and corporate crimes the level of proof required to convict should be lowered from the traditional criminal level of ‘beyond reasonable doubt’.

The treatment of lawlessness and unlawful conduct by ordinary people is totally different to the treatment of corporate and white collar criminals

3.40 When ordinary people break the law and commit crimes they face a serious combination of punishment- jail time, serious financial penalties, loss of employment and income, shame, repentance and the requirement that they earn back the right to be a full participating citizen and member of the community. Not so with corporations and business.

3.41 Corporate and business offences are dealt with primarily within a non-criminal framework. For example, workplace deaths are rarely treated as homicides or manslaughter, but as incomplete acts or attempts, such as the failure to provide safe working conditions. The death of Mr Ward, who was cooked to death in the back of a G4S prison van in regional Western Australia, is an example³⁶. The only charges laid were breaches of occupational health and safety and failure to provide a safe working environment, resulting in minor fines.

3.42 Corporate, business and white-collar crime is not a priority for Governments. It exists in the shadows of the corporate world and is largely ignored by Federal and State governments and authorities charged with investigating and preventing crime.

3.43 The lack of serious investigation and enforcement of corporate and business crime is remarkable, given the public exposure and knowledge about the extent and severity of unlawful and criminal conduct and the serious harm that results.

3.44 Corporate, white-collar and business crimes are subject to very different processes of surveillance, regulation and investigation and enforcement in comparison to crimes committed by powerless, lower status individuals and groups. Despite the prevalence and harms resulting from these corporate and business crimes they are characterised by low public concern, regulatory under enforcement, minimal political and policing action, low prosecution rates and the lightest sanctions and court penalties.³⁷

3.45 The criminal laws should be enforced just as vigorously against corporate and business executives and corporations and business just as they are against conventional street crime.

3.46 The list of high profile and powerful corporations that operate in Australia who have admitted or been convicted of unlawful conduct and criminality is endless-

³⁶Sambrook, C (2011) Duty of Care: beyond the case of Mr Ward, cooked to death by gigantic outsourcer G4S, *Open Democracy*, 8 June 2011, <https://www.opendemocracy.net/ourkingdom/clare-sambrook/duty-of-care-beyond-case-of-mr-ward-cooked-to-death-by-gigantic-outsourcer>

³⁷Schwab, A, (2010) *Pigs at the Trough: Lessons from Australia's Decade of Greed*, John Wiley: Dave Whyte Regulation and Corporate Crime.

Senate Inquiry into Penalties for White Collar Crime

BHP, BP, Chevron, Exxon Mobile, Goldman Sachs, Alcoa, Shell Volkswagen, Pfizer, KPMG, Siemens, General Motors, Ford, Microsoft, Morgan Stanley, James Hardie, NAB, Commonwealth Bank, ANZ, Westpac etc.

3.47 Many are repeat recidivist offenders. If these corporations were people they would suffer severe punishments, including imprisonment. They would no longer be able to operate. However, corporations pay some money and in many instances go back to commit more crimes.

3.48 They employ lobbyists to block laws, fund political parties to ensure favourable government policy and lobby to preserve subsidies tax breaks and generous corporate welfare. Engaging in unlawful conduct, lawlessness and criminality is no barrier to business success.³⁸

3.49 Corporate and white collar offenders receive much lower criminal sentences than street criminals and there is a notable lack of criminal prosecutions. Prison sentences imposed on corporate and white-collar crime are either non-existent or at the lower end of the available range of sentences for corporate and white-collar crime.

Inconsistencies, inadequacies and failures of current regimes

3.50 There are too many inconsistencies and inadequacies in the criminal, civil and administrative penalties for corporate and financial misconduct and white collar crime.

- This includes evidentiary standards, the use and duration of custodial sentences and the use and duration of banning orders.
- There is an over reliance on self-regulation, self-reporting and industry monitoring and an over reliance on education and training as a preventative measure.
- There has been a preference among regulators to settle rather than litigate enforcement actions in corporate crime.
- Charging corporate and white criminals is relatively easy. Securing a conviction is difficult.
- Those accused have access to money and legal advice and can delay and extend charges for years.
- The level and complexity of detail can overwhelm juries and judges.

4. SOLUTIONS/ACTION

So what action is required?

Corporate regulator(s) with great powers, funding and capacity

4.1 We need a corporate regulator willing and able to act and armed with the legislative and regulatory power and weapons needed. Governments need to ensure that the corporate regulators are funded and pressured to do their job

³⁸ Schwab, A, (2010) *Pigs at the Trough: Lessons from Australia's Decade of Greed*, John Wiley; Sydney Morning Herald (2010) Where are They Now? *SMH*, June 12, 2010

Senate Inquiry into Penalties for White Collar Crime

Better targeting and investigation of industries where criminality is prevalent

4.2 More resources need to be devoted to identifying and scrutinising, monitoring, investigating and pursuing corporate and business crime in identified industries. Action must be taken in industries where unlawful conduct and criminality has been identified. This includes banking and financial services, insurance, pharmaceuticals, privatised public services (health, education, vocational training, aged care), mining and resources, franchise industry, fast food and hospitality, labour hire, contract labour, industries that employ low paid workers, political donations, property development.

Stronger protection of vulnerable and disadvantaged people and people who live precarious lives

4.3 As governments extol and actively promote and support the virtue of markets, corporations and business, their responsibility also includes protecting ordinary people from the negative consequences of corporate, business and white-collar malfeasance, lawlessness and criminality.

4.4 However, governments have largely abandoned their duty to control and protect ordinary people from unlawful conduct, malfeasance and criminality by corporations and business

4.5 Rather than impose deregulation, free trade, privatisation and removal of consumer protections to benefit corporations and private business, Governments should be defending ordinary people against unscrupulous corporations and business whose unlawful and criminal misconduct and criminal behaviour contributes to serious harm, financial loss, damage and immiseration for many people.

More vigorous enforcement of current laws, stronger penalties for individuals and lower threshold for criminal charges

4.6 The community wants criminal sanctions imposed on corporate criminals, just as they are against those who commit conventional crimes. Existing criminal laws should be enforced as vigorously against corporate executives as they are against conventional crime offenders. Corporate and business crime must be a higher law enforcement priority.

4.7 What is needed is a stronger crackdown on individuals (and corporations and business entities) responsible for corporate and white collar crime. Personal liability should be imposed on those responsible for corporate and white-collar crime.

4.8 A more severe posture (tough on corporate crime) needs to be adopted towards individuals, managers and directors of corporations and business involved in unlawful conduct, malfeasance and criminality. This requires more serious pursuit of individuals, securing of evidence and prosecution of individuals involved in wrongdoing, and jail time for offences. Investigation and enforcement is often

Senate Inquiry into Penalties for White Collar Crime

hindered by the large expenditure of time and investigative skills required. The authorities must strengthen their enforcement divisions.

4.9 Penalties must inject fear into corporate and business criminals and overcome the willingness to break the law for financial gain. Civic penalties are too low and not strong enough. They essentially provide a slap on the wrist and fail to deter white collar and corporate crime

4.10 We suggest:

- Triple damages whereby financial penalties are at least 3-5 times the profit gained or loss avoided
- Disgorgement laws that allow the seizure of gains from corporate and white collar crime
- Harsher jail terms
- Corporations found guilty of unlawful conduct should be barred from public and government contracts

Penalties for associated parties and entities

4.11 There is a reluctance to pursue Directors of failed corporations and business where significant debt and losses have been incurred. It needs to be made easier to hold corporations, their executives, Directors and other associated parties accountable for corporate and financial crime. Criminal liability standards for corporate directors, executives and shareholders need to be strengthened.

4.12 There is a need to ensure that people with managerial or supervisory authority in a corporation or business who know about crimes committed by an employer or the business itself, and who do nothing about operations or actions that will result in a crime being committed by the corporation and those individuals should be held responsible.

4.13 Where corporate crimes involve a financial loss to the third parties, such as customers, consumers, investors and the general public, penalties should also apply to auditors, officers and directors of corporations involved and those who by their actions or inaction have intentionally or unintentionally aided and abetted the crime.

4.14 Penalties should extend to the personal wealth and property of those auditors and Directors.

Victims must be a higher priority in enforcement, penalties, sentencing and restitution

4.15 The devastating impact of corporate crime on victims and citizens remains largely hidden and victims have been dismissed as unimportant.

4.16 It is clear that little consideration is given to the perspective, experience and views of the victims of corporate and business crime. Victims of corporate crime are even more invisible than victims of conventional crime.

Senate Inquiry into Penalties for White Collar Crime

4.17 David Whyte writes that corporate crimes and crimes that risk the lives and health of workers and the general public typically have no structure for identifying victim needs and harms with a view toward providing appropriate victim services and remedies.³⁹

4.18 Corporate crime is often defined as a victimless crime. This is palpably false. The way the harms of corporate crime are defined diminishes the impact on victims. Making victims of corporate crime visible occurs only when the actual victims and their advocates make their voices heard with such volume and persistence that politicians perceive that their positions of power are in jeopardy if they do not act to protect and serve victims of corporate crime.

4.19 The direct financial, human and social wreckage wrought by corporate and business crimes are among the worst types of crime victimization. Victims experience extremely serious and far reaching harms. They suffer crime victimization on a grand scale. In addition to their immediate financial loss, victims experience a range of behavioural, emotional, psychological and health problems, long term financial difficulties and other severe impacts (such as marriage breakups, destruction of family relationships, suicide, mental health breakdown), not appreciated by governments, politicians and regulators.

4.20 When corporations commit a crime they impose profound multiple harms on victims.

4.21 The direct impact of the crimes is bad enough- people lose their savings, their homes, their retirement income, their marriage, their families, their health and wellbeing, even their children and in many cases, their lives- as a consequence of these corporate crimes.

4.22 The profound harm victims suffer is compounded by their invisibility: the corporate structure itself which protects the corporate entity: the narrative of 'blame the victim' that authorities, regulators, politicians and industry knowingly promote: the inaction of governments and regulators: the failure of the authorities to take action against the perpetrators and those who profit and the appallingly low penalties given to perpetrators against whom action is taken. In many cases victims see the corporations and businesses who commit these crimes suffer no penalty, retain the profits from their crimes and continue to operate, often to reoffend against other people.

4.23 There is insufficient protection for victims (and potential victims) of corporate crime and no support offered to actual victims. The profound social injustice of corporate and business crime for its victims and their families must be rectified.

4.24 Penalties must include financial restitution to the victims.

³⁹ Whyte, D (2007) Victims of Corporate Crime in Wacklate, S (2007) *Handbook of Victims and Victimology*

Senate Inquiry into Penalties for White Collar Crime

Stronger whistle-blower protections

4.25 Whistle-blowing is an important way to prevent and expose corporate crime. If people believe they will get dobbed in by colleagues they may be deterred.

4.26 Many recent examples of corporate crime were only brought to light by whistle-blowers.

4.27 However, whistle-blowers lack sufficient legal protection and incentives. Current laws are inadequate. The definition under the Corporations Act is limited and does not cover people who have left the organisation and who are no longer employees. Actions could include:

- Legislation to strengthen whistle-blower protection
- Compensation, damages and rewards for whistle-blowers who expose corporate, financial and white collar crimes (or they get a % of the money saved) and for those who lose financially as a result of their whistleblowing.

Reform limited liability laws

4.28 Corporations receive the benefits (but often avoid the obligations) of legal status.

4.29 At the core of business and corporate law is a doctrine- limited liability- that makes corporations and business and those who work in them more likely to behave badly, engage in malfeasance and criminality. Legal liability is the critical legal innovation that led to the creation of corporations.

4.30 Limited liability is the notion that investors in a corporation should not be liable for bad things the corporation or business does. As Kent Greenfield has written, many of the historical rationales for legal liability don't make sense in the contemporary context, because corporations are themselves the shareholders.⁴⁰

4.31 One option is to get rid of limited liability. Another option is to refuse to award the protection of limited liability when corporations and owners are the controllers of other corporations.

We urge caution in the use of Deferred Prosecution Agreements

4.32 The Abbott/Turnbull Government is considering a Deferred Prosecution Agreements (DPA) Scheme⁴¹ which would give corporations accused of wrongdoing, malfeasance and criminality the opportunity to defer prosecution in exchange for compliance with a range of conditions. DPAs involve a shift from prosecution to compliance.

4.33 A DPA is a contractual agreement between government and a corporate entity that allows government to impose sanctions and set up and monitor institutional

⁴⁰ Greenfield, K (2011) Reforming Limited Liability Law, The Nation, June 27, 2010 <http://www.thenation.com/article/reforming-limited-liability-law>

⁴¹ Attorney Generals Department (2016) *Improving Enforcement Options for Serious Corporate Crime: Consideration of a Deferred Prosecution Agreements Scheme in Australia*, Public Consultation Paper, March 2016, Australian Government.

Senate Inquiry into Penalties for White Collar Crime

changes, in exchange for an agreement that government forego further investigation and corporate criminal indictment.

4.34 DPAs have become the mainstay of white-collar and corporate crime enforcement in the UK and US and occupy a middle ground between declining to prosecute and trials or guilty plea. At first appearance they appeal. However, there are serious concerns.

4.35 One concern is that DPAs become the default option. Instead of being convicted for criminal wrongdoing- and perhaps barred from competing for government contracts- a form of plea bargain takes place in which the corporation acknowledges wrongdoing, pays a penalty and promises not to transgress, otherwise the prosecution won't stay deferred. In the US and UK, DPAs have become the primary strategy used to address corporate, business and white-collar criminality.

4.36 DPAs allow a corporation to pay what is in essence a civil penalty. There is only the threat of future criminal charges. As Law Professor Rena Steinzor notes, the authorities rarely circle back to repeat violators.⁴²

4.37 Corporations use DPAs to avoid publicly admitting wrongdoing and neither admit nor deny the crime. Prosecutors and enforcement authorities don't necessarily acknowledge guilt publicly. They simply say the corporation is agreeing to pay a fine and the amount of the fine. DPA is an agreement to pay without acknowledging culpability and responsibility.

4.38 There are concerns that DPAs encourage repeat criminality. Companies that have entered into DPAs do reoffend.

4.39 DPAs make the consequence of criminality a financial penalty, simply another cost of doing business. Business people no longer need to fear jail time. The question of whether to engage in unlawful or criminal conduct becomes another business decision as to whether the financial return from the unlawful conduct outweighs the financial cost of the penalty.

4.40 There is no evidence that DPAs deter corporate and white collar crime. They may, in fact, encourage crime by reducing the threats of prosecution and incarceration. As the number of DPAs rise, the number of prosecutions decline.

Criminal liability for corporations and corporate 'death' penalty

4.41 We need more criminal liability for corporations. We need penalties for corporations that deter corporations and those who work for them from breaking the law. Too often corporations skirt the law and get away with it.

4.42 Recidivist corporate and business offenders should be forced to go out of business by revocation of their business license or charter.

4.43 We need a charter revocation law that would revoke or rescind corporate charters when a corporation has committed repeated multiple felonies.

⁴² Steinzor, R (2014) *Why Not Jail: Industrial Catastrophes, Corporate Malfeasance and Government Inaction*, Cambridge University Press, 2014.

Senate Inquiry into Penalties for White Collar Crime

Annual corporate, business and white-collar crime report

4.44 It is remarkable, given the incidence of corporate crime, that there is no publicly available crime record data base that tracks the incidence and magnitude of corporate crime, the harms caused and the details of corporate and business perpetrators.

4.45 Publicly funded crime research institutions and bodies such as the Australian Institute of Criminology pay little attention to corporate and business crime. Either AIC or AISIC or some other public entity should be responsible for producing an Annual Report on corporate and business crime in Australia.

Need for a Royal Commission into Corporate and Business Crime

4.46 We support the calls by many others for a Royal Commission into corporate, business and white collar crime, including corruption in Australia.

4.47 We believe the harms and costs resulting from corporate and business crime are much greater than those that result from corruption in the trade union movement. If a Royal Commission into corruption in the trade union movement is considered a priority by the Federal Government, we ask why a Royal Commission into corporate and business crime is not a priority as well.