

FRAUD AND CORRUPTION IN GOVERNMENT SEMINAR

**UNIVERSITY OF NSW
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KEYNOTE ADDRESS

WHITE COLLAR CRIME: PERPETRATORS AND PENALTIES

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The Hon Justice Peter McClellan,
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Supreme Court of NSW

Throughout human history, individuals who have transgressed the accepted norms of a community have generally received some form of punishment. In our community the norms are now mostly to be found in statute. A breach of a statute will be adjudicated in a court. The most challenging task for any judge is the sentencing of those who have committed a crime. The difficulty for the sentencing judge is to ensure that the “punishment fits the crime”.

The sentencing process is intended to achieve a number of objectives. Every sentence contains elements loosely described as “punishment”. In some communities the punishment will involve the infliction of physical pain. Some crimes (particularly murder and major drug crimes) attract the death penalty. Of course, it is common in all communities to punish by depriving the offender of their liberty for a period of time. It may be that a fine, which is intended to hurt the recipient financially,

or some form of community service is considered to be an appropriate punishment either alone or in conjunction with other forms of punishment.

In our community, there are a number of purposes which the sentencing judge must seek to achieve. They are identified in the *Crimes (Sentencing Procedure) Act 1999* (NSW). Deterrence of the offender and others from committing a similar crime, protection of the community, making the offender accountable for his or her actions, denouncing the conduct of the offender, recognising the harm done to the community and, importantly, the promotion of the rehabilitation of the offender are all recognised by the statute.¹

In some cases, particularly those involving violence or sexual offending, the protection of the community may be a weighty consideration in the sentencing of an individual offender. Difficulties have arisen when sexual offenders have been incarcerated, in part for the protection of the community, but an assessment at the time of their prospective release indicates that they remain a danger to the community. Legislation providing for the continuing detention of sexual offenders has been accepted as legitimate by the High Court,² but legislation of a similar character which was specific to an individual who had previously been convicted of manslaughter has not.³

Before members of the general community could read or write, and commerce was largely confined to various forms of barter, communities consisted largely of two groups – those who owned the land and those who worked for the owners of the

¹ *Crimes (Sentencing Procedure) Act 1999* (NSW) section 3A.

² *Fardon v A-G (Qld)* (2004) 223 CLR 575.

³ *Kable v DPP (NSW)* (1996) 189 CLR 51.

land. With the industrial revolution came the emergence of a middle class and an increase in the sophistication and complexity of commercial transactions. Simple financial transactions gave way to more sophisticated financial arrangements. Banks were created providing facilities for the underwriting of financial transactions and offering loans to merchants and traders who required capital. With the creation of corporations came the development of financial markets, which meant that companies were no longer dependent, at least not entirely, on the wealth of their founder or on loan facilities. Rather, they could raise capital by accepting investors as shareholders in their enterprise.

In more recent years the mechanisms for the raising of loan monies and the structure of direct and indirect investments in securities have become increasingly complex. I hesitate to describe them as “sophisticated”. As the global financial crisis made plain, the financial products which were created incorporated risks that few people understood. Their ultimate collapse has proved catastrophic for many, including both large and small investors.

The development of financial markets provided the opportunity for many in the community to participate in the legitimate creation of wealth through the production of income and the enhancement of capital. However, the concentration of wealth brings with it the opportunity for the unscrupulous, clever and not-so-clever to manipulate it to their own advantage. Our community realised long ago that a market which operates without regulation will benefit few but disadvantage many. As a consequence, it has been necessary to create a complex body of statutory rules by which the financial markets and those who operate within them are regulated.

The conventional crimes concerned with dishonesty in financial dealings are commonly used to prosecute those who seek unlawful advantage from their access to the funds of others. The crime of obtaining a benefit by deception, a breach of the former section 178BA of the *Crimes Act 1900* (NSW), may involve a simple single fraudulent transaction or a complex sequence of transactions in which the underlying “fraud” is cleverly masked, at least to the target of the deception. In other cases, rules which may be particular to financial markets or corporations have been created to control the conduct of an individual or a corporation. A breach of such a rule may involve a criminal offence for which the legislature has provided a penalty.

At the time of the South Sea Bubble in 1720, the proportion of the community with either a direct investment in corporations or in the available financial instruments was limited. Although with time the pool of investors grew, it remained relatively confined until well into the 20th century. During that century, at least in Australia, an increasing number of persons became direct investors in the stock market. They were often independently wealthy, either from inheritance or greater than average earning power. Some were traders who may or may not have had other income from outside the financial markets. At that time the retirement funds for many people were provided by a defined benefit scheme guaranteed by government or by a large financial institution, commonly a life insurance company. The future wellbeing of the majority of the community was not dependent on the performance of the market.

In the 1990s the financial landscape changed irreversibly. The recession in that decade revealed the underlying weakness of a guaranteed future benefit funded from investments in the market. As a result both government and private

superannuation arrangements were restructured. For new participants in superannuation schemes, benefits were generally tied to the market. Guaranteed outcomes from privately funded schemes were replaced by arrangements in which the returns were confined to those that the market may from time to time provide. For the first time, many in the community became dependent on the integrity of those who participated in and managed the financial market. Their financial future is now dependent on the activities of people over whom they have no control, making decisions about transactions which they probably do not understand.

In Australia, these changes in the financial landscape have been accompanied by the introduction of compulsory superannuation for all workers. This addressed two issues. Firstly, it addressed the previous and acute lack of savings in the community. Secondly, it reduced the burden on government revenues caused by the need to underwrite a guaranteed financial outcome for those in the community who, because of age or ill health, could no longer participate in the workforce.

The volume of money invested in superannuation has grown quickly since it was first made compulsory in 1992. It will continue to grow. That growth is likely to be accelerated by an increase in the rate at which the employer must provide its contributions. This has two consequences of present relevance. Firstly, the absolute volume of money in the market will grow. Secondly, the number of people with access either directly or indirectly to that money will also grow. Being an individual's primary source of funds for their later years, a loss in value of those funds either by market forces or illegal means will have consequences for many people in the community. Inevitably the regulatory authorities carry an increased responsibility and

of necessity the rules by which the markets are regulated must engage the criminal law. The form and severity of any punishment for a breach of the law becomes a critical issue.

When sentencing an offender the judge is required to identify and evaluate the circumstances of the offending and the culpability of the offender. The “maximum penalty for a statutory offence serves as an indication of the relative seriousness of the offence”.⁴ An “increase in the maximum penalty for an offence is an indication that sentences for that offence should be increased”.⁵

Crimes which have the same general description may not have equally “evil” content or characteristics.⁶ In the context of domestic burglary, Bingham LCJ discussed how the objective seriousness of a crime might fluctuate. He said:

The seriousness of the offence can vary almost infinitely from case to case. It may involve an impulsive act involving an object of little value (reaching through a window to take a bottle of milk, or stealing a can of petrol from an outhouse). At the other end of the spectrum it may involve a professional, planned organisation, directed at objects of high value. Or the offence may be deliberately directed at the elderly, the disabled or the sick; and it may involve repeated burglaries of the same premises. It may sometimes be accompanied by acts of wanton vandalism.⁷

When assessing the seriousness of a crime involving violence to an individual, the extent of the harm occasioned to the victim is a significant matter.⁸ The sentence may vary depending upon the nature and extent of the injuries inflicted on the victim. White-collar crime also impacts upon victims, sometimes many, but usually lacks any

⁴ *Muldrock v The Queen* (2011) 85 ALJR 1154, 1163 [31].

⁵ *Muldrock v The Queen* (2011) 85 ALJR 1154, 1163 [31].

⁶ *Reynolds v Wilkinson* (1948) 51 WALR 17, 18 (Dwyer CJ) quoted in *Ibbs v The Queen* (1987) 163 CLR 447, 452 (Mason CJ, Wilson, Brennan, Toohey and Gaudron JJ).

⁷ *R v Brewster* (1998) 1 Cr App R 220, 225 (Bingham LCJ) cited *In the Matter of the Attorney-General's Application [No 1] under s 26 of the Criminal Procedure Act; R v Ponfield; R v Scott; R v Ryan; R v Johnson* (1999) 48 NSWLR 327, 337; [1999] NSWCCA 435, [45] (Grove J).

⁸ Richard G Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999) 225.

physical violence. Although mostly confined to a loss of money, that loss may have a devastating consequence for the wellbeing of the individual. Identifying and weighing the harm may prove difficult. When a market is manipulated, the loss to a particular individual may be impossible to identify. When sentencing for the more traditional crimes, where physical injury may be combined with a financial loss to an individual, sentencing judges have many cases to draw upon to guide their instincts. And because of the long history of those crimes, both the statutory maximums and the penalties imposed in individual cases are well-defined and generally understood. A few examples may be useful.

In *Lovell v The Queen; Dominey v The Queen* [2006] NSWCCA 222, the offenders were convicted of intentionally or recklessly destroying property belonging to another, contrary to section 195(1) of the *Crimes Act*.⁹ Their crime carried a maximum penalty of five years imprisonment.¹⁰ Both offenders received a sentence from the sentencing judge of two years full-time imprisonment, with a total term of four years.¹¹ This was reduced on appeal to a fixed term of 15 months for Lovell and 18 months for Dominey.¹² Both applicants pleaded guilty, entitling them to a discount on sentence.

The offenders were stepbrothers.¹³ One afternoon in 2004 Christopher Northcott visited the home of Lovell.¹⁴ Both Lovell and Dominey were there at the time.¹⁵ The

⁹ *Lovell v R; Dominey v R* [2006] NSWCCA 222, [3]–[5] (Johnson J).

¹⁰ See section 195(1)(a) *Crimes Act 1900* (NSW).

¹¹ *Lovell v R; Dominey v R* [2006] NSWCCA 222, [4]–[5] (Johnson J).

¹² *Lovell v R; Dominey v R* [2006] NSWCCA 222, [81]–[82] (Johnson J).

¹³ *Lovell v R; Dominey v R* [2006] NSWCCA 222, [7] (Johnson J).

¹⁴ *Lovell v R; Dominey v R* [2006] NSWCCA 222, [7] (Johnson J).

¹⁵ *Lovell v R; Dominey v R* [2006] NSWCCA 222, [7] (Johnson J).

three men consumed quantities of beer and rum and cola.¹⁶ During this drinking session an altercation occurred between both offenders and Northcott.¹⁷ Both offenders demanded that Northcott leave.¹⁸ Northcott refused to leave and was then assaulted by the offenders.¹⁹ After Northcott had been ejected from the residence he inflicted damage on Lovell's car.²⁰ When the offenders realised this, they went to Northcott's home, which he shared with his mother.²¹ They forcibly entered the house and, using a fire extinguisher, smashed objects such as the front door, the television and stereo equipment.²² The total damage was estimated at \$4,000.²³

In *El-Youssef v The Queen* [2010] NSWCCA 4 the offender was charged with a number of offences. They included two counts of robbery, one count of larceny and one count of robbery while armed with a dangerous weapon.²⁴ He pleaded guilty.²⁵ In respect of the last offence the trial judge was asked to consider a further five matters on a Form 1.²⁶ For the offence of larceny the maximum penalty is imprisonment for five years.²⁷ The maximum penalty for robbery is imprisonment for 14 years.²⁸ When the robbery is committed with an offensive weapon, the maximum penalty increases to 25 years imprisonment.²⁹ The offender received a total

¹⁶ *Lovell v R; Dominey v R* [2006] NSWCCA 222, [7] (Johnson J).

¹⁷ *Lovell v The Queen; Dominey v The Queen* [2006] NSWCCA 222, [7] (Johnson J).

¹⁸ *Lovell v The Queen; Dominey v The Queen* [2006] NSWCCA 222, [7] (Johnson J).

¹⁹ *Lovell v The Queen; Dominey v The Queen* [2006] NSWCCA 222, [7] (Johnson J).

²⁰ *Lovell v The Queen; Dominey v The Queen* [2006] NSWCCA 222, [7] (Johnson J).

²¹ *Lovell v The Queen; Dominey v The Queen* [2006] NSWCCA 222, [9] (Johnson J).

²² *Lovell v The Queen; Dominey v The Queen* [2006] NSWCCA 222, [10] (Johnson J).

²³ *Lovell v The Queen; Dominey v The Queen* [2006] NSWCCA 222, [10] (Johnson J).

²⁴ *El-Youssef v The Queen* [2010] NSWCCA 4, [3] (Howie J).

²⁵ *El-Youssef v The Queen* [2010] NSWCCA 4, [3] (Howie J).

²⁶ *El-Youssef v The Queen* [2010] NSWCCA 4, [3] (Howie J).

²⁷ *Crimes Act 1900* (NSW) section 117.

²⁸ *Crimes Act 1900* (NSW) section 94.

²⁹ *Crimes Act 1900* (NSW) section 98.

sentence of 11 years with an overall non-parole period of eight years and three months.³⁰

The offender was engaged in a serious criminal enterprise. Over a period of two months he committed several robberies of pharmacies, grocers, supermarkets and a service station.³¹ On seven separate occasions he went into these stores intending to purchase goods.³² As he paid for his good(s) he would then snatch small to large amounts of money from the cash register while it was open.³³ Over a two-month period he stole a total of about \$3,600.³⁴ The offender, with another, also robbed a bank.³⁵ Both offenders were armed. The first offender carried a black replica pistol while the co-offender was in possession of a rifle.³⁶ The offenders threatened to shoot the bank tellers.³⁷ The offenders made off with \$9,490 in cash.³⁸

In *Abreu v The Queen* [2007] NSWCCA 267 the offender committed various crimes including break and enter and use of an unlawful weapon to prevent lawful apprehension, contrary to section 33B(1) of the *Crimes Act*, and five counts of larceny contrary to section 117(1) of the *Crimes Act*.³⁹ Further offences were also dealt with on two Forms 1.⁴⁰ The sentencing judge said that the facts revealed “a

³⁰ *El-Youssef v The Queen* [2010] NSWCCA 4, [5] (Howie J).

³¹ *El-Youssef v The Queen* [2010] NSWCCA 4, [7]–[13] (Howie J).

³² *El-Youssef v The Queen* [2010] NSWCCA 4, [7]–[13] (Howie J).

³³ *El-Youssef v The Queen* [2010] NSWCCA 4, [7]–[13] (Howie J).

³⁴ *El-Youssef v The Queen* [2010] NSWCCA 4, [7]–[13] (Howie J).

³⁵ *El-Youssef v The Queen* [2010] NSWCCA 4, [14] (Howie J).

³⁶ *El-Youssef v The Queen* [2010] NSWCCA 4, [14] (Howie J).

³⁷ *El-Youssef v The Queen* [2010] NSWCCA 4, [14] (Howie J).

³⁸ *El-Youssef v The Queen* [2010] NSWCCA 4, [14] (Howie J).

³⁹ *Abreu v The Queen* [2007] NSWCCA 267, [2] (McClellan CJ at CL).

⁴⁰ *Abreu v The Queen* [2007] NSWCCA 267, [3] (McClellan CJ at CL).

litany of criminal behaviour of the same type”.⁴¹ The criminality involved was said to be “objectively serious”.⁴²

During 2003 and 2004 the offender committed acts of larceny across a range of stores trading in hardware, electrical furniture, liquor, and computer/electrical supplies.⁴³ He also broke into five vehicles, stealing mobile phones and cash.⁴⁴ The total loss to the owners was in excess of \$23,000.⁴⁵ He was sentenced to a non-parole period of five years with a further period of parole of two years and six months.⁴⁶

The offender in *R v Cimone* (2001) 121 A Crim R 433; [2001] NSWCCA 98 was convicted of robbery in company, larceny, and receiving stolen property.⁴⁷ Robbery in company carries a maximum penalty of 20 years imprisonment.⁴⁸ The offender and three other co-offenders commandeered a vehicle driven by the victim and requested that they be taken to a remote location.⁴⁹ At this location the offender placed a knife at the back of the victim’s neck, robbing him of \$100, his watch, his mobile and personal papers.⁵⁰ The victim was then detained while the offender and another offender took the car and withdrew \$500 from the victim’s bank account.⁵¹ The offender, with his co-offenders, later returned the victim to the remote location

⁴¹ *Abreu v The Queen* [2007] NSWCCA 267, [15] (McClellan CJ at CL).

⁴² *Abreu v The Queen* [2007] NSWCCA 267, [15] (McClellan CJ at CL).

⁴³ *Abreu v The Queen* [2007] NSWCCA 267, [3] (McClellan CJ at CL).

⁴⁴ *Abreu v The Queen* [2007] NSWCCA 267, [3] (McClellan CJ at CL).

⁴⁵ *Abreu v The Queen* [2007] NSWCCA 267, [3] (McClellan CJ at CL).

⁴⁶ *Abreu v The Queen* [2007] NSWCCA 267, [10] (McClellan CJ at CL).

⁴⁷ *R v Cimone* (2001) 121 A Crim R 433, 435; [2001] NSWCCA 98, [1] (Beazley JA).

⁴⁸ *Crimes Act 1900* (NSW) section 97(1).

⁴⁹ *R v Cimone* (2001) 121 A Crim R 433, 435; [2001] NSWCCA 98, [7] (Beazley JA).

⁵⁰ *R v Cimone* (2001) 121 A Crim R 433, 435; [2001] NSWCCA 98, [7] (Beazley JA).

⁵¹ *R v Cimone* (2001) 121 A Crim R 433, 435; [2001] NSWCCA 98, [7] (Beazley JA).

and absconded with his car.⁵² Threats of further harm were made to the victim if he reported these events to the police.⁵³ On the charge of robbery in company the offender was sentenced to three years with a non-parole period of two years.⁵⁴

In *Marshall v The Queen* [2007] NSWCCA 24 the offender pleaded guilty to two counts of larceny and three counts of aggravated break, enter and commit a serious indictable offence, contrary to sections 117 and 112(2) of the *Crimes Act*. The latter offence attracts a maximum penalty of 20 years imprisonment. The offender received a total sentence of six years and eight months with a non-parole period of five years.⁵⁵ The offender broke into the home of the victim and her family while they were asleep.⁵⁶ He stole goods valued in excess of \$4,500.⁵⁷ The offender received a minimum term of 18 months imprisonment with a total term of two years.⁵⁸ The facts of the second count were similar to the first and resulted in the applicant receiving the same sentence.⁵⁹ Counts three and four were larceny offences.⁶⁰ In both cases the offender stole money from the till of a supermarket and video store.⁶¹ For these counts the applicant was sentenced to a minimum term of four years with a balance term of 16 months.⁶² In the last count the offender broke into a house and demanded money from a 56-year-old victim.⁶³ The victim had no money and, rather than leave

⁵² *R v Cimone* (2001) 121 A Crim R 433, 435; [2001] NSWCCA 98, [7] (Beazley JA).

⁵³ *R v Cimone* (2001) 121 A Crim R 433, 435; [2001] NSWCCA 98, [7] (Beazley JA).

⁵⁴ *R v Cimone* (2001) 121 A Crim R 433, 435; [2001] NSWCCA 98, [2] (Beazley JA).

⁵⁵ *Marshall v The Queen* [2007] NSWCCA 24, [7] (Howie J).

⁵⁶ *Marshall v The Queen* [2007] NSWCCA 24, [9] (Howie J).

⁵⁷ *Marshall v The Queen* [2007] NSWCCA 24, [9] (Howie J).

⁵⁸ *Marshall v The Queen* [2007] NSWCCA 24, [6] (Howie J).

⁵⁹ *Marshall v The Queen* [2007] NSWCCA 24, [9] (Howie J).

⁶⁰ *Marshall v The Queen* [2007] NSWCCA 24, [9] (Howie J).

⁶¹ *Marshall v The Queen* [2007] NSWCCA 24, [9] (Howie J).

⁶² *Marshall v The Queen* [2007] NSWCCA 24, [6] (Howie J).

⁶³ *Marshall v The Queen* [2007] NSWCCA 24, [9] (Howie J).

empty-handed, the offender stole property from the house worth more than \$10,000.⁶⁴

In each of these cases the amount of money or value of the goods lost by the victim was particularly small or modest. But for the violence or physical threats against the victims, each of these crimes would be unlikely to attract a significant penalty and may not have warranted a prison sentence. What then should be the sentencing regime for white-collar crime, particularly if large monetary sums are involved or the integrity of a market is compromised?

Prior to the recent simplification of fraud and other related offences in New South Wales⁶⁵ there was a select group of commonly prosecuted white-collar offences. They included, but were not confined to, embezzlement, obtain money or valuable things by deception, make or use a false instrument, fraudulently misappropriate money collected/received and obtain credit by fraud.

The offence of embezzlement is described by language from another era. It involves the fraudulent misappropriation of property delivered to a clerk or servant on behalf of his or her master or employer.⁶⁶ The offence carries a maximum penalty of 10 years imprisonment.⁶⁷ In *R v Bacolod* [2008] NSWDC 81 the offender was charged with 9 separate offences.⁶⁸ Seven of these concerned embezzlement.⁶⁹ The

⁶⁴ *Marshall v The Queen* [2007] NSWCCA 24, [9] (Howie J).

⁶⁵ See the *Crimes Amendment (Fraud, Identity and Forgery Offences) Act 2009* (NSW).

⁶⁶ *Crimes Act 1900* (NSW) section 157.

⁶⁷ *Crimes Act 1900* (NSW) section 157.

⁶⁸ *R v Bacolod* [2008] NSWDC 81, [1] (Berman SC DCJ).

⁶⁹ *R v Bacolod* [2008] NSWDC 81, [1] (Berman SC DCJ).

remaining two involved obtaining money by deception.⁷⁰ The offender was employed by the Swiss Hotel and her job was to organise functions at the hotel.⁷¹ These functions were generally paid for in cash which the offender would regularly pocket.⁷² In order to conceal her crime, the offender made fraudulent entries in the books of account.⁷³ The offender committed these offences over a period of seven years, stealing a total of \$1.7 million.⁷⁴ The sentencing judge remarked that the offences were objectively serious because of the obvious breaches of trust, the sizeable amount of the funds and the time over which the offences took place.⁷⁵ The offender received a head sentence of five years imprisonment with a non-parole period of three years.⁷⁶

The *Crimes Act* defined the offence of obtain money or valuable thing by deception under section 178BA(1) in the following terms: “[w]hosoever by any deception dishonestly obtains for himself or herself or another person any money or valuable thing or any financial advantage of any kind whatsoever shall be liable to imprisonment for 5 years”. Many crimes were prosecuted under this section. It was commonly used to prosecute credit card fraud.

In *R v Kilpatrick* (2005) 156 A Crim R 478; [2005] NSWCCA 351 the offender pleaded guilty to 65 counts of obtaining money or valuable thing by deception which occurred over a period of five years.⁷⁷ The offences were split into three groups. The

⁷⁰ *R v Bacolod* [2008] NSWDC 81, [1] (Berman SC DCJ).

⁷¹ *R v Bacolod* [2008] NSWDC 81, [1] (Berman SC DCJ).

⁷² *R v Bacolod* [2008] NSWDC 81, [1] (Berman SC DCJ).

⁷³ *R v Bacolod* [2008] NSWDC 81, [1] (Berman SC DCJ).

⁷⁴ *R v Bacolod* [2008] NSWDC 81, [1] (Berman SC DCJ).

⁷⁵ *R v Bacolod* [2008] NSWDC 81, [1], [4] (Berman SC DCJ).

⁷⁶ *R v Bacolod* [2008] NSWDC 81, [12] (Berman SC DCJ).

⁷⁷ *R v Kilpatrick* (2005) 156 A Crim R 478, 484; [2005] NSWCCA 351, [42] (Smart AJ).

first group of offences concerned the offender deceiving finance companies into lending him large sums of money that varied between \$50,000 and close to \$200,000.⁷⁸ The second group related to credit card fraud.⁷⁹ The offender, through a friend who worked as a manager at the National Australia Bank, obtained the credit card details of banking customers which he then used to purchase goods or services over the phone. The goods and services purchased totalled \$55,000.⁸⁰ The third group of offences mirrored the first. The amount of money lent by the finance companies was a little over \$1,500,000.⁸¹ The victims of these offences were not entirely out of pocket as the houses used as security for these loans did exist and were able to be sold to recover some of the monies. All up, the offender was able to steal \$2,699,243 over five years.⁸² For the first category of offences the offender was sentenced to a fixed term of imprisonment for two years, and for the second he was sentenced to a fixed term of imprisonment for one year.⁸³ For the final category he was sentenced to a term of four years imprisonment with a non-parole period of 18 months.⁸⁴ His total sentence was seven years imprisonment with a non-parole period of four years and six months.⁸⁵

Fraudulent misappropriation was previously dealt with by s 178A of the *Crimes Act*. The section made it an offence for anyone to receive any money or valuable security and misappropriate it for his or her own personal use. The maximum penalty for the offence was seven years imprisonment.

⁷⁸ *R v Kilpatrick* (2005) 156 A Crim R 478, 484; [2005] NSWCCA 351, [43] (Smart AJ).

⁷⁹ *R v Kilpatrick* (2005) 156 A Crim R 478, 485; [2005] NSWCCA 351, [44] (Smart AJ).

⁸⁰ *R v Kilpatrick* (2005) 156 A Crim R 478, 485; [2005] NSWCCA 351, [44] (Smart AJ).

⁸¹ *R v Kilpatrick* (2005) 156 A Crim R 478, 485; [2005] NSWCCA 351, [45] (Smart AJ).

⁸² *R v Kilpatrick* (2005) 156 A Crim R 478, 485; [2005] NSWCCA 351, [46] (Smart AJ).

⁸³ *R v Kilpatrick* (2005) 156 A Crim R 478, 485; [2005] NSWCCA 351, [47]–[48] (Smart AJ).

⁸⁴ *R v Kilpatrick* (2005) 156 A Crim R 478, 485; [2005] NSWCCA 351, [48] (Smart AJ).

⁸⁵ *R v Kilpatrick* (2005) 156 A Crim R 478, 480; [2005] NSWCCA 351, [10] (Grove J).

In *R v Higgins* [2006] NSWCCA 326 the offender was convicted of fraudulently omitting to account contrary to section 178A of the *Crimes Act*.⁸⁶ The offender was a bank manager at the Commonwealth Bank of Australia.⁸⁷ He used to visit nursing homes where some of the Bank's customers were located.⁸⁸ One elderly customer gave the offender a cheque for a sum of little over \$73,000 to invest on her behalf.⁸⁹ The offender failed to do this but instead used the money for his own purposes. He was sentenced to a non-parole period of one year and nine months, and a balance of term of one year and three months.⁹⁰

The offence of using a false instrument, a breach of the former section 300(1) of the *Crimes Act*, carried a maximum penalty of 10 years imprisonment. In *R v Gorgievski* (2002) 129 A Crim R 89; [2002] NSWCCA 45 the offender was sentenced to four years imprisonment with a non-parole period of two years.⁹¹ He pleaded guilty to five charges of making a false instrument contrary to section 300(1).⁹² He also pleaded guilty to another five offences, contrary to section 300(2), for using a false instrument.⁹³ A further 21 similar offences were included on a Form 1.⁹⁴ The offences were perpetrated against various financial institutions, including the Commonwealth Bank and St George Bank.⁹⁵ The offender opened an account with the Commonwealth Bank with the name of an existing Commonwealth Bank

⁸⁶ *R v Higgins* [2006] NSWCCA 326, [3] (Grove J).

⁸⁷ *R v Higgins* [2006] NSWCCA 326, [3] (Grove J).

⁸⁸ *R v Higgins* [2006] NSWCCA 326, [3] (Grove J).

⁸⁹ *R v Higgins* [2006] NSWCCA 326, [3] (Grove J).

⁹⁰ *R v Higgins* [2006] NSWCCA 326, [6] (Grove J).

⁹¹ *R v Gorgievski* (2002) 129 A Crim R 89, 90; [2002] NSWCCA 45, [4] (Buddin J).

⁹² *R v Gorgievski* (2002) 129 A Crim R 89, 90; [2002] NSWCCA 45, [1] (Buddin J).

⁹³ *R v Gorgievski* (2002) 129 A Crim R 89, 90; [2002] NSWCCA 45, [3] (Buddin J).

⁹⁴ *R v Gorgievski* (2002) 129 A Crim R 89, 90; [2002] NSWCCA 45, [3] (Buddin J).

⁹⁵ *R v Gorgievski* (2002) 129 A Crim R 89, 90–1; [2002] NSWCCA 45, [5] (Buddin J).

customer.⁹⁶ He had several false documents including a passport, birth certificate and driver's licence in the name of the customer.⁹⁷ During the first month he transferred \$20,000 from the customer's account to this newly created account.⁹⁸ Throughout the following month he made several withdrawals in excess of \$972,000.⁹⁹ In all, the offender obtained approximately \$2,000,000 from various financial institutions through the use of false documents.¹⁰⁰ He said that he committed the offences on behalf of another, who had paid him between \$8,000 and \$10,000 for carrying out each transaction.¹⁰¹ If this were true it suggests a sophisticated and slightly organised criminal enterprise.

In *Yow v The Queen* [2010] NSWCCA 251 the offender pleaded guilty to nine separate offences that related to the making and use of a false instrument and knowingly dealing with the proceeds of crime.¹⁰² Both the making and use of a false instrument carried a maximum penalty of 10 years imprisonment. The offence of dealing with proceeds of crime, however, carries a maximum penalty of 15 years.¹⁰³ The offender was sentenced to three years and 10 months with a non-parole period of two years, 11 months and 14 days.¹⁰⁴ The offender was part of a criminal syndicate which committed frauds through the use of counterfeit credit cards.¹⁰⁵ After a police search of the offender's residence, it was discovered that the offender was in possession of 25 counterfeit credit cards bearing the offender's signature and a

⁹⁶ *R v Gorgievski* (2002) 129 A Crim R 89, 90–1; [2002] NSWCCA 45, [5] (Buddin J).

⁹⁷ *R v Gorgievski* (2002) 129 A Crim R 89, 90–1; [2002] NSWCCA 45, [5] (Buddin J).

⁹⁸ *R v Gorgievski* (2002) 129 A Crim R 89, 90–1; [2002] NSWCCA 45, [5] (Buddin J).

⁹⁹ *R v Gorgievski* (2002) 129 A Crim R 89, 90–1; [2002] NSWCCA 45, [5] (Buddin J).

¹⁰⁰ *R v Gorgievski* (2002) 129 A Crim R 89, 91; [2002] NSWCCA 45, [6] (Buddin J).

¹⁰¹ *R v Gorgievski* (2002) 129 A Crim R 89, 91; [2002] NSWCCA 45, [6] (Buddin J).

¹⁰² *Yow v The Queen* [2010] NSWCCA 251, [3] (Fullerton J).

¹⁰³ *Crimes Act 1900* (NSW) section 193B(2).

¹⁰⁴ *Yow v The Queen* [2010] NSWCCA 251, [5] (Fullerton J).

¹⁰⁵ *Yow v The Queen* [2010] NSWCCA 251, [9] (Fullerton J).

fraudulent driver's licence.¹⁰⁶ During an interview with police the offender admitted to purchasing goods with the credit cards in order for the goods to be resold.¹⁰⁷ The total amount of the goods sold totalled \$41,000.¹⁰⁸ It was later revealed that the offender's housemates also used the counterfeit cards to purchase goods totalling \$2400.¹⁰⁹ Finally, the offender was able to open a bank account with the Commonwealth Bank using a false address.¹¹⁰ He deposited a little over \$6000 in this account, which were the proceeds of crime that he personally managed to amass.¹¹¹ The offender later admitted to withdrawing and transferring a total of \$2700 for his own personal use and to remit some of that money to Indonesia and Singapore.¹¹² Although it was conceded that the offender was not a principal in the criminal syndicate, "he nevertheless played an important role in ensuring the success of the overall scheme".¹¹³

By a 2009 amendment to the *Crimes Act* four new provisions have replaced more than 34 offences. Section 192E of the Act provides that "[a] person who, by any deception, dishonestly obtains property belonging to another, or obtains any financial advantage or causes any financial disadvantage, is guilty of the offence of fraud". The maximum penalty for this offence is 10 years imprisonment. The increase is significant, ranging from two to ten times the old penalty. The increase in the maximum penalty was acknowledged in the Second Reading speech by the then Attorney-General, John Hatzistergos, who said: "The bill also doubles the maximum

¹⁰⁶ *Yow v The Queen* [2010] NSWCCA 251, [8] (Fullerton J).

¹⁰⁷ *Yow v The Queen* [2010] NSWCCA 251, [9] (Fullerton J).

¹⁰⁸ *Yow v The Queen* [2010] NSWCCA 251, [9] (Fullerton J).

¹⁰⁹ *Yow v The Queen* [2010] NSWCCA 251, [11] (Fullerton J).

¹¹⁰ *Yow v The Queen* [2010] NSWCCA 251, [10] (Fullerton J).

¹¹¹ *Yow v The Queen* [2010] NSWCCA 251, [10] (Fullerton J).

¹¹² *Yow v The Queen* [2010] NSWCCA 251, [10] (Fullerton J).

¹¹³ *Yow v The Queen* [2010] NSWCCA 251, [13] (Fullerton J).

penalty for fraud from five to ten years, demonstrating how seriously we take the issue".¹¹⁴ For offences such as fraud and identity fraud the Attorney-General further observed that in recent times these crimes have grown, "costing Australians millions of dollars a year".¹¹⁵

It is now apparent that crimes which involve the fraudulent use of another person's identity pose a serious threat to the financial stability of the community. It is likely that many in this room have been the subject of theft by the use of their credit card. It costs the banks vast sums of money each year. Although at one level a simple crime, there are now sophisticated criminal groups involved in it. Apart from the more traditional credit card theft, white-collar crimes include crimes which to my mind warrant a unique label. I think of them as financial crimes. They may involve dishonest use of information or the fraudulent manipulation of a market.

In *R v Rivkin* (2003) 198 ALR 400; [2003] NSWSC 447 the offender, a somewhat colourful entrepreneur, businessman and stockbroker, was found guilty of one count of insider trading contrary to section 1002G(2) of the *Corporations Act 2001* (Cth).¹¹⁶ Rivkin was sentenced to imprisonment for a term of nine months to be served in the form of Periodic Detention.¹¹⁷ In addition, the Court imposed a fine of \$30,000.¹¹⁸

¹¹⁴ Second Reading Speech, Crimes Amendment (Fraud, Identity and Forgery Offences) Bill 2009, Legislative Council, 12 November 2009 (John Hatzistergos, Attorney-General of NSW).

¹¹⁵ *Ibid.*

¹¹⁶ The maximum penalty for insider trading under the *Corporations Act 2001* (Cth) was five years imprisonment and/or a fine of \$220,000. The maximum penalty has now been increased, taking effect from 13 December 2010, to imprisonment for 10 years and/or a fine of \$495,000. This type of increase is not evident across all financial crimes. There are no decisions under the new penalty regime of which I am aware (see the *Corporations Act 2001* (Cth) section 1311, schedule 3).

¹¹⁷ *R v Rivkin* (2003) 198 ALR 400, 414–5; [2003] NSWSC 447, [60] (Whealy J).

¹¹⁸ *R v Rivkin* (2003) 198 ALR 400, 416; [2003] NSWSC 447, [69] (Whealy J).

The maximum penalty, apart from any fine, was imprisonment for five years. The profit made from the commission of this offence was a modest \$2,664.94.¹¹⁹

In *ASIC v Vizard* (2005) 145 FCR 57; [2005] FCA 1037 the offender, who was a former lawyer and well-known member of the entertainment industry, pleaded guilty to three improper trades undertaken throughout the year 2000.¹²⁰ The offender was a non-executive Director of Telstra Corporation Pty Ltd and had access to confidential information about proposed financial dealings between Telstra and other companies.¹²¹ Mr Vizard got wind of a proposed merger between two technology companies that Telstra owned shares in.¹²² All the directors were informed of the progress of the merger.¹²³ Armed with this information he purchased shares in a company for which the price rose when the merger was publicly announced. However, when Mr Vizard sold them the price had fallen and he made a loss. Other similar transactions resulted in a profit of approximately \$2,600.¹²⁴ In his third trade Vizard acquired about \$250,000 worth of shares in a company in which Telstra sought to invest.¹²⁵ Vizard's purchase was made prior to Telstra's purchase and resulted in him receiving a profit of around \$1,650.¹²⁶ The purchase was made on the basis of information he had obtained in his capacity as director of Telstra.

ASIC did not prosecute Vizard for any criminal offences. This was controversial at the time. Instead ASIC brought civil proceedings to which Vizard pleaded guilty and

¹¹⁹ *R v Rivkin* (2003) 198 ALR 400, 406; [2003] NSWSC 447, [29] (Whealy J).

¹²⁰ *ASIC v Vizard* (2005) 145 FCR 57, 60–1; [2005] FCA 1037, [9], [14], [17] (Finkelstein J).

¹²¹ *ASIC v Vizard* (2005) 145 FCR 57, 60; [2005] FCA 1037, [8] (Finkelstein J).

¹²² *ASIC v Vizard* (2005) 145 FCR 57, 60; [2005] FCA 1037, [9] (Finkelstein J).

¹²³ *ASIC v Vizard* (2005) 145 FCR 57, 60; [2005] FCA 1037, [9] (Finkelstein J).

¹²⁴ *ASIC v Vizard* (2005) 145 FCR 57, 61; [2005] FCA 1037, [14]–[15] (Finkelstein J).

¹²⁵ *ASIC v Vizard* (2005) 145 FCR 57, 61–2; [2005] FCA 1037, [18] (Finkelstein J).

¹²⁶ *ASIC v Vizard* (2005) 145 FCR 57, 62; [2005] FCA 1037, [20] (Finkelstein J).

for which he was fined \$390,000 and disqualified from managing a corporation for a total of 10 years.¹²⁷

In *R v Hartman* (2010) 81 ACSR 121; [2010] NSWSC 1422, which is currently subject to appeal, the offender was employed as an equities dealer at Orion Asset Management Limited (“Orion”).¹²⁸ His job was to buy and sell listed securities on the Australian Stock Exchange in accordance with instructions from Orion’s stock portfolio managers.¹²⁹ His instructions and the volumes he was being asked to buy and sell allowed him to make transactions on his own behalf, taking advantage of the movements in the market which his authorised transaction would later create.¹³⁰ Through the use of the inside information the offender was able to amass a total profit of at least \$1.9 million, although the total figure would have been higher.¹³¹ He was charged and convicted of nineteen separate insider trading offences and six offences contrary to s 1043A(2), often referred to as “front running,”¹³² under the *Corporations Act*.¹³³

He was sentenced to a total term of four years and six months with a non-parole period of three years.¹³⁴ This is said to be the largest penalty issued for this type of

¹²⁷ *ASIC v Vizard* (2005) 145 FCR 57; [2005] FCA 1037, [49], [50]–[51] (Finkelstein J).

¹²⁸ *R v Hartman* (2010) 81 ACSR 121; [2010] NSWSC 1422, [9] (McClellan CJ at CL).

¹²⁹ *R v Hartman* (2010) 81 ACSR 121; [2010] NSWSC 1422, [9] (McClellan CJ at CL).

¹³⁰ *R v Hartman* (2010) 81 ACSR 121; [2010] NSWSC 1422, [9] (McClellan CJ at CL).

¹³¹ *R v Hartman* (2010) 81 ACSR 121; [2010] NSWSC 1422, [45] (McClellan CJ at CL).

¹³² Front running is “a form of insider trading which occurs where a person, typically a trader who is aware of a pending order in a stock which is likely to affect its price, trades in the stock or a derivative prior to the execution of the order and then, following the execution of the order, trades in it again, intending to take advantage of the anticipated rise or fall in the stock price, an advantage not available to a person who is unaware of the pending order”: *R v Hartman* (2010) 81 ACSR 121; [2010] NSWSC 1422, [1] (McClellan CJ at CL).

¹³³ *R v Hartman* (2010) 81 ACSR 121; [2010] NSWSC 1422, [1] (McClellan CJ at CL).

¹³⁴ *R v Hartman* (2010) 81 ACSR 121; [2010] NSWSC 1422, [60] (McClellan CJ at CL).

offending by the courts. He was of course convicted of the largest number of offences of this type.

In *R v De Silva* (2011) 64 ACSR 240; [2011] NSWSC 243 the offender pleaded guilty to one count of insider trading.¹³⁵ He was employed as a Portfolio Manager with the Macquarie Funds Management Group (FMG) of the Macquarie Group of Companies.¹³⁶ He held this position between 21 March 2005 and August 2007.¹³⁷ FMG was the group's foremost funds management business and was conducted through Macquarie Investments Management Limited (MIML).¹³⁸ MIML was responsible for a number of Australian and foreign investment funds.¹³⁹ FMG was compartmentalised according to asset classes. One asset class that the offender was working within was the Real Estate Securities Division (RES).¹⁴⁰ In his position in RES the offender was responsible for investment securities in the Asia region.¹⁴¹ Because of his role the offender gained knowledge of proposed trades by MIML in the Asian sector.¹⁴² This information included acquisitions of large volumes of shares on the Singapore Stock Exchange.¹⁴³ It became clear to the offender that these large acquisitions had the effect of increasing the value of these shares in a small period of time.¹⁴⁴ The approximate gross profits, in Australian dollars, which the offender

¹³⁵ *R v De Silva* (2011) 64 ACSR 240; [2011] NSWSC 243, [1] (Buddin J).

¹³⁶ *R v De Silva* (2011) 64 ACSR 240; [2011] NSWSC 243, [3] (Buddin J).

¹³⁷ *R v De Silva* (2011) 64 ACSR 240; [2011] NSWSC 243, [3] (Buddin J).

¹³⁸ *R v De Silva* (2011) 64 ACSR 240; [2011] NSWSC 243, [4] (Buddin J).

¹³⁹ *R v De Silva* (2011) 64 ACSR 240; [2011] NSWSC 243, [5] (Buddin J).

¹⁴⁰ *R v De Silva* (2011) 64 ACSR 240; [2011] NSWSC 243, [5] (Buddin J).

¹⁴¹ *R v De Silva* (2011) 64 ACSR 240; [2011] NSWSC 243, [10] (Buddin J).

¹⁴² *R v De Silva* (2011) 64 ACSR 240; [2011] NSWSC 243, [10] (Buddin J).

¹⁴³ *R v De Silva* (2011) 64 ACSR 240; [2011] NSWSC 243, [10] (Buddin J).

¹⁴⁴ *R v De Silva* (2011) 64 ACSR 240; [2011] NSWSC 243, [10] (Buddin J).

made through his criminal activities were \$1,412, 975.¹⁴⁵ This money was never recovered.¹⁴⁶

The offender was sentenced to two years and six months imprisonment, but is to be released on a recognisance release order after serving 18 months.¹⁴⁷ The offender was placed on a good behaviour bond for the duration of his sentence upon the giving of \$1,000 in security without surety.¹⁴⁸

In *R v Richard* [2011] NSWSC 866 the offender was convicted of two counts of engage in dishonest conduct in relation to a financial product or service, contrary to section 1041G(1) of the *Corporations Act*. At the time that these offences were committed the maximum penalty for the offence was five years imprisonment and/or a fine of \$220,000.¹⁴⁹ The maximum penalty is now 10 years imprisonment and/or a fine of \$495,000.¹⁵⁰ The offender was sentenced to a total term of imprisonment of three years and nine months with a release pursuant to a recognisance release order of two years and six months.¹⁵¹ Between November 2005 and September 2009 Richard was director of several financial services corporations operating within the financial services industry.¹⁵² Richard allegedly used his position as director and manager of these corporations to dishonestly siphon a large sum of money, \$26.6 million, from Australian superannuation investment funds into overseas shares in companies at inflated prices.¹⁵³ These shares realised significant profits and were

¹⁴⁵ *R v De Silva* (2011) 64 ACSR 240; [2011] NSWSC 243, [32] (Buddin J).

¹⁴⁶ *R v De Silva* (2011) 64 ACSR 240; [2011] NSWSC 243, [32] (Buddin J).

¹⁴⁷ *R v De Silva* (2011) 64 ACSR 240; [2011] NSWSC 243, [78] (Buddin J).

¹⁴⁸ *R v De Silva* (2011) 64 ACSR 240; [2011] NSWSC 243, [78] (Buddin J).

¹⁴⁹ *R v Richard* [2011] NSWSC 866, [24] (Garling J).

¹⁵⁰ See the *Corporations Act 2001* (Cth) section 1311, schedule 3.

¹⁵¹ *R v Richard* [2011] NSWSC 866, [130], [135] (Garling J).

¹⁵² *R v Richard* [2011] NSWSC 866, [31] (Garling J).

¹⁵³ *R v Richard* [2011] NSWSC 866, [1]–[2] (Garling J).

kept in tax havens after the relevant parties and companies in this scheme were compensated.¹⁵⁴ This was achieved by Richard's falsely representing himself as director and owner of these holding companies.¹⁵⁵

Richard was paid to carry out these dishonest business practices. He pocketed in excess of \$1.3 million while receiving a net annual salary of \$110,000 in his position as director.¹⁵⁶ In addition, a large proportion of profits received overseas were subsequently transferred to the holding companies that Richard falsely represented himself to be director of.¹⁵⁷ The dishonest conduct of Richard was only discovered when the Trio Capital Group failed.¹⁵⁸ The entire \$26.6 million was never recovered.¹⁵⁹

There are significant differences between the typical white-collar crime or financial crime and the crimes which may be thought of as more conventional. The absence of violence or physical injuries in the former is the most obvious. However, when considering the appropriate penalty, whatever the crime, the court must consider the *harm* caused by the offence (both the benefit to the offender and the loss to the victim), the *role* played by the offender in the commission of the offence (inclusive of motive and any planning involved), and the *means* by which the offender committed the crime.

¹⁵⁴ *R v Richard* [2011] NSWSC 866, [1] (Garling J).

¹⁵⁵ *R v Richard* [2011] NSWSC 866, [31]–[32] (Garling J).

¹⁵⁶ *R v Richard* [2011] NSWSC 866, [2], [44] (Garling J).

¹⁵⁷ *R v Richard* [2011] NSWSC 866, [31] (Garling J).

¹⁵⁸ *R v Richard* [2011] NSWSC 866, [2] (Garling J).

¹⁵⁹ *R v Richard* [2011] NSWSC 866, [2] (Garling J).

Commenting on the perceived difference in seriousness between white-collar crime and common crime, Gleeson CJ in *R v El-Rashid*¹⁶⁰ said:

The primary purpose of the criminal law is to preserve the peace, and crimes of armed robbery usually constitute a far more serious breach of the peace and danger to the public than crimes of the kind committed by the present respondent. All that having been said however, crimes of this kind [white-collar] are to be taken seriously and the objective features of the present case are very serious.¹⁶¹

Chief Justice Gleeson was writing in 1995. No doubt the keeping of the peace continues to have primacy in the criminal law. However, whereas in former decades the standards of honesty in business and sharp practice may have been accepted as “just the way we do business”, the wider community now has a far greater interest in ensuring the integrity of the markets than may previously have been the case.

Unless the criminal law is adequate to control unlawful conduct, a violent breach of the peace may not result (although this could never be entirely discounted) but the fabric and ultimately the economic and social wellbeing of our society can be compromised.

Both white-collar crime and financial crime have the capacity to do great harm to many members of the community. Apart from financial loss the psychological harm to an individual in the form of stress and anxiety may be significant. By its nature, white-collar or financial crime may be hard to discover, and the victims’ losses may be difficult to ascertain and quantify. The offender may have a multitude of victims.

¹⁶⁰ *R v El-Rashid* (NSWCCA, unreported, 7 April 1995).

¹⁶¹ *R v El-Rashid* (NSWCCA, unreported, 7 April 1995) 3 (Gleeson CJ).

The crime may affect the Australian economic “brand”¹⁶² and its desirability as a place to invest.¹⁶³ This may be contrasted with offences involving property damage, larceny or robbery where the damage is likely to be confined to an individual victim or a small group of victims.

The harm inflicted by insider trading and other market-related offences will be greater both in absolute terms and in respect of the number of victims than many other white-collar crimes and the more common offences. In its “rawest form, insider trading dislocates the market. It upsets overseas investors”.¹⁶⁴ Similarly, “the vast majority of shareholders suffer. They miss out on value; they should be able to share profits”.¹⁶⁵ Victims of insider trading include “Mums and Dads’, investors, small traders, and those who do not have the information and trade in that state of ignorance”.¹⁶⁶ Indeed, it is generally the “people on the outer ring of the market”, such as retirees and the like, who are particularly disadvantaged.¹⁶⁷

When sentencing white-collar criminals in the United States, the size of the identified loss is a “critical determinant” of a defendant’s sentence under the United States Federal Sentencing Guidelines.¹⁶⁸ The courts are instructed to take into account “the fair market value of the property unlawfully taken, copied, or destroyed”, the

¹⁶² Christopher Craigie, ‘Business Behaving Badly: White Collar Crime in the 21st Century’, 11th International Criminal Law Congress, 10 October 2008
<<http://www.cdpp.gov.au/Director/Speeches/20081010cc.aspx> > accessed 10 November 2011.

¹⁶³ Ibid.

¹⁶⁴ Roman Tomasic, *Casino Capitalism? Insider Trading in Australia* (1991) 55–67 quoted in Australian Institute of Criminology, ‘Chapter 6 – The Effects of Insider Trading’ (2009)
<<http://www.aic.gov.au/publications/previous%20series/lcj/1-20/casino/chapter%206.aspx>> accessed 10 November 2011.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Derick Vollrath, ‘Losing the Loss Calculation: Toward a More Just Sentencing Regime in White-Collar Criminal Cases’ (2010) 59 *Duke Law Journal* 1001, 1016.

“approximate number of victims multiplied by the average loss to each victim”, and the “reduction that resulted from the offense in the value of equity securities or other corporate assets”.¹⁶⁹ There are obvious difficulties in quantifying these losses – an issue raised by some authors particularly in relation to crimes which involve the securities of publicly traded companies.¹⁷⁰

Notwithstanding these difficulties, the amount of the loss may attract severe penalties. Prior to 2002 there developed an attitude that white-collar and financial criminals were given an unacceptable degree of leniency.¹⁷¹ Following increasing political pressure the *Sarbanes-Oxley Act* was enacted, which changed the sentencing guidelines for white-collar and financial crime.¹⁷² As a consequence of this Act the penalties were increased by 25 per cent.¹⁷³ The message delivered by the United States Sentencing Commission was a simple one: “If you do the crime, you’ll do the time ... Crimes in the suites will be treated the same, if not more seriously, than crimes in the streets”.¹⁷⁴

The guidelines use a points system to determine a sentencing range for each person convicted of a federal crime.¹⁷⁵ Points are assigned to each type of offence, with further points added according to the loss incurred by the victim and any other

¹⁶⁹ See the 2010 United States Federal Sentencing Guideline Manual, section 2B1.1, Application Notes 3(c).

¹⁷⁰ Vollrath, above n 168.

¹⁷¹ Jamie Gustafson, ‘Cracking Down on White-Collar Crime: An Analysis of the Recent Trend of Severe Sentences for Corporate Officers’ (2007) 40(3) *Suffolk University Law Review* 685, 692.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ See Eric Lichtblau, ‘Panel Clears Harsher Terms in Corporate Crime Cases’, *New York Times*, 9 January 2003 cited in Gustafson, above n 171, 692.

¹⁷⁵ See 2010 United States Federal Sentencing Guideline Manual, Chapter 2 – Offense Conduct and Chapter 5 Part A – Sentencing Table.

aggravating factors.¹⁷⁶ The higher the points the more severe the sentence.¹⁷⁷ Offences such as fraud or embezzlement are ranked either as a level 6 or level 7 offence.¹⁷⁸ If the loss incurred was less than \$5,000 and the offender has no criminal history, the offender may face gaol time of up to six months.¹⁷⁹ If the loss is above \$5,000 and there are multiple victims, the sentence increases.¹⁸⁰ For example, if the fraud or embezzlement involved more than \$400,000,000, a further 30 points would be added to the offence, bringing it up to 36 or 37 points.¹⁸¹ This would mean an offender could face 262 months or just over 21 years in gaol.¹⁸² As one American author wrote, some of the “recommended sentences for high-loss white-collar crimes eclipse the sentences typically imposed for murder and serial child molestation”.¹⁸³

The guidelines are not mandatory and have proved controversial. Many judges have departed from them where they lead to a result that is “patently unreasonable”.¹⁸⁴ The sentencing judge must fashion a sentence “that is fair, just, and reasonable ... carefully applied to the particular circumstances of the case and of the human being who will bear the consequences”.¹⁸⁵ Nevertheless the guidelines warrant careful consideration. They reflect a concern to ensure that the penalties for white-collar and financial crime pay adequate regard to the harm inflicted by the offender and the number of victims who suffer that harm.

¹⁷⁶ See, for example, the 2010 United States Federal Sentencing Guideline Manual, section 2B1.1.

¹⁷⁷ See the 2010 United States Federal Sentencing Guideline Manual, Chapter 5 Part A – Sentencing Table.

¹⁷⁸ See the 2010 United States Federal Sentencing Guideline Manual, section 2B1.1.

¹⁷⁹ See 2010 United States Federal Sentencing Guideline Manual, section 2B1.1(b)(1) and Chapter 5 Part A – Sentencing Table.

¹⁸⁰ See the 2010 United States Federal Sentencing Guideline Manual, section 2B1.1(b)(1).

¹⁸¹ Ibid.

¹⁸² See the 2010 United States Federal Sentencing Guideline Manual, section 2B1.1(b)(1) and Chapter 5 Part A – Sentencing Table.

¹⁸³ Vollrath, above n 168, 1021.

¹⁸⁴ *United States v Adelson* (2006) 441 F Supp 2d 506, 506 (Rakoff DCJ).

¹⁸⁵ *United States v Adelson* (2006) 441 F Supp 2d 506, 515 (Rakoff DCJ).

In *Rivkin* the sentencing judge commented on the difficulty in detecting crimes of insider trading:

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.¹⁸⁶

The maximum penalty provided by the statute for a particular offence is accepted as an indication of the seriousness of the offence. Of course the size of any sentence imposed on an individual offender must also reflect the seriousness of an individual's offending. The community is entitled to expect, particularly of sentencing for financial crime, that the penalty imposed matches the community's perception of the seriousness of the crime.

A recent study in America examined the public perception of the level of detection and the severity of sentences imposed for robbery and fraud.¹⁸⁷ The respondents to the study believed that street criminals were more *likely* to be caught and sentenced to more severe sentences than white-collar criminals, but that both crimes *should* be punished equally.¹⁸⁸ The study concluded that "more educated respondents and those with higher incomes were more likely to perceive that street crimes ... were

¹⁸⁶ *R v Rivkin* (2003) 198 ALR 400, 414–5; [2003] NSWSC 447, [44] (Whealy J).

¹⁸⁷ Andrea Schoepfer, Stephanie Carmichael and Nicole Leeper Piquero, 'Do Perceptions of Punishment Vary between White-Collar and Street Crimes?' (2007) 35 *Journal of Criminal Justice* 151.

¹⁸⁸ *Ibid* 159.

more likely to be detected and punished more severely than white-collar crimes".¹⁸⁹

The authors queried whether this was due to the fact that white-collar criminals normally have higher levels of education or because the more educated and wealthy are more likely to get away with their crimes.¹⁹⁰

A contentious issue in the sentencing of offenders is the role of deterrence. Recent studies and academic papers have questioned the significance of general deterrence. They suggest that the so-called cause and effect between the decrease of an offence rate following an increase in the penalty does not operate in practice.¹⁹¹ General deterrence is commonly thought of as having two separate parts: marginal and absolute. Marginal deterrence refers to "a direct correlation between the severity of the sanction and the prevalence of an offence".¹⁹² Absolute general deterrence is the theory that people are not deterred by the size of the potential penalty "but the perception that they will be detected if they commit a crime".¹⁹³ The former is most commonly questioned, the latter being accepted as more accurate.¹⁹⁴ The assumption underlying marginal deterrence is that human

¹⁸⁹ Ibid.

¹⁹⁰ Ibid 160.

¹⁹¹ See Mirko Bagaric and Theo Alexander, '(Marginal) General Deterrence Doesn't Work – and What it Means for Sentencing' (2011) 35 *Criminal Law Journal* 269; Paul Robinson and John Darley, 'The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best' (2003) 91 *The Georgetown Law Journal* 949; Mirko Bagaric, 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?' (2000) 24 *Criminal Law Journal* 21; Michael King, 'Deterrence, Rehabilitation and Human Nature: The Need for a Holistic Approach to Offenders' (2001) 24 *Criminal Law Journal* 355; Mirko Bagaric, 'The Fallacy and Injustice of Imprisonment to Discourage Potential Offenders' (2009) 33 *Criminal Law Journal* 134; David Anderson, 'The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging' (2002) 4 *American Law and Economic Review* 295; Keith Chen and Jesse Shapiro, 'Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-Based Approach' (2007) 9 *American Law and Economics Review* 1; Richard Berk, 'New Claims about Executions and General Deterrence: Déjà Vu All Over Again?' (2005) 2(2) *Journal of Empirical Legal Studies* 303; David Weisburd, Elin Waring and Ellen Chayet, 'Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes' (1995) 33(4) *Criminology* 587.

¹⁹² Bagaric, 'The Fallacy and Injustice of Imprisonment', above n 191, 135.

¹⁹³ Ibid 137.

¹⁹⁴ Bagaric and Alexander, above n 191, 280.

beings, or at least some, are rational and determine their actions according to a form of cost-benefit analysis.¹⁹⁵

The questioning of the general deterrence theory has its origin in research from the United States.¹⁹⁶ Many of the studies have been conducted over the last 30 years and have looked at the relationship between the rates of homicide and the impact of capital punishment.¹⁹⁷ There have also been studies conducted which examined the reasons behind tax evasion in the United States and how the likelihood of detection features in the decision-making process of the potential offender.¹⁹⁸

In one study undertaken by David Anderson in the United States, he concluded that:

the popular strategy of addressing crime with adjustments in the penal code is unlikely to provide substantial reductions in crime rates and that solutions to the trillion-dollar crime burden must involve a new emphasis on alternative deterrents. The findings speak against more severe sentencing, not for emotional reasons, but because most current criminals do not have the information or mindset required to respond to these incentives for compliance. At the times of their offenses, 76% of the criminals in the sample and 89% of the most violent offenders were incognizant of either the possibility of apprehension or the likely punishments associated with their crimes. Still more active criminals are impervious to harsher punishments because no feasible detection rate or punishment scheme would arrest the impelling forces behind their behaviors, which might include drugs, fight-or-flight responses, or irrational thought.¹⁹⁹

¹⁹⁵ Ibid 277.

¹⁹⁶ See Norval Morris, 'Impediments to Penal Reform' (1966) 33(4) *University of Chicago Law Review* 627; Franklin Zimring and Gordon Hawkins, *Deterrence: The Legal Threat in Crime Control* (1973).

¹⁹⁷ Zimring and Hawkins, above n 196, Isaac Ehrlich, 'The Deterrent Effect of Capital Punishment: A Question of Life and Death' (1975) 655 *American Economic Review* 397; Jack Gibbs, *Crime, Punishment, and Deterrence* (1975); Thorsten Sellin, *The Penalty of Death* (1980).

¹⁹⁸ Susan Morse, Stewart Karlinsky and Joseph Bankman, 'Cash Businesses and Tax Evasion' (2009) 20(1) *Stanford Law and Policy Review* 37; Mirko Bagaric, Theo Alexander and Athula Pathinayake, 'The Fallacy of General Deterrence and the Futility of Imprisoning Offenders for Tax Fraud' (2011) 26 *Australian Tax Forum* 511.

¹⁹⁹ Anderson, above n 191, 308.

Anderson's study was based on 278 interviews with male prisoners at two-medium security prisons.²⁰⁰ The offences ranged from sexual assault, robbery and assault to burglary, drugs, drink-driving and other non-violent offences.²⁰¹ A further 159 prisoners were asked supplementary questions about the reasons why they offended.²⁰² The data was collected between 1997 and 1999.²⁰³ Two questions asked were concerned with whether the prisoner appreciated the risk of getting caught and whether they knew what the likely punishment would be if they were caught.²⁰⁴ These questions sought to identify whether criminals make informed and calculated decisions.²⁰⁵ The answer for those interviewed was that they rarely do.²⁰⁶

There may be a distinction between violent and non-violent crimes and those who commit them. Anderson observed that:

Those who had committed nonviolent crimes (burglary, drugs, driving under the influence, nonpayment of child support, escape, parole violations, and forgery) appeared more aware of the risks associated with their crimes than violent criminals. For crimes that are more likely to be repeated (robbery, burglary, drugs, DUI, and forgery), between 21% and 43% of the criminals knew exactly what the punishment would be. In contrast, for the violent crimes that are more likely to be spontaneous, only 4%-16% of the criminals knew what the punishment would be. Beyond the 21% of criminals that did not think they would be caught and the 18% that were completely ignorant of the likely punishment if caught, another 42% and 35% gave no thought to apprehension or possible punishments, respectively.²⁰⁷

In an earlier study, the American Richard Berk challenged the conclusion of previous studies that suggested a casual link between capital punishment and a decline in

²⁰⁰ Ibid 300–1.

²⁰¹ Ibid 303.

²⁰² Ibid 300–1.

²⁰³ Ibid 301.

²⁰⁴ Ibid 303–4.

²⁰⁵ Ibid 305.

²⁰⁶ Ibid 308.

²⁰⁷ Ibid 305.

homicide.²⁰⁸ He suggested that there is a lack of credible evidence to support such a claim.²⁰⁹ He wrote that there is “no evidence of a negative relationship between ... executions ... [and] homicides”.²¹⁰ Out of a sample of 1,050 offenders across 50 States over 21 years, only in 11 cases could he positively affirm a relationship between the drop in homicide rates following the execution of an offender in the previous year.²¹¹ He concluded that it would be “bad social policy” to generalise that there is a linear relationship between homicide rates and capital punishment.²¹²

There are suggestions of similar findings in relation to tax evasion. In a 2009 study a group of American academics examined tax evasion in the small business sector.²¹³ They conducted 275 field interviews with cash business owners, and tax preparers and bankers with cash business clients.²¹⁴ The findings of the study are interesting. The authors concluded that business owners and preparers cheated on their taxes because “(1) people they know and trust who are in the same position cheat on their own taxes and (2) *there is a very low likelihood that they will get caught*” (emphasis added).²¹⁵ The authors observed that “[e]vasion seems best explained by opportunity, including the low-perceived likelihood of detection and penalty, and by peer norms”.²¹⁶ These findings are also consistent with other studies.²¹⁷

²⁰⁸ Berk, above n 191.

²⁰⁹ Ibid 327–8.

²¹⁰ Ibid 327.

²¹¹ Ibid 304, 327.

²¹² Ibid 328.

²¹³ Morse, Karlinsky and Bankman, above n 198.

²¹⁴ Ibid 38.

²¹⁵ Ibid 65.

²¹⁶ Ibid 67.

²¹⁷ See Sue Yong, ‘A Critical Evaluation of the Economic Deterrence Model on Tax Compliance’ (2006) 12 *New Zealand Journal of Taxation Law and Policy* 95; Ken Devos, ‘Measuring and Analysing Deterrence in Taxpayer Compliance Research’ (2007) 10(2) *Journal of Australian Taxation* 182.

I have little difficulty accepting that for many crimes, particularly spontaneous crimes of violence and those committed in response to a drug addiction and the consequent need for funds, a prospective offender may not be deterred by the size of the sentence imposed on a similar offender. The courts are replete with instances of repeat offenders in drug-related crimes. The domestic incident which escalates into violence is unlikely to involve people who, at least during the incident, reflect on the penal consequence of their act. And in most cases, given the size of the general population, it is doubtful whether many people will be aware of the penalties which the courts have previously imposed on offenders.

The research with respect to taxation fraud is interesting. However, it must be remembered that the fear of being caught is in reality a fear of being convicted and sent to gaol for a period of time. Being caught and suffering only a monetary penalty would, I suggest, play quite differently in the mind of a potential tax evader. With respect to corporate fraud and illegal market manipulation, the possible length of a term of imprisonment may have different consequences. I accept that like taxation fraud there are difficulties of detection and a fundamental concern about being caught. However, when an offender is detected and punished with imprisonment, almost in every case, the sentence is attended with significant publicity in at least the financial press.

Whatever may be the role of general deterrence, there can be no doubt that the severity of any sentence is a marker of the seriousness with which the courts view a particular offence. The most severe penalty of life imprisonment is reserved for murder and the most serious drug offences. The taking of life and the potential harm

occasioned by the distribution of illegal drugs are believed to justify this approach. The challenge for both the legislature and the courts is to reflect the seriousness of the offending in the sentences imposed for white-collar or financial crime.