



White Paper
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Wrongful Activities of Corporate Officers

Abstract

The recent court cases involving wrongful activities of corporate officers show that these activities cannot be tolerated. Nonetheless, they continue. Wrongful activities may be punishable by civil penalties, imposition of banning orders, and criminal penalties including incarceration.

The corporate regulator, ASIC, views wrongful acts as serious breaches of the law and according to the Chairman, "perpetrators can be assured they will face the force of ASIC's investigation and legal resources to pursue them and lay charges." Also, these actions will not be tolerated by the courts as shown in the recent sentencing of Mr Cooper for a period of 5 years' jail. Mr Cooper was the former chairman of the FAI Security Group that had dealings with the HIH group of companies.

Further laws are being enacted to make activities illegal such as the Anti-Money Laundering and Counter-Terrorism Financing Bill 2005. This law will widen the scope of detection in financial markets and make the activities more difficult for those who participate in them.

This paper identifies issues for litigation arising from the wrongful actions of corporate officers. Recent cases are used to show the various means available to the courts for dealing with wrongful actions. The role of regulatory authorities is important for a successful court action and the difficulties for them in producing evidence are discussed. The defences available to corporate officers are given. To assist regulators achieve the required evidence arrangements for cooperation and coordination between agencies identifies the difficulties and constraints particularly where cross-border activities are concerned.

Corporate officers to act honestly

Corporate officers are required to act honestly. The former statutory requirement expressed this requirement as:

“A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.”¹

This expression has remained over the years to impact on the general law. Its statutory evolution to the expression in the *Corporations Act 2001* sees the requirement for directors to act honestly in terms of using their positions and corporate information in good faith. The requirement to act honestly is now a negative expression under *Corporations Act 2001*, s 184(1):

“(1) A director or other officer of a corporation commits an offence if they:

- (a) are reckless; or
- (b) are intentionally dishonest;

and fail to exercise their powers and discharge their duties:

- (c) in good faith in the best interests of the corporation; or
- (d) for a proper purpose.”

Directors using their positions in a dishonest manner is the focus of attention under the *Corporations Act*². The conversion of the expression from a positive one to a negative expression may have something to do with the behaviour of corporate officers over the years with the need to impose criminal penalties for a breach of their duties.

The duties applying to directors and other company officers apply to those of all corporations. Consequently, directors and officers of large public corporations have the same duties as single director private corporations. There is some discussion about removing some of the duties for single director corporations³ but the duty to not act dishonestly will no doubt remain as single director corporations will deal with third parties such as creditors and other members of the director's family and friends. Where the single director corporation involves other persons there is a requirement under general law to acknowledge the interests of these other persons when transacting business that may affect them where an insolvency event occurs⁴. Directors must act in the best interests of the corporation no matter its type or size⁵.

The duties of corporate directors and officers now require them to avoid wrongdoing or to correct it when it is present or apparent. The wrongful actions or omissions can be serious to warrant criminal sanctions or they can be not so serious calling for a civil penalty. Also, wrongdoing can be a mistake that was not intended at the time. The law now deals with the range of wrongdoing by corporate officers.

¹ See for example *Companies Act 1958* (Vic), s 107(1).

² See also *Corporations Act 2001*, s 184(2) which applies the duty to directors and other company officers.

³ The Hon Chris Pearce MP, Parliamentary Secretary to the Treasurer, “Pearce Announces Progress Towards Simpler Regulatory System Bill”, 14 August 2006, Canberra; Corporate and Financial Services Regulation Review, *Consultation Paper*, April 2006, Commonwealth of Australia 2006, at 4.2.

⁴ *Walker v Wimborne* (1976) 137 CLR 1.

⁵ *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285 at 289, 300-301.

Avoiding wrongdoing or correcting it

The promotion of good corporate governance with reasonable transparent processes within the corporation to detect improper activity is the best course for corporate officers who are responsible for the performance of the corporation. The objective of good corporate citizenship requires corporate officers to be diligent and to act with propriety.

This standard for corporate officers can slip for a range of reasons. But when improper or illegal activities are detected internally to the corporation the course of action should be as John Sidgore, President and Chief Executive Officer of Worldcom, Inc said⁶:

“I can assure you that WorldCom’s new management team and employees share the public’s outrage over these events. I cannot change the past, but I am responsible for what we do now and in the future. My actions will be guided by my commitment to restore public confidence in this great company and to operate WorldCom according to the highest standards of ethics and integrity.”

The importance of public confidence cannot be understated. Corporations need investors and creditors to have confidence in the corporation’s management and performance.

The Chairman of Worldcom⁷ supported his CEO’s determination to restore public confidence in Worldcom, saying:

“So let me begin where I think most appropriate, by echoing John’s sentiments and extending to this committee, to the Congress, to the President, and to the American people my most sincere apology. You have my commitment, our commitment to do what we can to accomplish four critical objectives: To get to the bottom of this, to bring wrongdoers to justice, to develop safeguards for the future, and to save this great company.”

Despite these assurances the losses of WorldCom had occurred. The major loss is injury to employees who took no part in the deceit practiced within the company to disguise financial performance and investors. The Chairman at the hearing put the loss in these terms⁸:

“The latest company to abuse the public trust is WorldCom. It appears now that senior WorldCom executives deliberately hid almost \$4 billion in expenses disguising its true performance in order to keep earnings in line with analysts’ estimates. The announcement of this fraud turned WorldCom from a world beater into a penny stock and forced it to lay off thousands of blameless employees.

...

During the telecom boom of the 1990s WorldCom stock was highly prized and was held by State pension funds, institutional investors and millions of average Americans. The stock has plummeted from a high of nearly \$65 a share just a few years back. This betrayal to the spirit of the Fourth of July by senior WorldCom managers is so immense that it could cost tens of thousands of workers and average citizens their livelihood and life savings.”

⁶ Testimony of John Sidgore, President and Chief Executive Officer, Worldcom *Wrong Numbers: The Accounting Problems at Worldcom*, Hearing before the Committee on Financial Services U.S House of Representatives 107th Congress 2nd Session, July 8, 2002 Seria107-74, U.S. Government Printing Office Washington :2002 No. at 102.

⁷ *Ibid* at 104.

⁸ *Ibid* at 1-2. The hearing commenced on 8 July 2002, hence the reference to 4 July.

A broader view of corporate wrongdoing

Congressman Kanjorski (Committee of Financial Services) expressed the consequences of the WorldCom demise as⁹:

“WorldCom’s recent announcement that it overstated its earnings by at least \$3.8 billion in 2001 and in the first quarter of 2002 is only one of the latest examples of this unacceptable behavior.

With the revelations of WorldCom’s questionable accounting practices, it has become increasingly apparent that these scandals do not result from some idle mistakes or a few fraudulent acts. For me the WorldCom deceit is just the latest development to make clear that there is a systemic problem with accounting irregularities, executive abuse, and corporate governance and misconduct in our country’s securities markets. It also greatly troubles me how so many corporate insiders, outside auditors, investment bankers, research analysts and countless others could miss the simple, yet staggering accounting deception.

The corporate misdeeds at WorldCom, Tyco, Adelphia, Rite-Aid, Exxon, Global Crossing and Enron have also challenged the credibility of corporate financial reporting systems.”

Correcting the problems

The issue is whether the problems can be corrected. This issue involves identifying and defining the problems and determining if individuals must pay by way of compensation or incarceration and for the government to put better laws in place to deter future problems of this kind. There is the individual problem leading to the committing of the wrongdoing that has occurred. There is also the public interest problem where the government needs to decide how to best provide for an environment of business confidence.

The attention of the US Government became acutely focused on correcting the problems identified in Congressman Kanjorski’s statement. This included a study and report by the United States General Accounting Office into the role of investments banks and financial analysts, and the misuse of structured transactions such as special purpose entities. The purpose of this study was to see if “investment banks knowingly and substantially assisted Enron in deceiving the public about Enron’s true financial condition.”¹⁰

A significant Government response was the enactment of the Corporate and Auditing and Accountability, Responsibility, and Transparency Act of 2002¹¹ but also known as Sarbanes-Oxley Act of 2002¹². The key features of this Act are¹³:

- created an independent accounting oversight board
- more enforcement tools for the Securities and Exchange Commission
- restricted non-audit services by accounting firms
- corporate executives held accountable for the accuracy of financial reports

⁹ Congressman Paul E Kanjorski, *Ibid* at 6.

¹⁰ United States Accounting Office, *Investment Banks: The Role of Firms and Their Analysts with Enron and Global Crossing*, Report to the Senate Committee on Banking, Housing, and Urban Affairs and the House Committee on Financial Services, March 2003, Letter to the Chairman of the Committees dated March 17, 2003.

¹¹ Pub. L. No. 107-204.

¹² Signed into law by the President on 30 July 2002

¹³ See Securities and Exchange Commission, *Report Pursuant to Section 704 of the Sarbanes-Oxley Act of 2002*.

- increased criminal penalties for securities fraud
- provided for the separation of investment banking and investment analysis.

These features are important for corporate officers despite rumblings about the extra burdens imposed under the Act on corporations including offshore corporations considering listing in the United States¹⁴. The significance of the new provisions imposed on corporations in the United States and those listing in the United States have world-wide ramifications. Locally, this can be seen in the enactment of the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* that amended the *Corporations Act 2001* (**Corporations Act**) to incorporate similar actions to regulate Australian corporations and the behaviour of corporate officers in relation to financial reports.

Responses in the Australian context

The Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act introduced a number of reforms for financial reporting, auditing reform, financial reporting including true and fair view, disclosure of information including continuous disclosure with infringement notice provisions, shareholder participation and information, new provisions for senior manager and employees and officers, and the remuneration of directors and executives.

Other features of the change in the Corporations Act provisions comprise:

- legal enforcement of accounting and auditing standards
- other enforcement matters involving the revision of criminal penalties, protection of employees reporting breaches, disqualification of directors, and civil penalties
- proportionate liability.

Accounting and auditing standards

Accounting and auditing standards are disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901* (Cth)¹⁵. They are made by the Australian Accounting Standards Board (or AASB) and they are not inconsistent with the Corporations Act and regulations.

The accounting standards must be used in the financial reports of all disclosing entities, public companies, large proprietary companies and registered schemes¹⁶. Where the company, disclosing entity or registered scheme is listed, the directors are required to give a declaration and signed by the chief executive officer or the chief financial officer¹⁷. The financial reports must also give a true and fair view of the financial position and performance¹⁸.

Dealing with persons who breach the Corporations Act

The Corporations Act has a range of measures for dealing with persons who breach the Act. An important feature of the new measures is the protection of persons who report breaches of the

¹⁴ Atkins PS, Commissioner, U.S. Securities and Exchange Commission, *The SEC's Evolving Regulatory Role in an Increasingly Integrated World Economy*, Paris, France, May 15, 2006.

¹⁵ *Corporations Act 2001*, ss 334, 336.

¹⁶ *Corporations Act 2001*, ss 292(1), 296.

¹⁷ *Corporations Act 2001*, s 295A.

¹⁸ *Corporations Act 2001*, s 297.

law. A person, called the discloser, can qualify for protection under *Corporations Act 2001*, Part 9.4AAA—Protection for whistleblowers. The discloser can be any one of the following¹⁹:

- an officer of a company
- an employee of a company
- a person who has a contract for the supply of services or goods to a company
- an employee of a person who has a contract for the supply of services or goods to a company.

The disclosure must be made to any one of the following:

- Australian Securities and Investments Commission
- the company's auditor or a member of an audit team conducting an audit of the company
- a director, secretary or senior manager of the company
- a person authorised by the company to receive disclosures of that kind.

The discloser is required to inform their name before making the disclosure and that they have reasonable grounds to suspect that information they have indicates:

- the company has, or may have, contravened a provision of the Corporations legislation
- an officer or employee of the company has, or may have, contravened a provision of the Corporations legislation

The discloser must make the disclosure in good faith.

A person making a disclosure qualifies for protection by²⁰:

- not subject to any civil or criminal liability for making the disclosure
- no contractual or other remedy may be enforced, and no contractual or other right may be exercised, against the person on the basis of the disclosure.
- having qualified privilege in respect of the disclosure
- a contract to which the person is a party may not be terminated on the basis that the disclosure constitutes a breach of the contract
- court order reinstating an employee who has been dismissed because of the disclosure

Section 1317AC prohibits victimisation of the discloser including threats to the person. Threats can be express or implied, conditional or unconditional. In a prosecution for a threat, it is not necessary to prove that the person threatened actually feared that the threat would be carried out. The person carrying out a threat that causes damage to the victim is liable to compensate the

¹⁹ *Corporations Act 2001*, s 1317AA.

²⁰ *Corporations Act 2001*, s 1317AB.

victim (section 1317AD). Section 1317AE deals with the situation where confidential information is disclosed during the course of the disclosure to ASIC and other authorities.

Extension of time for disqualified directors

Where a person is disqualified under section 206B(1) of the Corporations Act, the Australian Securities and Investments Commission (**ASIC**) may apply to the court under section 206BA to extend the disqualification period by an additional period of up to 15 years. The application must be made before the beginning of the disqualification period and by the end of the first year of the disqualification period. ASIC can only apply once for an order to extend the disqualification period. The court can take account of any matters it thinks appropriate before making an order.

Also, ASIC can apply to the court to disqualify a person from managing a corporation for up to 20 years in certain circumstances where the person has been an officer of two or more corporations when they have failed within the last 7 years. Also, the court must be satisfied that:

- the manner in which the corporation was managed was wholly or partly responsible for the corporation failing; and
- the disqualification is justified.

ASIC is also required to keep a register of disqualified persons (section 1274AA).

Proportionate liability

An important feature of the change to the Corporations Act is proportionate liability. It was inserted into the *Australian Securities and Investments Act 2001* (**ASIC Act**) and the *Trade Practices Act 1974* and the Corporation Act to ensure that proportionate liability is applied to damages for economic loss and for misleading and deceptive conduct.²¹

Proportionate liability in any proceedings involves an apportionable claim. The liability of concurrent wrongdoers is limited “to an amount reflecting that portion of the damage or loss claimed”. However, the court needs to determine that the proportion is just according to the responsibility of a person (the defendant) for the loss or damage (ASICA 12GR(1), CA 1041N(1), TPA 87CD(1)).

The apportionable claim was introduced into law to deal with wrongdoings that are not intentional or fraudulent. It is dealt with as a civil liability. This is apart from the crime of fraud where there is intent to defraud the corporation and others. Responsibility is apportioned between defendants in legal proceedings.

The concept of proportionate liability arises in proceedings for a proportionate claim against a defendant who is a concurrent wrongdoer according to Subdivision 2A of Part 7.10 of the Corporations Act, Subdivision GA of Division 2 of Part 2 of the ASIC Act and Part VIA of the Trade Practices Act. The ASIC Act provision concerns conduct in relation to a takeover document or a fundraising document under the Corporations Act. The Corporations Act provision concerns conduct in relation to a financial product or financial service that is misleading or deceptive or likely to be so. The Trade Practices Act provision concerns a contravention of section 52²²

²¹ *Australian Securities and Investments Act 2001*, s 12GF(1), *Trade Practices Act 1974*, s 52, *Corporations Act 2001*, s 1041I(1).

²² **52 Misleading or deceptive conduct**

(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

An apportionable claim is made for economic loss or damage to property that has been caused by the conduct done by contravening section 12DA of the ASIC Act, section 1041H of the Corporations Act and section 52 of the Trade Practices Act and the economic loss or the property damage was not intentional or fraudulent (ASICA 12GP(1), CA 1041L(1), TPA 87CB(1)). A concurrent wrongdoer involves one or more persons acting independently or jointly whose acts or omissions cause damage or loss (ASICA 12GP(2), CA 1041L(2), TPA 87CB(2)).

The purposes of Subdivision GA of the ASIC Act, Subdivision 2A Part 7.10 of the Corporations Act and Part VIA of the Trade Practices Act apply irrespective of whether the wrongdoer is insolvent or that it is being wound up, ceased to exist or died (ASICA 12GP(5), CA 1041L(5), TPA 87CB(5)).

In apportioning liability between defendants the court is required to exclude the portion of loss due to the plaintiff's contributory negligence and to take account of the comparative responsibility of an concurrent wrongdoer who is not a party to the proceedings ((ASICA 12GQ(3), CA 1041M(3), TPA 87CC(3)). The plaintiff can bring other proceedings against other concurrent wrongdoers but it cannot recover damages that exceed the actual loss or damage sustained (ASICA 12GT, CA 1041P, TPA 87CF)²³. The court has the power to join a person as a party to the proceedings (ASICA 12GU, CA 1041Q, TPA 87CG).

A further important feature needs to be noted by the defendant wrongdoer in relation to proportionate liability for apportionable claims. That is the requirement to notify the plaintiff of any other person who is a concurrent wrongdoer where the defendant has reasonable grounds to believe that he other person is a concurrent wrongdoer. The written notice must give details of the identity of the other person as soon as practicable. If the defendant fails to give this notice then the court can order the defendant to pay costs of the proceedings that have been unnecessarily incurred by the plaintiff. The costs order may be made on an indemnity or other basis (ASICA 12GR, CA 1041N, TPA 87CD).

Each wrongdoer is responsible for their portion of damages awarded (ASICA12GS, CA 1041O, TPA 87CE). A defendant cannot be required to contribute to the damages or contribution recovered from another wrongdoer or to indemnify the other wrongdoer.

New legislation for dealing with money laundering and terrorism funding

The proposed Anti-Money Laundering and Counter-Terrorism Financing legislation replaces existing laws dealing with money laundering and the funding of terrorism. There are some significant issues in the new legislation that will impact on company officers. In particular, company officers undertaking wrongdoing where large sums are involved in transactions, could be caught by the new regulatory regime dealing with anti-money laundering and anti-terrorism funding.

The reforms are intended to improve and strengthen the current anti-money laundering and counter-terrorism financing system. It will bring Australia's system in line with international standards that have been issued by the Financial Action Task Force on Money Laundering (**FATF**). FATF is an international organisation that is concerned with strengthening the global financial system to deal with anti-money laundering.

The intention of the new legislation is to provide a generic framework to enable individual businesses to manage money laundering and terrorism financing risks that are specific to their industry. While a risk based approach is intended, the Bill to date includes much prescriptive regulatory measures that have been objected to by a range of industry organizations including the

²³ The Explanatory Memorandum at para 379 states that these provisions "enable a plaintiff to bring an action against another concurrent wrongdoer in respect of the same damage or loss."

financial markets industry²⁴. Legally-binding Rules, and non-binding Guidelines will supplement the general principles under the new legislation. The Rules will establish operational details. These would include relevant standards and specific requirements for:

- customer identification procedures
- monitoring of customer activity
- reporting suspicious matters
- appropriate “risk-trigger” events
- development of anti-money laundering and counter-terrorism programs.

The new legislation extends the regulatory regime from banks and other cash dealers to include a range of other financial service providers. This is a significant broadening of the system to capture through reporting, the movement of funds. Also, the obligations under the new legislation will no longer be linked to cash transactions but refer to financial products. A customer due diligence with enhanced reporting requirements will cause more information about transactions to be identified.

Significant matters for reporting include verifying the identity of new customers, monitoring customers and their transactions, reporting specified transactions and suspicious matters, and implementing and maintaining programs.

Generally, a reporting entity is required carry out a procedure in order to verify the identity of a customer before a designated service is provided to the customer. A reporting entity must give the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) reports about suspicious matters (proposed s 39). At this stage, AUSTRAC will continue to be Australia's financial intelligence unit and regulator in relation to anti-money laundering and counter-terrorism funding. AUSTRAC will regulate reporting entities and continue to collect, retain, analyse and disseminate financial intelligence to designated law enforcement, revenue, national security, social justice and other regulatory agencies. AUSTRAC is intended to have an enhanced enforcement and monitoring role. The role of AUSTRAC is best described by it²⁵:

“AUSTRAC is not an investigative or prosecutorial agency. AUSTRAC collects financial transaction reports information from a range of cash dealers including the financial services, bullion and gaming sectors, as well as solicitors and members of the public. These reports include suspect transactions, significant cash transactions, international funds transfer instructions and international currency transfer reports. This information is stored, analysed and disseminated as financial intelligence to domestic law enforcement, revenue, national security and social justice agencies, as well as international FIU counterparts with which we have exchange agreements. AUSTRAC also oversees the identification of accounts and account signatories (for example, the 100 point check).

In collecting financial intelligence and ensuring that accounts and their signatories are identified, AUSTRAC assists its partners in their investigation and prosecution of criminal and terrorist enterprises in Australia and overseas.”

There will be offences for:

²⁴ Legal and Constitutional Legislation Committee of the Senate, *Exposure Draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2005*, April 2006, Commonwealth of Australia, Canberra at p 15.

²⁵ Overview of AUSTRAC, <www.austrac.gov.au>.

- providing false or misleading information or documents
- forging identity documentation
- providing or receiving a designated service anonymously or using a false customer name
- structuring a transaction to avoid a reporting obligation.

Civil penalties will be provided as an alternative enforcement mechanism and in addition to criminal offence provisions.

A revised exposure draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill and the draft Rules was released for public comment by the Minister for Justice and Customs, Senator Chris Ellison, on 13 July 2006 for a period of three weeks²⁶. The revised exposure draft contains changes to reflect the Government's response to calls for a more flexible risk-based framework in order to allow businesses identify, manage and mitigate risks of anti-money laundering and counter-terrorism funding.

These mechanisms will impact the management of corporations and their transactions. Transactions will tend to be conducted through financial markets in Australian and overseas. Company officers undertaking transactions that can be monitored under the new legislation for anti-money laundering and counter-terrorism funding may find that they will need to provide further particulars in relation to the transaction. The transactions may not be funding in relation to money laundering or terrorism funding but it may not be a transaction for the benefit of the corporation. This process should assist in identifying some transactions that may be part of wrongdoing by some company officers. But those persons who will commit 'white collar' crime in the future are likely to be more astute and educated to understand the new legislation and structure transactions as an attempt to avoid detection.

'White collar' crime

The notion of 'white collar' crime is distinguished from other crime as non-violent acts committed by persons of high esteem in the community usually in commercial matters. There is a distinction made by the courts which in turn is caused by the legislature. This can be seen in the case of *R v Hassen Mohammed El-Rashid*²⁷ where it was observed to have been said²⁸:

“the difference was the result of two factors, first, that Parliament has provided lower penalties for “white collar” offences and, second, that violent crimes, such as armed robbery for example, are usually far more serious.”

The focus of 'white collar' crime has moved from the individual to the organisation where individuals whether alone or in concert with others commit acts that are criminal acts. These acts are made criminal within the Corporations Act or the Australian Securities and Investments Act. But other legislation such as those dealing with occupational health and safety, environmental issues dealing with pollution control, and acts involving funding of terrorism and money laundering, contain criminal penalties for certain acts or omissions committed by a corporation and individuals within the corporation.

²⁶ Minister for Justice and Customs, Senator Chris Ellison, *Media Release*, 13 July 2006.

²⁷ Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Gleeson CJ, Mahoney and Sperling JJ, 7 April 1995.

²⁸ *ASIC v Vizard* [2005] FCA 1037.

The cases in recent times tend to examine the severity of the sentence or the degree of punishment that is appropriate for the acts committed²⁹. These acts now tend to be done by persons holding office in a corporation and these persons are in office because of their qualifications and reputations as honest acting in good faith for the benefit of the corporation's members and creditors. They understand conflict of interest and they would always act with propriety ensuring that they have no personal conflict with the business of the corporation or if they do, to take appropriate actions to make sure others know of the conflict or potential conflict. From an investor's point of view, and of the community generally, these persons can be trusted.

However, in the context of 'white collar' crime there seems to be a distinction made by the courts. This may be due to the use of the term, 'white collar' crime, in a loose manner to describe wrongdoings that are illegal involving commercial matters including corporate matters. It appears that 'white collar crime' involves persons who hold office within a corporation and does not extend to persons who cause a corporate officer to commit an act that carries a criminal penalty. This can be seen in the cases of *R v Howard* and *R v Cooper*. In relation to the particular act Mr Howard was the corporate officer while Mr Cooper was not a corporate officer for purposes of the act committed³⁰. Mr Howard committed acts that breached his duty to act honestly under the Corporations Act. Mr Cooper committed 'bribery offences' under the Crimes Act.

While a distinction is made between 'white collar' crime and other crime, there is a question about the validity of this distinction when matters involve corporate activity that is a criminal offence.

Court distinction of 'white collar' crime

The courts have provided a distinction between 'white collar' crime and other crime on several bases. The latter crimes are considered to be more serious as they involve violence. The distinctions are often discussed in the cases. Finkelstein J of the Federal Court has been active in 'white collar' crime matters and has opened the issue for discussion and drawing on past views about 'white collar' crime.

In *ASIC v Vizard*³¹, Finkelstein J said about the treatment of 'white collar' crime and other crimes:

"The reason some people believe that white collar crimes are not serious is not only because of the absence of violence but, I suspect, because of the invisibility of the losses caused, which are usually spread among consumers and shareholders rather than concentrated on a few victims. The reality is, however, that the cost of white collar crime is often extremely high, causing many people to suffer greatly. Just ask the creditors and shareholders of the Pyramid Group and Estate Mortgage in Victoria, of the Bond and Connell Groups in Western Australia, of the State Bank of South Australia in South Australia, of Quintex in Queensland, and of HIH and One.Tel in New South Wales. The list is not exhaustive."

Finkelstein J points to another distinction:

"It is the distinction between 'true crimes' and offences 'which ... are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty': *Sherras v De Rutzen* [1895] 1 QB 918, 922. These latter offences are commonly referred to as regulatory

²⁹ See the discussion in *R v Howard* [2003] NSWSC 1248, *ASIC v Vizard* [2005] FCA 1037, *R v Cooper* [2006] SWSC 609.

³⁰ Mr Howard was the General Manager Finance of HIH Casualty & General Insurance Limited (a company in the group of companies of HIH Insurance Limited). Mr Cooper was not an officer or employee of this company group. Mr Cooper was the chief executive officer of FAI Home Security Pty Ltd and chief executive officer of Home Security International Incorporated (A company incorporated in the USA) and he held beneficial ownership of share in other companies that became involved in the activities following the takeover of FAI Insurances Limited by HIH Insurance Limited.

³¹ [2005] FCA 1037.

offences. They are enacted ‘for the regulation of individual conduct in the interests of health, convenience, safety and the general welfare of the public’: *R v Pierce Fisheries Limited* [1971] SCR 5, 13. Commonly, regulatory offences are not concerned with values but with results. Their object is to induce compliance with rules that benefit society as a whole. It is commonly said that a conviction for a regulatory offence, much like a conviction for a white collar crime, carries with it less culpability than a conviction for a ‘true crime’. See the discussion in *R v Wholesale Travel Group Inc* [1991] 3 SCR 154, 219.”

In relation to the duties of directors and other company officers under the Corporations Act, Finkelstein J made the following statements:

“The sections also bear the stamp of ‘regulatory offences’. On a daily basis, a director of a large public company will come across information that is not available to the public or even to the company’s shareholders. According to the common law a director is denied the ability to use such information for his or her own purposes. It does not matter that the director’s action causes no harm to the company or does not rob it of an opportunity which it might have exercised for its own advantage: *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134. This rule admits of few exceptions. Parliament realised that the common law was too often ignored. The temptation to make an improper profit was too great. So Parliament decided to act. The Companies Acts were amended to create an offence if a director misused information obtained by reason of his fiduciary position. It is in this sense that the sections are regulatory in character, directed to avoiding the potential harmful consequences of a particular type of conduct.”

These provisions under the Corporations Act “have another equally important purpose. They seek to establish a norm of behaviour that is necessary for the proper conduct of commercial life and so that people will have confidence that the running of the marketplace is in safe hands. For this reason a contravention of [these provisions] carries with it a significant degree of moral blameworthiness. There is moral blameworthiness because a contravention involves a serious breach of trust.”³²

A further area of distinction is in the sentencing process. Finkelstein J observes:

“I have also referred to the widely held view that ‘white collar’ offenders are treated lightly. The reason seems to be this. Traditional sentencing holds that factors such as an unblemished past life, a reputation for honesty, an involvement in and a contribution towards community affairs, and so on (generally referred to by the umbrella expression “good character”) are important factors in mitigation of sentence. I do not wish to deny the relevance of those factors, but in some cases they may result in the imposition of a very lenient sentence. At any rate there must be a limit to how far good character can be taken into account when dealing with a “white collar” offender, especially where the contravention concerns dishonesty or the abuse of a position of trust. Those convicted of such offences rarely have a criminal record. It is their good character that has enabled them to occupy the position of trust which they have ultimately breached. Indeed, it is their good character that is often used to facilitate the offence.”

This can be seen in the treatment of the distinctions in the cases, *R v Howard* and *R v Cooper*. These cases show the distinction between ‘white collar’ crime by a company officer and other crime involving commercial matters linked to the wrongdoing of a company officer that is also called ‘white collar’ crime. The distinction is in the treatment by the courts of the sentences given in each case.

³² *ASIC v Vizard* [2005] FCA 1037.

R v Howard

The court considered said that the offences committed by Mr Howard were very serious and that this merits “a term of imprisonment, unless the particular circumstances of Mr Howard are truly exceptional.” The standing of Mr Howard was, as the court describes:

“He occupied a senior position in a large public corporation. It was a position of trust. The shareholders of that corporation, the policy holders of insurance issued by that corporation, and the public were entitled to expect that Mr Howard would act with integrity. The law expects no less.”

The dishonesty of Mr Howard was described as:

“Yet Mr Howard, as he acknowledges, acted dishonestly. He was guilty of gross breaches of trust. Repeatedly, over a number of months, he failed to act in the interests of the corporation, preferring his own interests. He did so at a time when he well knew that the corporation was on its knees.”

An account of his dishonesty and wrongdoing was given by the court as:

“He worked for a time in a stockbroking firm. During an economic downturn he was retrenched. He observed others, better placed, making arrangements for their future. When retrenched, the package offered was modest. He could see the same thing happening again in December 2000 as HIH lurched towards its doom. He was, therefore, vulnerable to the blandishments of Mr Cooper as he offered the bait of security after HIH's demise. Once he accepted money from Mr Cooper, he had been compromised. The acceptance of more money for yet more favours followed.

This is an explanation, but not an excuse. At a time when Mr Howard should have exhibited character, he had none. He was dishonest. He abused the trust that had been placed in him. He acted out of greed.”

Despite this explanation, the court recognised the actions of Mr Howard to deal with his wrongdoing. These were:

- he pleaded guilty
- he went to the authorities before he was charged and revealed his wrongdoing
- he assisted the administration of justice
- he assisted the prosecution investigating Mr Howard's finances
- he provided valuable information about other persons involved in the wrongdoing
- he revealed details that were unknown to the Crown
- he provided assistance to the Crown and undertook to provide further assistance in the future.

The court's consideration of discounts for leniency in sentencing Mr Howard identified the policy underlying the consideration for leniency:

“The policy of encouraging those with information to break ranks and come forward has special relevance in the context of what is commonly called White Collar crime. Those

who commit such crimes are usually intelligent, and well able to afford expensive lawyers. Their crimes are often obscure. They depend upon subtle inferences arising from documentation, the so-called "paper trail". The paper is usually buried in a mass of other paper. Even where it can be uncovered, proof is usually difficult. Crucial documents are often missing. Motivation will sometimes remain obscure. Prosecution is therefore difficult. Successful prosecution is even more difficult.

Accordingly, there is a great temptation in these circumstances for those involved to sit tight and to close ranks. The policy pursued by the law is designed to encourage those not as deeply involved to offer assistance. It is a policy described by one English Judge in 1913 as one of 'encouraging dishonour amongst thieves', that is, for persons to come forward to trade information for advantage. That is not to overlook that contrition may form part, at least, of the motivation in offering to provide assistance."

Applying this policy to the case of Mr Howard, the court said:

"Here Mr Howard is well placed to act as a guide through the labyrinth. He was a senior manager. He was concerned with finance. He dealt with those at the top. He is able to shed light upon their motivation."

Mr Howard's assistance to the processes and those involved in wrongdoing in relation to HIH Insurance Limited and group of companies were described to the court. The assistance provided by Mr Howard were:

- the Royal Commission taskforce was saved much time by Mr Howard directing attention to certain particular areas and transactions
- he made a number of statements
- he gave evidence on two occasions
- he assisted counsel and gave evidence in proceedings before the Supreme Court against Mr Adler, Mr Williams, and Mr Federora
- he retained his own lawyers to prepare statements
- he provided these statements to the Crown at considerable cost to himself (except for reimbursement of part of the costs)
- he has committed to assist in further prosecutions in the future
- he will be an important witness
- he can be expected to be cross examined at length which will revisit his wrongdoing
- he will need to devote much time to these prosecutions at the expense of full time employment
- he will be exposed to publicity.

The court expressed the view about Mr Howard that he "was aware of these matters when he made the decision to come forward. It cannot have been an easy decision to have made. Mr Howard is entitled to significant leniency as a consequence of that action."

In considering the appropriate sentence for Mr Howard, the court referred to the case of *R v Gallagher*³³ where Gleeson CJ said:

“It is a common feature of cases where leniency is being sought on behalf of a person who has co-operated with the authorities that the argument in favour of such leniency comes from the Crown as well as the offender. The prosecuting authorities themselves have gained, or hope to gain, from the assistance in question, and it is understandable that they regard it as advancing the interests which they represent to see that such assistance is suitably and publicly rewarded. There is, however, usually no-one to put an opposing or qualifying point of view. This raises the need for special care on the part of the judge. The Court must be astute to ensure that it is being given accurate, reliable, and complete information concerning the alleged assistance and the benefits said to flow from it. Public confidence in the administration of criminal justice would be diminished if courts were to give uncritical assent to arguments for leniency, which are being jointly urged by both the prosecution and the defence, in circumstances which may call for a close examination of the alleged assistance. Care must also be taken to ensure that the ultimate sentencing result that is produced is not one that is so far out of touch with the circumstances of the particular offence and the particular offender that, even understood in the light of the considerations of policy which support the principles set out above, it constitutes an affront to community standards. If sentencing principles are capable of producing an outcome of that kind, then that calls into question their legitimacy.”

It is important to note that the task for the judge depends on the court “being given accurate, reliable, and complete information concerning the alleged assistance and the benefits said to flow from it.” This is necessary because of what Gleeson CJ says, public confidence. Consequently, leniency must not be “so far out of touch with the circumstances of the particular offence and the particular offender that, even understood in the light of the considerations of policy which support the principles set out above, it constitutes an affront to community standards.”

This important piece of sentencing policy is not confined to the criminal law. It applies to civil actions too. The case of *ASIC v Vizard*³⁴ demonstrates the need for an appropriate period of disqualification from holding office in a corporation for dishonesty and breach of trust despite the fact that, in that case, the court observed that the corporation did not itself suffer loss. The court gave the following account in assessing the appropriate period of disqualification:

“In assessing the appropriate period of disqualification I must be mindful not to impose a period which is out of all proportion to the gravity of the offence. Provided the period is proportional, it can be fixed to reflect the need to protect society from the kind of unlawful conduct engaged in by the defendant. In my view the appropriate period of disqualification is ten years. But for the factors requiring a “discount”, a much longer period would have been in order.”

In the case of Mr Howard, the court gave as sentence of three years imprisonment obliging Mr Howard to serve two years. The court then said:

“In view of your undertaking under s21(E) of the Act to provide assistance in the future, I have suspended that sentence so that you may be released forthwith. Should you fail to honour your undertaking, you will be liable to serve the prison term that I have identified.”

The case of *R v Howard* gives practitioners representing persons charged with ‘white collar’ offences important factors to assist the client in achieving a lesser sentence. Importantly, it shows that charges for ‘white collar’ offences can provide the client with a better outcome than if the

³³ (1991) 23 NSWLR 220.

³⁴ [2005] FCA 1037.

client is charged under the *Crimes Act 1900* (NSW). This will be seen when the case of *R v Cooper* is examined.

A possible reason for the different treatment by the courts of 'white collar' crime involving the wrongdoing of company officers may be the views held by judges about 'white collar' crime. This can be seen in the case of *R v Cooper*.

R v Cooper

The case of *R v Cooper* is a case of 'white collar' crime in the broader sense of the term³⁵.

Mr Cooper was charged under the *Crimes Act 1900* (NSW) for 'bribery offences'³⁶ and 'false statement offences'³⁷. Mr Cooper was never a director, officer or employee of HIH Insurance Limited and the HIH group of companies. The court expressed the substance of the crime as:

"The prisoner offered to bribe Mr. Howard and bribes were given by the prisoner to Mr Howard on five separate occasions, the total amount being approximately \$119,000 or approximately \$124,000. The prisoner made the offer and made the payments with the intention of corrupting Mr Howard, that is with the intention of influencing Mr Howard to show favour to the prisoner's companies. I have found that Mr Howard was in fact corrupted by the offer and the payments."

In relation to the false statements about a sponsorship claim that was claimed to not be satisfied but in fact was satisfied, the court said:

"These false statements did not deceive Mr Howard, who knew the true position. However, the prisoner knew that the false statements could be used by Mr Howard to deceive other employees or officers of [HIH Insurance Limited or HIH Casualty & General Insurance Limited] into believing that the Vision Publishing sponsorship claim had not been satisfied."

According to the court, Mr Cooper could not be taken as committing a breach of trust as he was not a director, an officer or an employee of the HIH group of companies. But Mr Cooper "was complicit in breaches of trust by Mr Howard."

The courts consideration of deterrence of bribery in the sentencing of Mr Cooper included this statement:

"Bribery is an offence which is difficult to detect, difficult to investigate and difficult to prove. The present offences of bribery became capable of being proved, only because Mr Howard, after a long period of strenuously denying that he had been guilty of any wrongdoing, admitted his guilt and agreed to provide assistance to law enforcement authorities, including giving evidence against the prisoner. In the present case the bribery offences involved the corrupting of a senior officer of a company."

The court considered mitigating factors in the sentencing of Mr Cooper. It was noted that Mr Cooper:

- has no criminal record
- is a person of previous good character

³⁵ *R v Cooper* [2006] NSWSC 609 at para 273.

³⁶ Section 249B(2)(b) of the Crimes Act.

³⁷ Section 178BB of the Crimes Act.

- is unlikely to re-offend
- has good prospects of rehabilitation.

These factors accord with section 21A(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

Despite his good character showing a number of acts of generosity to employees and others, the court said:

“evidence of previous good character is of less weight where, as here, the previous good character has enabled the offender to assume a position where he could commit the offences and it is also of less weight where an offender is to be sentenced for repeated offences committed over a period.”

The factor of re-offending was also discussed. The court said:

“I accept that the prisoner is unlikely to re-offend but a reason for his being unlikely to re-offend is that he is unlikely ever again to be in a position where he could commit similar offences.”

A further factor was remorse according to section 21A(3)(i) of the *Crimes (Sentencing Procedure) Act*. The court found that Mr Cooper had “shown no remorse at all for any of the offences” despite making reparations for damage suffered by HIH Insurance Limited.

Mr Cooper made payments to the liquidator of HIH Insurance Limited. However, the court noted that these payments “were not voluntary; they were made only after court proceedings had been commenced and prosecuted. Furthermore, it appears that at least some of the monies paid to the liquidator were provided, not by the prisoner or any of his companies, but by third persons.”

The argument that offences committed by Mr Cooper “not out of a motive of personal gain, but out of a motive of obtaining advantages for companies associated with him”, did not count as a mitigating factor by the court. The court also observed other factors working against Mr Cooper for purposes of mitigation:

- he did not curtail his lifestyle by driving expensive cars, living in a residential apartment at Balmoral, staying at Hayman Island and gambling large sums of money at casinos

Then there was the matter of adverse media publicity. On this matter, the court said in the case of Mr Cooper:

“I accept that the prisoner has suffered widespread adverse media publicity and public humiliation. I accept that, whatever offences he might have committed, some of the adverse media publicity about him has been unmerited. For example, in some publications he has been described, wrongly, as having been a director or an officer of HIH. He has sometimes been described as a person responsible for the collapse of HIH. On the limited information available to me, that description would appear to be unwarranted.”

The court also stated that Mr Cooper has no assets and was declared bankrupt and “that his convictions for these offences will make it difficult for him to operate commercially or to obtain employment.”

A comparison was also made by the court between the sentencing of Mr Howard and Mr Cooper. While there is some degree of correspondence between some of the offences in both cases, the court pointed to other factors that distinguish the two cases. By comparison, Mr Cooper:

- did not plead guilty
- was charged under the Crimes Act
- offered Mr Howard a bribe, not Mr Howard soliciting a bribe
- conduct was more serious than that of Mr Howard
- complicit in the breaches of trust by Mr Howard
- charges laid did not apply to Mr Howard.

While the court considered the offences to be “broadly described as ‘white collar’ crimes”, the sentence in Mr Cooper’s case was more severe than that of Mr Howard. A distinction was observed by the court:

“Mr Howard was charged with offences under the *Corporations Act* for which the maximum penalty was imprisonment for five years. The offences under s 249B(2)(b) of the *Crimes Act* for which I am sentencing the prisoner carry a higher maximum penalty of imprisonment for seven years.”

It is clear that the mitigating factors assisting Mr Howard were not present for Mr Cooper. Worse still, Mr Cooper appeared to make the task difficult for the court to find any favourable mitigating factors to assist his case.

Distinction between criminal and civil proceedings is blurring

The different treatment of ‘white collar’ crime and other crimes by the courts involves a change that is occurring in the proceedings.

Finkelstein J describes the former clear lines between criminal and civil proceedings in *ASIC v Petsas*³⁸:

“Acts which were prosecuted by the criminal law were punished, while those who transgressed civil laws were made to pay compensation. The distinction is the root cause of the fundamental differences developed by the common law for criminal and civil proceedings, especially in the rules for discovery, the burden of proof and the admissibility of evidence. For some time, however, the reasonably clear line between the civil and criminal law has been collapsing. So great is the collapse that in 2003 Hayne J was able to say that the distinction between civil and criminal proceedings “is, at best, unstable”: *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Limited* (2003) 216 CLR 161, 200.”

This unstable situation is due to three reasons identified by Finkelstein J³⁹

1. civil remedies are now available to supplement criminal sanctions
2. civil remedies are being chosen as alternatives to the criminal law, especially in the area of so called “white collar” crime
3. civil remedies may be chosen by the enforcing authority as an express alternative to a criminal prosecution.

³⁸ [2005] FCA 88.

³⁹ *ASIC v Petsas* [2005] FCA 88 para 1.

Civil sanctions comprising injunctions, forfeiture, restitution and civil fines are becoming more prominent for ASIC in its dealing with breaches of the Corporations Act. Finkelstein J identifies the following reasons for this approach by the regulatory authority:

- proceedings that are “civil” in nature
- proceedings are likely to be cheaper and more efficient than criminal proceedings.

According to Finkelstein J, “civil proceedings are cheaper and more efficient because the rules of evidence are less strict, the protections afforded to defendants are not as great and the level of certainty required to secure a conviction (the standard of proof) is lower.” The use of civil proceedings will encourage regulatory authorities to be more inclined to take action in doubtful, or potentially doubtful, cases if there is a greater likelihood of a conviction being obtained.

This changing distinction between criminal and civil proceedings is, according to Finkelstein J, causing problems for the courts. In particular:

- how a sentencing judge should go about determining an appropriate civil penalty for an essentially criminal offence
- what is a judge to do when required to impose a civil remedy (for example, a fine) when on the same facts in a criminal court the very same offender would have been imprisoned
- should the judge attempt to achieve an equivalence
- should the judge simply ignore the fact that on another day before a different judge the offender would have been incarcerated
- is there something in between.

Finkelstein J points out in this deliberation of questions for the courts that:

“In Australia imprisonment is the most severe form of punishment and is therefore reserved for serious crimes. Fines are not usually regarded as an equivalent to imprisonment and are appropriate for less culpable offenders.”

The case, *ASIC v Vizard*, was the first insider trading provision breach where the court had to impose a civil penalty instead of a criminal sentence for a breach of the provisions⁴⁰. This case can be compared with *Regina v Rivkin*⁴¹ where the court determined the sentencing of Mr Rivkin for a breach of the insider trading provisions of the Corporations Act. This latter case is significant as it shows the principles for sentencing of ‘white collar’ crime:

“General principles relating to sentencing in white collar crimes – and insider trading may properly be regarded as such a crime - are well known. The relevant aspect of those principles for present purposes may be shortly stated as follows: -

1. The element of general deterrence is important in white collar crimes. It is of course, an important part of the sentencing process in all crimes. It is however, an especially important matter in crimes such as the present because of the need to mark out plainly to others who might be minded to breach their professional or related

⁴⁰ *ASIC v Vizard* [2005] FCA 88 at para 4.

⁴¹ *Regina v Rivkin* [2003] NSWSC 447.

obligations that such conduct will generally merit, in appropriate cases, condign punishment.

2. An important reason why this is so, relates to the often remarked difficulty in detecting and investigating white collar crime. Insider trading is particularly hard to detect. It may often go unnoticed but where it occurs it has the capacity to undermine to a serious degree the integrity of the market in public securities. It has the additional capacity to diminish public confidence not only so far as investors are concerned but the general public as well. Moreover, this diminution in confidence may occur subtly and is not confined to the circumstances where a substantial insider trading transaction has taken place. There is a capacity to undermine and diminish public confidence in the market even where the offence may be regarded as one which in some respects occupies a lower level of seriousness. This is likely to be particularly so in the case of an offender who occupies a substantial position as a trader and advisor in the market.

3. It is especially important that the sentencing process provide a firm disincentive to the carrying out of illegal activities especially by those who are engaged in the securities industry. There is a need to sound, in effect, a clarion call to discourage illegal and unethical behaviour among company directors, company officers, brokers, traders, advisors and those who have a close connection through, for example merchant banking, to the stock market. (See *Regina v Pantano* (1990) A Crim R 328 at 380; *Regina v Andrew Peter White* (NSWCCA unreported, 20 August 1998); *Regina v Riccord* (NSWCCA unreported 9 May 1997); *Regina v El-Rashid* (NSWCCA unreported 7 April 1995); *Regina v Hawker* [2001] NSWCCA 148 at paras 23 and 24; *Regina v Pont* (2000) NSWCCA 419; *Regina v Hannes* (2000) 158 FLR 389 at para 394 (per Spigelman CJ); *Regina v Hannes* (James J) 13 December 2002 at para 90; see also *The Griffiths Report* (1989) [1.2.1; 3.3.4 – 3.3.6; 4.3.4] Second Reading Speech to the Corporations Legislation Amendment Bill 1991 4215).

Despite the change in the distinction between criminal and civil procedure for 'white collar' crime there remains the element of deterrence in both situations. The insider trading breaches, like other 'white collar' crime are difficult to detect and tend to rely on 'whistle blowers' to reveal the wrongdoing.

In summing up the sentence to be imposed on Mr Rivkin, the court said:

"In my view, the sentence to be imposed must, to a degree, take into account the deterrent effect it may have on the offender personally. The prospect of the offender's rehabilitation arises in this regard. In one sense, it would hardly be likely, one would think, that the offender would be tempted to contemplate the commission of a further insider trading offence. This is because of the expense, public disgrace and public humiliation involved in the present conviction, not to mention the possible adverse impacts on his ability to trade on the stock market in the future. Nevertheless, he has not shown any contrition for his conduct and has refused to admit that he has been guilty of any wrongdoing. These latter considerations betoken the need for a sentence which carries with it the likelihood of a deterrent impact on his future conduct and which of itself is likely to ensure his rehabilitation so as to prevent any further delinquency in the area in which he has impermissibly and improperly acted."

As seen in *R v Cooper* and in the case of *Regina v Rivkin*, the actions of the person charged are important to the court. The factors identified earlier from *R v Howard* are pertinent to any case involving 'white collar' crime. The need to demonstrate that the person will not re-offend is crucial together with commitments to further assist in the prosecution of other person who may be committing wrongdoing.

Good character

The element of good character is a prominent factor in 'white collar' crime that receives much attention in the cases. While it is a mitigating factor in sentencing it also is the basis on which trust is established. Finkelstein J said about good character in sentencing:

“So while good character cannot be ignored it should only play a minor role in sentencing for most white collar corporate crime. At a general level, corporate crimes committed by prominent business people have a tendency to erode the moral base of the law and provide an opportunity for other offenders to justify their misconduct. At a more immediate level corporate crime is diffuse in its impact, is easily concealed with seemingly legitimate business transactions and is difficult to detect, control and punish. Corporate crimes are usually committed to accumulate wealth and power and are almost always the result of deliberate and calculated conduct. I have said in another context that, for this kind of offence, it is the nature of the offence rather than the character of the offender that should be the principal consideration for the punishment to be imposed: *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd (No 2 – Distribution Transformers)* (2002) ATPR ¶41-872. I continue to hold that view.”

The broad view of 'white collar' crime has a subset of 'corporate crime'. 'Corporate crime' is the parlance of the Corporations Act and other legislation impacting on corporations such as the Trade Practices Act. It may be the case that 'corporate crime' will be treated in a different manner than other 'white collar' crime as we saw with the cases of *R v Howard* and *R v Cooper*.

Future focus of the courts

The focus of the court's attention in the future may be less on the character of the person but on the nature of the offence committed by the person. This change of focus may see the distinction between crimes diminish so that 'white collar' crimes will be treated as any other crime as the nature of the offence can significantly harm many other persons for a long period of time.

There is more law contained in the Corporations Act to facilitate the discovery of wrongdoing by corporate officers together with a range of civil and criminal penalties that can be applied by the courts to wrongdoers.



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