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Understanding penalties regimes for corporate wrongdoing in Australia and implications for the teaching of corporate law

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Abstract

This paper discusses a project which will review penalties over a 10 year period (2004-2013) under Australian and Securities Investments Commission (ASIC) administered legislation. The project is a response to a significant policy debate unfolding regarding the penalties imposed by courts and other bodies under legislation administered by key economic regulators such as ASIC. The project examines not only linkages between regulatory tools, available penalty regimes and rationales underpinning penalty decisions, but also how these factors interact reflexively with the evolution of policy regarding the punishment of corporate wrongdoing in Australia. This paper also considers how an understanding of penalty regimes can better inform the teaching of corporate law in terms of the underlying policy objectives that they are designed to achieve.

Introduction

On 20 March 2014 the Australian Securities and Investments Commission (ASIC) released Report 387 *Penalties for corporate wrongdoing* (Report).[2] For the purposes of the report ASIC 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.'[3]

This is a significant report by ASIC and its key purpose is to:

> '..outline the penalties available for a range of corporate wrongdoing under legislation administered by ASIC to enable consideration of whether they are proportionate and consistent with those for comparable wrongdoing:

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[2] 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.

[3] *Ibid*, p.8

> (a) in overseas jurisdictions (i.e. Canada (Ontario), Hong Kong, the United Kingdom and the United States); and
> (b) within the Australian context (i.e. across other domestic regulators and legislation administered by ASIC).'[4]

The jurisdictions selected are obviously common law jurisdictions derived from English legal traditions and conventions. The Report seeks to achieve these twin purposes by comparing maximum penalties for similar types of corporate wrongdoing under different legislation and deduce from this comparison how the penalties available to ASIC compare internationally and whether these available penalties are: '..proportionate and consistent.' The report further directs this comparison by examining penalties for: i) different types of market misconduct such as market manipulation, insider trading and making false statements to the market: and ii) financial services misconduct such as fraud, unlicensed conduct, false or misleading representations and inappropriate advice.[5] The central conclusions made by ASIC are that:

> '..both the maximum terms of imprisonment and fines available in Australia are broadly consistent with those available in the overseas jurisdictions surveyed; and
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> non-criminal monetary penalties—including administrative penalties and disgorgement—are not as widely available and are lower in Australia when compared with the overseas jurisdictions surveyed.'[6]

Regarding maximum imprisonment terms, of the four overseas jurisdictions surveyed three are largely comparable with Australia but in the United States (US) there is a marked difference. For example, the maximum term for disclosure offences in Australia is 5 years, but in the US it is 20 years, and for unlicensed conduct offences in Australia the maximum is 2 years and in the US again it is 20 years.[7] Even more marked perhaps are the differences between ASIC and comparable regulatory actors in the other jurisdictions surveyed regarding regulatory capability to hand down civil and administrative penalties for individuals. For example maximum civil penalties in Australia for insider trading are Aus$200,000, where they are unlimited in Hong Kong and the United Kingdom (UK), in the US the greater of $Aus1,100,000 or three times the benefit gained, and in Canada Aus$1,050,000. There are similar discrepancies between ASIC and the other jurisdictions regarding market manipulation, disclosure, false statements, unlicensed conduct and inappropriate advice.[8] However, some Australian regulatory agencies do have greater flexibility and capacity than ASIC in these areas:

> 'For example, for cartel conduct, the Australian Competition and Consumer Commission (ACCC) can seek a civil penalty that is the greater of $10 million, three times the value of the benefits obtained that are reasonably attributable to the contravention or 10% of the annual turnover of the company (including related entities).'[9]

Australia also seems to be out of regulatory step with the other jurisdictions in terms of ASIC's capacity to impose disgorgement penalties in non-criminal proceedings regarding the

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[4] *Ibid*, p.7
[5] *Ibid*, p.4
[6] *Ibid*,p.15.
[7] *Ibid*, p.16
[8] *Ibid*, p.19
[9] *Ibid*, p.6

wrongdoing behaviours surveyed. ASIC has very limited scope to require disgorgement of profits and other financial benefits gained whereas in the US disgorgement can be required across all the categories surveyed, Canada in all but disclosure, the UK all but unlicensed conduct, and Hong Kong in all but disclosure and unlicensed conduct.[10] Prima facie there would seem to be a case for ASIC to have access to such penalties. However, it is important not only to document the availability of penalties and their maximums, but also to articulate the actuality of such penalties in practice in Australia and other jurisdictions in terms of their incidence and intensity. This is the core objective of our research project which is discussed in more detail below.

However, before delving further into issues of possible penalty maxima and actual application and severity of applied sanctions it is important to consider what are the philosophical motivations underpinning systems of punishment. This is a crucial element of any debate about penalties, whether in the corporate area or other parts of the legal system. There are five widely accepted penal goals or as they are sometimes described, rationales for punishment: Incapacitation; Deterrence (including both general and individual deterrence); Rehabilitation; Restoration; and Retribution. They may be accorded slightly different labels in different jurisdictions and/or analytical commentaries. For example the New Zealand Ministry of Justice lists its five rationales and goals of sentencing as: Just Deserts (Retribution and Denunciation) and Proportionality; Deterrence; Incapacitation; Rehabilitation; and Restitution.[11] Different jurisdictions and different regulatory actors may place different levels of emphasis upon various of these punishment goals. For example, there has been an increasing emphasis in the US on incapacitation allied with reduced belief in that country on the efficacy of rehabilitative strategies. The most high-profile manifestation of this is the *three strikes and you are out policy* summarised by the US Department of Justice in these terms:

> 'Under the federal "Three Strikes" provision, which is now codified at 18 U.S.C. § 3559(c), the defendant receives mandatory life imprisonment if he or she: is convicted in federal court of a "serious violent felony" and has two or more prior convictions in federal or state courts, at least one of which is a "serious violent felony." The other prior offense may be a "serious drug offense."'[12]

A similar emphasis on incapacitation in the US helps to explain the significantly higher maximum penalties available for corporate wrongdoing discussed earlier in comparison to those available in Australia. ASIC lists the various types of regulatory tools available to it as: enforcement; education; policy advice; guidance; surveillance; and stakeholder engagement. Within its enforcement toolkit ASIC lists its main available types of action: punitive (e.g. imprisonment, fines); protective (e.g. disqualification, banning orders); preservative (e.g. injunctions, freezing orders); corrective (e.g. disclosure); compensatory (e.g. damage recovery); and negotiated (e.g. enforceable undertakings).[13] It can be seen that some of the

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[10] *Ibid*, p.20

[11] New Zealand Ministry of Justice, *The Rationales and Goals of Sentencing*, 2014, http://www.justice.govt.nz/publications/global-publications/s/sentencing-policy-and-guidance-a-discussion-paper/3.-the-rationales-and-goals-of-sentencing

[12] Department of Justice, *US Attorney's Criminal Resource Manual*, 1032, Sentencing Enhancement – "Three Strikes" Law, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01032.htm

[13] Australian Securities and Investments Commission, Report 387, *Penalties for corporate wrongdoing*, 20 March 2014, pp.9-10 http://www.asic.gov.au/asic/asic.nsf/byHeadline/14-055MR%20ASIC%20reports%20on%20penalties%20for%20corporate%20wrongdoing?opendocument.

sentencing rationales discussed above will be more influential in the different enforcement responses available to ASIC. For example, rehabilitation, individual deterrence, general deterrence and restoration priorities are influential in many enforceable undertakings imposed by ASIC. However, it may be harder to discern the influence of discrete enforcement goals in certain other ASIC enforcement actions. This uncertainty is partially explained by the data gaps surrounding ASIC's overall enforcement activities.

The proposed research project

ASIC acknowledges that it is more than ten years since there was a comprehensive review of its penalties regime. Our research project intends to use the penalties report as a springboard for ASIC-oriented research in a number of areas. The first stage of the project will involve a literature review and a comprehensive examination and listing of what penalties have been handed down for corporate wrongdoing, by courts and other bodies which have the power to impose penalties under ASIC administered legislation for the period 2004-2013. These other bodies are ASIC (which has the power to impose penalties in limited circumstances), the Administrative Appeals Tribunal (AAT), the Market Integrity Panel, and the Takeovers Panel (decisions of the Takeovers Panel are of particular importance for market participants who work on takeovers). The research team will examine the penalties imposed in all areas of ASIC's responsibilities as listed below under 'Investors and financial consumers' and 'Markets'. There is no existing data base where these penalties can be obtained and so the research project has the objective of generating this resource.

The second stage of the project will comprise semi-structured interviews and surveys of ASIC personnel and selected participants in the regulated communities to assess their views on issues relevant to penalties for corporate wrongdoing under ASIC administered legislation. The findings from the surveys and interviews will be analysed and incorporated with the empirical findings of the first stage. Also the project will further the international comparison of ASIC's Report 387 by investigating the penalties imposed in Australia in comparison to the following countries: Canada [Ontario], Hong Kong, New Zealand, Singapore, the United Kingdom and the United States. We will conduct detailed document analysis of external academic and internal technical reports to make cross-country comparisons of how penalties for corporate wrongdoing are implemented in the seven key countries of Australia, Canada, Hong Kong, New Zealand, Singapore, the United Kingdom (UK) and the United States (US). This also will involve approximately ten in-depth interviews with respondents drawn largely from senior representatives of business and consumer associations, the legal community and regulatory authorities. So, for the review period of ten years (2004-2013), the project objectives are to examine:

i) What are the actual penalties that ASIC has handed down for corporate wrongdoing and is there consistency regarding offences and ASIC penalties handed down over these periods?
ii) What are the actual penalties that Australian courts have handed down for corporate wrongdoing and is there consistency within individual jurisdictions on sentences allocated?
iii) Are there jurisdictional differences within Australia regarding the incidence and intensity of these recorded penalties?
iv) Given that ASIC in report 387 considered the maximum penalties available in the four overseas jurisdictions of Ontario, Hong Kong, the UK and the US,

what are the actual sentences that courts in those jurisdictions have handed down for corporate wrongdoing?

v) What are the jurisdictional differences between them and Australia in terms of incidence and intensity?

vi) Are there differences between ASIC and Australian courts regarding the penal goals that underpin their distribution of penalties for corporate wrongdoing?

vii) Are there differences between the various jurisdictions in comparison to Australia regarding the penal goals that underpin their sentencing trends for corporate wrongdoing?

This is by no means an exhaustive list and as ever available resources will shape the scale of any research in these areas, including our own. However, the examples above and associated research questions can help to provide increased empirical depth to debates about corporate wrongdoing, how widespread such behaviours may be, whether contemporary regulatory infrastructures are responding appropriately to corporate wrongdoing in Australia and elsewhere, what are the punishment rationales informing enforcement praxis, and how such regulatory responses might be improved. These are regulatory goals worth pursuing not only for ASIC, but for all those with an interest in countering corporate wrongdoing in Australia.

ASIC's responsibilities and enforcement approach

It is worth pausing for a moment and reflecting on the scale of ASIC's bailiwick because it has very broad responsibilities. Based on information in ASIC's Annual Reports its regulated populations and responsibilities include, in addition to registry services:

Investors and financial consumers

(a) Deposit-takers, credit and insurers: 173 authorised deposit-takers; 5,856 credit providers (Australian credit licensees); 28,201 credit representatives; $68 billion in insurance premiums; 55 licensed general insurance companies with 7,461 representatives; 641 non-cash payment facility providers; 13 trustee companies

(b) Financial advisers: AFS licensees licensed to provide personal advice (3,394 licensees) or general advice (1,395 licensees); 2 ASIC-approved external dispute resolution schemes

(c) Investment banks: 26 investment banks; 250 hedge fund managers/responsible entities; 43 retail OTC derivative providers; 7 credit rating agencies

(d) Investment managers and superannuation: more than $1.0 trillion funds under management; 200 super fund trustees; 483 active responsible entities; 4,152 registered managed investment schemes; 614 foreign financial service providers; 718 custodial service providers

Markets

(a) Corporations: 2 million registered companies, of which 2,141 are listed entities (including registered schemes and foreign companies)

(b) Financial market infrastructure: 18 authorised financial markets; 6 licensed clearing and settlement facilities

(c) Insolvency practitioners: 685 registered liquidators; 10,746 companies entering external administration per annum

(d) Financial reporting and audit: 4,852 registered company auditors; 27,893 companies which are required to produce financial reports; 86 audit firms

(e) Market and participant supervision: 136 market participants; 800 securities dealers; supervision of 7 markets

ASIC details its enforcement strategy in its *Information Sheet 151 ASIC's approach to enforcement*. For example, the four core issues that ASIC considers when deciding to take enforcement action are: i) strategic significance (e.g. what is the extent of the harm or loss?); ii) benefits of pursuing misconduct (e.g. is enforcement cost-effective?); iii) issues specific to the case (e.g. what evidence is available?); and iv) alternatives to formal investigation.[14] The enforcement tools available to ASIC can involve minor consequences or more punitive strategies. Amongst the punitive strategies that ASIC can pursue are: prison terms and court orders; criminal financial penalties; and civil financial penalties.[15] In addition ASIC can pursue courses of action that are: protective (e.g. disqualification); preservative (e.g. retaining assets within jurisdiction); corrective; compensatory; seek a negotiated resolution (e.g. enforceable undertakings); or issue infringements.[16] In Information Sheet 151 ASIC provides examples of how it selects strategies and courses of action and the underlying rationales for these decisions. Also, since March 2012 ASIC issues regular reports about its enforcement outcomes. For example, in its report covering the period January-June 2014 ASIC details its enforcement outcomes across a range of specific areas of enforcement and whether those actions were: criminal; civil; administrative; enforceable undertakings/negotiated outcomes; or public warning notices. It does this for both the 1 January – 30 June 2014 period and aggregates the data for the period 1 July 2012 – 30 June 2014.[17]

Such empirical data is helpful and a welcome innovation in recent years, but even so it raises the crucial issue of expectation. In particular, whether parliamentary and public expectations about the levels of consumer protection that regulatory watchdogs such as ASIC are expected to deliver are realistic given the funding levels such regulatory actors actually receive. ASIC has been very open in recent times about what it believes it is able to achieve in terms of its enforcement outcomes given its operating budget and its extensive administrative remit.[18] For example, in an interview related to its 2012 enforcement outcomes report ASIC Chair Mr Greg Medcraft emphasised that: 'You get what you pay for.' He went on to stress that: ASIC had only 26 staff to cover 25 investment banks; the 135 insurers are reviewed only once every seven years; although the big four audit firms are reviewed once every 1.5 years the remaining 72 audit firms are reviewed less than once a decade; and that although the top 20 financial planners are reviewed once every 1.7 years, for the next 30 largest it is only once every 3.8 years.[19] This is the actuarial reality of ASIC's regulatory surveillance capacity expressed in the context of 2012 data and there are no substantive grounds to believe that the situation has improved. In fact cuts to ASICs budget announced by Treasurer Joe Hockey in the last federal budget are likely to worsen the situation. When appearing before a Senate Estimates committee in June 2014 Mr Medcraft stressed the fact that ASIC's budget will be reduced by 12 per cent for the 2014-15 financial year under cuts flagged in the federal budget. This means that ASIC will have to reduce its staff by 209 staff to approximately 1,570. In monetary terms ASIC's budget will be reduced by $120 million over a four year

[14] Australian Securities and Investments Commission, *Information Sheet 151 ASIC's approach to enforcement*, pp.3-4, http://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-approach-to-enforcement/
[15] *Ibid*, pp.4-6
[16] *Ibid*, pp.6-7
[17] Australian Securities and Investments Commission, *ASIC enforcement outcomes: January to June 2014, Report 402*, July 2014, http://asic.gov.au/regulatory-resources/find-a-document/reports/rep-402-asic-enforcement-outcomes-january-to-june-2014/
[18] Australian Securities and Investments Commission, *ASIC enforcement outcomes: January to June 2012, Report 299*, September 2012, http://www.asic.gov.au/asic/asic.nsf/byheadline/12-222MR+ASIC+enforcement+report+-+January+to+June+2012?openDocument
[19] P. Durkin, 'ASIC bid to pre-empt budget cuts', *The Australian Financial Review*, 17 September 2012, http://www.afr.com/p/national/asic_bid_to_pre_empt_budget_cuts_fXPyHxGV1ngFAAVsCRN8gM

period. Mr Medcraft said these cuts meant that ASIC would have to increase its reliance on the Australian public to act as whistle-blowers on corporate crime, because the budgetary reductions would compel reduced ASIC surveillance of certain sectors. 'We will not undertake the same level of proactive surveillance that we did previously and will have to be more careful in selecting those matters we pursue,' he said. At the end of the day ... where people see white-collar crime occurring, it becomes more important for people to report that.'[20]

So, given this grim budgetary outlook and the absolutely central strategic regulatory role that ASIC plays in the economic good health of the nation, it is crucial for ASIC as a regulatory agency, for the Australian federal government that funds that agency, for business and for the Australian community who depend on that agency, that penalties regimes under ASIC administered legislation create the appropriate incentives for compliance by those whose activities are regulated by ASIC. This is important so that ASIC achieves its statutory objectives of promoting the confident and informed participation of investors and consumers in the financial system and maintaining, facilitating and improving the performance of those in the financial system. There must, therefore, be regular evaluation of the principles and practices of ASIC's penalties system. If its penalties regime lacks legitimacy ASIC is less likely to be a successful regulator. For its penalties regime to have legitimacy it must be, and be seen to be, not only adequate in its available maxima, but effective in the application of actual penalties by courts and other bodies. This is the motivation for our project, to add empirical information to facilitate regulatory evaluation and related policy development regarding corporate wrongdoing. However, contemporary concerns in Australia and elsewhere regarding corporate wrongdoing did not emerge in a vacuum so it is important to consider the broader context.

Current debates about penalties for corporate wrongdoing and the broader discourse on white-collar crime

In 2015 as the world grapples with the continuing fallout from the Global Financial Crisis (GFC) - seven years and counting so far, the grim prospects of sovereign default and a double dip recession remain real for many countries especially in Europe. As a result there is an increased focus on the massive harms that can be wrought by corporate wrongdoing and white-collar crime, most particularly in the financial sector. That increased focus has been highlighted in some jurisdictions such as the US by heavy sentencing imposed upon some of those who have been convicted of using corporate forms to engage in harmful behaviour such as defrauding investors. Perhaps the most well-known example of this is the 150 year term of imprisonment handed to Bernie Madoff by a New York court in June 2009 after he had pleaded guilty to eleven federal felonies he had committed via his wealth management business, which the court appointed trustee estimated had cost his clients more than US$18 billion. This huge sentence is seen by some commentators as signifying a new post GFC punitiveness towards financial crime, especially if the offenders are seen as high-ranking financial actors.[21]

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[20] G. Wilkins, 'You're on your own: Watchdog ASIC's warning after budgetary cuts', *Sydney Morning Herald*, 4 June 2014, http://www.smh.com.au/business/youre-on-your-own-watchdog-asics-warning-after-budget-cuts-20140604-39i4s.html

[21] C. Hurt, 'Evil Has a New Name (and a New Narrative): Bernard Madoff', (2009), *Michigan State Law Review*, Volume 2009, Issue 4, p.947.

As a counterbalance to this particular view there has been widespread bemusement amongst members of the judiciary, the academe, the general public and the media in the US that poor and pernicious organisational business practices revealed by the carnage of the GFC led to only one criminal prosecution against one individual. The individual in question a mid-lower level Goldman Sachs banker Fabrice Tourre, a prosecution that was depicted in the media as: '..the little fish who did not get away…'[22] or the SEC nailing a minnow while the whales, (in Tourre's case senior executives at Goldman Sachs), avoided prosecution.[23] This prosecutorial reality throws the subject of penalties for individual and corporate wrongdoing centre stage, especially the issue of why so few high status offenders go to jail.

Nevertheless, some leaders of the global finance industry feel that they are being treated unfairly by regulators as the latter seek to change the behaviour and operational practices of contemporary banks. For example Jamie Dimon, chief executive of the US's largest bank JP Morgan Chase:

> 'Banks are under assault…In the old days, you dealt with one regulator when you had an issue. Now it's five or six. You should all ask the question about how American that is, how fair that is.'[24]

This is of course the same Jamie Dimon who has led JP Morgan through a number of scandals that have incurred huge fines. In January 2014, JP Morgan agreed to a settlement of US$2.6 billion for its role in the Bernie Madoff frauds cited above. As a result: '…tallying up the bank's largest fines over the past two years totals more than $25 billion that JP Morgan has paid out to settle a wide range of accusations of misconduct.'[25] This is an astonishing total and begs the question, especially in the context of penalties regimes, of whether massive fines really curb poor corporate behaviour or affect financial market sentiment in a meaningful way, for example, through significant falls in share value, because JP Morgan remains the most successful bank in the US despite repeated and costly regulatory infringements. In 2013 JP Morgan negotiated a US$13 billion settlement with the US Department of Justice (DOJ) and other US agencies to: '..resolve federal and state civil claims arising out of the packaging, marketing, sale and issuance of residential mortgage-backed securities (RMBS) by JP Morgan, Bear Stearns and Washington Mutual prior to Jan. 1, 2009.'[26] Perhaps unsurprisingly JP Morgan also has been one of the players in the Libor scandal, the European Commission ruled in October 2014 that: '..JP Morgan, participated in an illegal bilateral cartel aimed at influencing the Swiss franc Libor benchmark interest rate between March 2008 and July 2009….JPMorgan was fined €61,676,000 after benefitting from a reduction of its fine for its cooperation with the investigation under the Commission's

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[22] S. McGee, 'Fabrice Tourre: The Little Fish That Did Not Get Away', *The Fiscal Times*, 2 August 2013, http://www.thefiscaltimes.com/Columns/2013/08/02/Fabrice-Tourre-The-Little-Fish-That-Didnt-Get-Away.aspx#page1

[23] D. Dayen, 'The SEC Nails a Minnow While The Whales Go Free: Why wasn't Goldman Sachs on trial alongside Fabrice Tourre', *New Republic*, 6 August 2013, http://blogs.tnr.com/article/114188/fabrice-tourre-goldman-sachs-trial-sec-nails-minnow

[24] N. Popper, 'JP Morgan Chase Chief Says 'Banks Are Under Assault', *New York Times DealBook*, 14 January 2015, http://dealbook.nytimes.com/2015/01/14/jpmorgan-chase-profit-declines-7-percent/?_r=0

[25] M. Farrell, *Wall Street Journal*, 7 Jan 2014, J.P. Morgan Adds $2.6 Billion to Its $25 Billion Plus Tally of Recent Settlements, http://blogs.wsj.com/moneybeat/2014/01/07/j-p-morgan-adds-1-7-billion-to-its-25-billion-plus-tally-of-recent-settlements/

[26] Department of Justice, 19 November 2013, *Justice Department, Federal and State Partners Secure Record $13 Billion Global Settlement with JPMorgan for Misleading Investors About Securities Containing Toxic Mortgages*, http://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-13-billion-global-settlement

2006 Leniency Notice, as well as a 10% reduction for agreeing to settle the case with the Commission.'[27] The scale of the Libor scandal was acknowledged by former Assistant Attorney General of the DOJ Lanny A. Breuer: 'Libor will prove to be one of the largest, if not the largest white-collar case in history'.[28]

Despite Mr Dimon's protests about regulators *ganging up* on his firm there are many other commentators who argue that those who commit white-collar crime are generally treated too leniently by justice systems in the US and elsewhere. This is an opinion held not just by radio talk show shock jocks, disgruntled investors, journalists, members of parliamentary committees in Australia and other countries, or academics. For example on 21 October 2014, current ASIC chair Mr Greg Medcraft said:

> 'This 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.'[29]

Unsurprisingly Mr Medcraft's remarks prompted an immediate response from Finance Minister Senator Mathias Cormann as revealed in his remarks the next day to a Senates Estimates Committee hearing:

> 'I rang the chair of ASIC to ask him myself the question, do you believe Australia is a paradise for white-collar criminals, because if that is what he believed I would be very concerned. The clear and crisp and unambiguous answer that the chair of ASIC put to me was a no.'[30]

At that same Senate hearing Mr Medcraft confirmed that Senator Cormann's telephone call had prompted him to clarify his view:

> 'I correct that. Basically the point is that we want to make sure that we don't become a paradise. I want to make it clear that what we are talking about is making sure that we don't end up in that situation.'[31]

Again at that same Senate hearing Committee member National Party Senator John Williams stated:

> '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.'[32]

These comments attest to the murky, confusing, politically charged and sometimes contradictory world of white-collar crime and what should be appropriate penalties for

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[27] European Commission, *Antitrust: Commission settles RBS-JPMorgan cartel in derivatives based on Swiss franc LIBOR; imposes € 61.6 million fine on JPMorgan*, 21 October 2014, http://europa.eu/rapid/press-release_IP-14-1189_en.htm

[28] *PBS Frontline*, 'Lanny Breuer: Financial Fraud Has Not Gone Unpunished' (22 January 2013), available at www.pbs.org/wgbh/pages/frontline/business-economy-financial-crisis/untouchables/lanny-breuer-financial-fraud-has-not-gone-unpunished/.

[29] S. Mitchell and J. Moullakis, 'Medcraft calls for harsher penalties', *The Australian Financial Review*, 22 October 2014, p.13

[30] G. Wilkins, 'Cormann slaps down Medcraft', The Australian Financial Review, 23 October 2014, p.1

[31] *Ibid*

[32] *Ibid*

individual and corporate wrongdoing. The impact of recent Australian parliamentary inquiries on corporate misconduct and white-collar crime, especially in the financial sector is discussed in more detail below, but first it is interesting to consider penalties regimes in the broader context of debates about white-collar crime.

The label white-collar crime was introduced by Edwin Sutherland in the 1940s because he aimed to foster an integrated analysis of: '..crime in the upper, or white-collar class'.[33] He hoped that building a bridge between the economic and sociological disciplines would provide an improved theoretical framework within which to propagate his strong moral convictions about commercial, political and professional wrongdoing. Sutherland's long-held interest in the: '..occupational crimes of persons of respectability and high social status..' had been evident from research he undertook in the 1920s.[34] Sutherland believed that higher social status not only facilitated differential implementation of the law, but also offered greater opportunities to commit crime. Sutherland sought to raise, at a very practical level a greater awareness about the harms caused by those whom he saw as white-collar criminals.

Many of the theoretical problems associated with the label white-collar crime stem from Sutherland's faith in differential association as an adequate general explanatory framework for all crime, not merely white-collar crime. Under differential association theory, Sutherland asserts that criminal behaviour is learned like any other behaviour and that many types of business career virtually necessitate some form of harmful or criminal activity.[35] Sutherland was unable to adequately substantiate these assertions, so that even though his ideas on the differential implementation of legal processes upon high status offenders are now widely accepted, differential association theory is not. Sutherland's faith in differential association theory meant that he was not rigorous in his attempts at definition of white-collar crime. In his initial 1940 paper his attempt at definition merited only a footnote.[36] In later works Sutherland returned intermittently to issues of definition, but he was unable to produce a universal standard which could gain wide acceptance.[37]

This lack of definitional clarity means that white-collar crime is something of a slippery concept that is difficult to measure. This lack of specificity has received much criticism and the category white-collar crime has been described by Finney and Lesieur as a '..taxonomic zoo'.[38] Sutherland himself acknowledged this uncertainty, for example in 1946 in correspondence to one of his sternest critics, Paul Tappan, he admitted: '..the concept of white-collar crime is questionable in certain respects and I hope to elaborate on these in a later publication.'[39] Sadly Sutherland never did elaborate on these matters before his death in 1950. Nevertheless, as Shapiro notes, despite white-collar crime being a jumbled concept which relies on what some might see as rather spurious correlation between role-specific norms and the characteristics of the occupants of these roles, the Sutherland legacy is not easily cast aside: 'The concept of white-collar crime is polemically powerful and notwithstanding considerable imprecision,

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[33] E. H. Sutherland, 'White-collar Criminality', (1940), *American Sociological Review*, 5, p.1-12 @ p.1.
[34] K. Schuessler, *Edwin H. Sutherland On Analyzing Crime*, Chicago: University of Chicago Press, 1973, p.xix.
[35] J.W. Coleman, 'The Theory of White-collar crime, From Sutherland to the 1990s', in K. Schlegel and D. Weisburd (eds), *White-collar crime Reconsidered*, Boston: Northeastern University Press, 1992, pp.53-77 @ p.54
[36] G. Geis, and C. Goff, 'Edwin H. Sutherland: A Biographical and Analytical Commentary', in G. Geis (ed), *On White-collar crime*, Lexington, Mass: D.C. Heath and Company, 1982, pp.171-188 @ p.181.
[37] G. Geis, 'White-collar crime, What Is It?', in K. Schlegel, and D. Weisburd, (eds), *White-collar crime Reconsidered*, n.28 above, pp.31-52.
[38] H.C. Finney and H.R. Lesieur, 'A Contingency Theory of Organizational Crime', in S.B. Bacharach (ed), *Research in the Sociology of Organizations*, Vol. 1, London: JAI Press, 1982, p.263.
[39] K. Schuessler, *Edwin H. Sutherland On Analyzing Crime*, n.8 above, p.xxi.

palpably self-evident.'[40] As seen in the very brief discussion above it is evident in the remarks of the ASIC chair, of government ministers, of senators, of US regulators and despite its inherent definitional imprecision it has traction globally in debates about corporate wrongdoing and other forms of harmful behaviour in business. This traction means that perceptions about white-collar crime influence discourses about corporate law and can be drivers in public inquiries into specific instances of poor behaviour in business.

Recent official inquiries and debates about penalties for corporate wrongdoing

There has been much disquiet in Australia about levels of perceived corporate wrongdoing and the penalties that higher status offenders are seen to be receiving. This has been particularly the case in the finance sector. First regarding the advice that individual investors have been receiving from some finance professionals, and second, how financial organisations that employ or have commercial relationships with these finance professionals have reacted to complaints from customers about financial advice received. These concerns have been highlighted by a number of high profile public inquiries. For example, on 26 June 2014 the Senate Economics References Committee released its much anticipated Final Report into the performance of the Australian Securities and Investments Commission.[41] The report is a substantial document, 519 pages in length ranging across a diverse range of topics including not only general issues such as ASIC's role, regulatory theories in relation to ASIC, credit laws, the Financial Ombudsman, corporate whistleblowing, ASIC enforcement, financial literacy, financial planners, governance and accountability structures, but also a very specific focus on Commonwealth Financial Planning Limited (CFPL). CFPL is a wholly owned subsidiary of Australia's largest bank the Commonwealth Bank of Australia (CBA), CFPL operates under the business advice structure of Colonial First State (CFS) which is also part of CBA.

The media release accompanying the Senate Report is withering in its criticism of CFPL and CBA. It describes past practices at CFPL as 'appalling', and the conduct of a number of CFPL advisers as: '..unethical, dishonest, well below professional standards and a grievous breach of their duties.'[42] The Committee believes that: 'The CFPL scandal needs to stand as a lesson to the entire financial services sector. Firms need to know that they cannot turn a blind eye to rogue employees who do whatever it takes to make profits at the expense of vulnerable investors.' In particular, Committee Chair Senator Bishop lamented CBA's response to the CFPL scandal: 'That a major financial institution could have tolerated for so long conduct that included apparent criminal behaviour is not easy to accept.' Senator Bishop went on to state that: '…the evidence that the committee has received is so shocking and the credibility of both ASIC and the CBA so compromised that a Royal Commission really is warranted.'[43]

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[40] S.P. Shapiro, 'Collaring the crime, not the criminal: Reconsidering the concept of white-collar crime', (1990), *American Sociological Review*, Vol. 55, pp.346-365 @ p.357.
[41] Senate Economics References Committee, *the performance of the Australian Securities and Investments Commission*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC/Final_Report/index
[42] Senate Economics References Committee, *the performance of the Australian Securities and Investments Commission*, *Media Release*, 26 June 2014, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC/Media_Releases
[43] *Ibid*

Commonwealth Treasurer Joe Hockey has not endorsed the clamour for a royal commission although he did criticise CBA for being too slow to admit its mistakes and compensate victims.[44] Mr Hockey is reported as telling the Coalition joint party room in Canberra on 15 July 2014 that he is not only annoyed with CBA but also with ASIC: 'ASIC has failed miserably and I'm very, very unhappy with its handling of this.'[45]

There has been continuing political fallout from the toxic sales culture at the heart of the CFPL debacle despite the somewhat belated efforts of CBA itself to politically defuse the toxic political fallout. Most notably in July 2014 the announcement by CBA of improved compensation measures to victims via its Open Advice Review Program (OARP) and the appointment of former High Court judge Ian Callinan as chair of CBA's Independent Review Panel (IRP), which will hear appeals from financial planning customers dissatisfied with compensation offered by the bank's OARP.[46] However, although CBA has received widespread media condemnation, similar to the US example of JP Morgan cited earlier, like JP Morgan its trading position and share price have not suffered in any significant way. CBA chairman Mr Narev himself has stated that CBA has not seen a 'discernible' number of their customers not wanting to deal with the bank as a result of the advice scandal and financial market reaction in terms of CBA share price movement has been negligible. This was also noted by Justin Bratling, chief investment officer of Watermark Funds Management: 'There was not a single research note written during the week from any of the analysts…and for a company that has generated $9 billion worth of profit this year, the advisory business is very small. It's a rounding error really in the overall profitability of the bank.'[47]

The lesson for the *entire financial services sector*, to use Senator Bishop's phrase, is that problems associated with lack of accountability and deflection of responsibility apply not only to the activities of individual financial planners, but also sometimes can be widespread within subsidiary organisations. Moreover, these have contributed to substantial harm to many thousands of Australian investors in recent years, while not necessarily having a negative impact on the share price of parent organisations. This begs the question of the adequacy of sanction for poor behaviour, not just the scale of penalty maxima available, but the likelihood of penalties being applied to individual financial professionals and senior executives within organisations that engage in wrongdoing and how this affects prevailing ethical standards within business organisations.

A clearly frustrated Senate Committee in Recommendation 54 of its final report stated that: 'The committee recommends that the Parliamentary Joint Committee on Corporations and Financial Services inquire into the various proposals which call for a lifting of professional,

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[44] P. Coorey and N. Khadem, 'Coalition says CBA response "inadequate"', *The Australian Financial Review*, 4 July 2014, p.9

[45] M. Kenny, 'Treasurer Joe Hockey criticises ASIC over CBA scandal', *The Age*, 15 July 2014, http://www.theage.com.au/federal-politics/political-news/treasurer-joe-hockey-criticises-asic-over-cba-scandal-20140715-3bym3.htm

[46] M. Janda, 'Commonwealth Bank financial planning compensation scheme to be led by ex-High Court judge Callinan', *ABC News*, 11 July 2014, http://www.abc.net.au/news/2014-07-11/commonwealth-bank-financial-planning-compensation-scheme-callin/5589922

[47] J. Whyte, J. Eyers and B. Hartge-Hazelman, 'CBA's Narev tries to fix financial fallout damage', *The Australian Financial Review*, 7 July 2014, http://www.afr.com/p/business/sunday/cba_boss_ian_narev_disputes_financial_XxzZhx9wmXMyhmRa1ABp2O.

ethical and education standards in the financial services industry.'[48] The Parliamentary Joint Committee accepted Recommendation 54 and established an inquiry. It took submissions, held public hearings and issued its report in December 2014. It made fourteen recommendations, including the establishment of an independent Finance Professionals Education Council but it did not specifically address the issue of penalties regimes.[49]

An influential public inquiry which has considered the issue of penalties regimes available to ASIC is the Financial System Inquiry (FSI), chaired by former chairman of both CBA and the Future Fund Mr David Murray AM. The FSI's final report was released on 7 December 2014 by Treasurer Joe Hockey and in addition to recommending that the Commonwealth Government should provide ASIC with banning powers, the FSI stated that: 'The maximum civil and criminal penalties for contravening ASIC legislation should be substantially increased to act as a credible deterrent for large firms. ASIC should also be able to seek disgorgement of profits earned as a result of contravening conduct.'[50]

It is important to remember that the FSI final report at the end of the day is just that, a report and not government policy. As such the Government may or may not decide to accept all, some, or many of its recommendations. Treasurer Hockey stressed when releasing the report that: 'The Government intends to consult with industry and consumers before making any decisions on the recommendations. This consultation will occur up until 31st March 2015.'[51] Nevertheless it would be, to paraphrase senior civil servant Sir Humphrey Appleby from the BBC comedy series *Yes Minister*, a *courageous*, decision by a Treasurer and/or Commonwealth Government to repudiate a substantial proportion of the recommendations from such a public and extensive inquiry. So, it is likely that many of the FSI's recommendations will wend their way into government policy, including its view about extending the range of powers and penalties available to ASIC. This accentuates the importance of penalties regimes not only in the hurly burly of business regulation but also in the consideration of corporate law more generally.

Penalties regimes and the teaching of corporate law

Statute occupies a central position in company law, as it does in criminal law. By contrast with criminal law, however, the legislation governing companies and corporate activities is both regulatory and prohibitory in nature. In other words, not only does the legislation prohibit conduct that is unlawful; it also regulates the way in which companies and their agents should conduct their affairs. The regulatory nature of company law is further reinforced by the existence of a corporate regulator, whose responsibilities include supervising conduct, investigating improper conduct and initiating enforcement action in circumstances where there has been a breach of the rules.

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[48] Senate Economics References Committee, *the performance of the Australian Securities and Investments Commission*,
http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC/Final_Report/index

[49] Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into proposals to lift the professional, ethical and education standards in the financial services industry*, December 2014, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Financial_Adviser_Qualifications/Report

[50] Financial System Inquiry, *Final Report*, November 2014, p.250, http://fsi.gov.au/publications/final-report/

[51] The Hon Joe Hockey MP, Treasurer of the Commonwealth of Australia, *Release of the Financial System Inquiry Report*, 7 December 2014, http://jbh.ministers.treasury.gov.au/media-release/061-2014/

It could be argued that the imposition of penalties in the area of criminal law is more straightforward than in the area of company law because it is easier to identify when a person has committed a proscribed act - and to determine what penalty might be appropriate in the circumstances - than to identify when a person has failed to comply with prescribed conduct and what penalty might be appropriate for such failure. In addition, the design of the penalties, be they civil or criminal, is likely to be relatively complex if the focus is as much on encouraging proper conduct as it is on punishing and deterring improper conduct.

To date, the corporate law curriculum has paid little attention to penalties, the ways in which they are structured and their underlying philosophical motivations. This is partly because there is a tendency to treat them as peripheral in nature; namely, to treat them as the inevitable outcome of non-compliance with the regulatory requirements rather than as an important factor in achieving regulatory compliance in the first place.

It is suggested that an understanding of penalties has a number of benefits for students of corporate law. First, it helps them to locate corporate law within the broader legal system and to appreciate both its strengths and weaknesses. In particular, students can compare the merits of ‘hard law’, as reflected in legislation, with the merits of ‘soft law’, as reflected in regulatory guidelines and codes of conduct, in terms of regulating companies and their agents and achieving appropriate regulatory outcomes. Secondly, an understanding of penalties enables students to appreciate the points of divergence and convergence between corporate law and other areas of law such as criminal law and to distinguish between different types of statutory law. Thirdly, it provides students with insights into the challenges and tensions that regulators face when dealing with the often-mentioned but poorly-understood concept of white-collar crime. Fourthly, issues concerning penalties and their effectiveness go to the heart of questions concerning the legitimacy of corporate law and its underlying objectives.

It is possible to incorporate an understanding of penalties into the corporate law curriculum in a number of ways. For example, statutory provisions could be taught with reference to their corresponding penalties so that students develop an awareness of the consequences of non-compliance and, therefore, a comparative understanding of the relevant statutory provisions and their importance in achieving regulatory outcomes. In addition, materials and cases on enforcement investigations and proceedings could be included in the prescribed reading. Finally, teachers could engage with the discourse and debate around the design and imposition of penalties to highlight the challenges and tensions that exist in this area.

Conclusion

An increased focus on the jurisprudence of penalty regimes in the teaching of corporate law would be a welcome additional lens on their strategic importance in the shaping of business activity, corporate decision-making and the behaviour of individuals within business organisations. Penalties regimes and the likelihood of their application in practice are a significant factor in standards of operational behaviour within corporate organisations and markets and levels of actual and/or possible wrongdoing. This is because if rational economic actors, both individual and organisational, fear the consequences of penalties regimes sufficiently then they are more likely not to engage in wrongdoing. Sound evaluation and appropriate calibration of penalties regimes can be a significant lever to help shape business behaviours in ways that are congruent with community expectations and this is the policy discourse to which this project will make a contribution.