Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates

2016 - 2017

Division/Agency: Australian Securities and Investment Commission
Question No: 218
Topic: Effectiveness of penalties
Reference: Hansard page 45 (19 October 2016)
Senator: Leyonhjelm, David

Question:

Senator LEYONHJELM: Mr Medcraft, if I could just follow up, in the first instance, the matter that Senator Williams raised on penalties, and your comments in relation to penalties not being sufficient. I have been in business for 40-odd years, and I have never known a businessperson to engage or not engage in conduct contrary to the company law on the basis of penalties. Criminologists would argue that penalties are pretty much irrelevant when it comes to more traditional criminal activity as well—that it is the prospect of being caught that is more powerful. What do you think about that?
[...]
Mr Medcraft: I am happy to come back to you with a bit more information on notice. From talking globally with law-enforcement agencies, the probability of getting caught and what happens when you get caught is actually often a big driver. But I am happy to come back to you on the issue.

Answer:

While ASIC accepts that the prospect of being caught is key factor in deterring misconduct it also considers that severity of the penalty is an important driver of deterrence, particularly where the misconduct is difficult to detect. It has been recognised that for types of white-collar misconduct that ASIC prosecutes, the severity of the penalty and in particular the term of imprisonment, is significant in deterring this type of misconduct.

As the current Chief Justice of the NSW Supreme Court has noted, there are some categories of offence, such as white-collar crime, for which the Courts have held that the general deterrence remains relevant in sentencing.[1] Chief Justice Bathurst specifically pointed to offences under the *Corporations Act 2001* including insider trading and market manipulation:

> *The passage of new legislation and the enforcement criminal sanctions in this area of itself will have a deterrent effect and general deterrence in this area still almost certainly has a role to play in the sentencing process.*

[1] Keynote address to the Legal Aid Criminal Law Conference, delivered by the Honourable Tom Bathurst, Chief Justice of NSW (1 August 2012)
(http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Bathurst/bathurst010812.pdf)

An important reason for general deterrence in relation to white collar offences is that such offences are typically crimes of contemplation.[2] As was observed in *DPP (Cth) v Gregory* [2011] VSCA 145 at [53]:

> "*[G]eneral deterrence is likely to have a more profound effect in the case of white collar criminals. White collar criminals are likely to be rational, profit seeking individuals who can weigh the benefits of committing a crime against the costs of being caught and punished. Further, white collar criminals are also more likely to be first time offenders who fear the prospect of incarceration*".[3]

More recently, the NSW Court of Criminal Appeal observed in *R v Pogson, Lapham and Martin* (2012) 91 ACSR 420; [2012] NSWCCA 225 at [141] – [142] (emphasis added):

> "*Sentencing courts have a responsibility to ensure that the sentence imposed punishes the offender, denounces their criminal conduct and provides sufficient disincentive to others who may be tempted to offend, to ensure that they refrain from criminal activities.* ***Although some statements have been made suggesting that in relation to some offences general deterrence may be controversial, this is not the case with respect to crimes involving the market or other forms of business dealings***".
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> *…It is of the utmost importance that when sentencing for market-related offences, the courts impose sentences of sufficient severity to ensure, as far as possible, that others who may be tempted to engage in dishonest conduct to the benefit of themselves, or a company in which they have an interest, are dissuaded from criminal activity.*

It has also been observed that in order to give practical effect to these principles, the "*real bite*" of general deterrence only takes hold when a custodial sentence is imposed.[4] And, in relation to insider trading, "*it is self-evident that the longer the sentence, the harder the bite*".[5]

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[2] *R v Jacobson* [2014] VSC 592 at [74]; *R v Chan* [2010] VSC 312 at [22].
[3] Endorsed in *Kamay v R* [2015] VSCA 296 at [42] & [51]. See also *Dragojlovic v R* [2013] VSCA 151 at [299].
[4] *R v Hinchliffe* [2013] NSWCCA 327 at [276]-[278]; *R v Donald* [2013] NSWCCA 238 at [86]; *R v Richard* [2011] NSWSC 866 at [120]; *Braun v R* [2008] NSWCCA 269 at [85].
[5] *R v Hill & Kamay* [2015] VSC 86 at [93].