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SENTENCING OF CORPORATE OFFENDERS

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Sentencing of Corporate Offenders

I propose to commence my examination of this subject by outlining the roles of the Australian Securities & Investments Commission and the Commonwealth DPP in the investigation and prosecution of corporate offending. I will also confine my comments to corporate offending as it is most commonly understood, breaches of the Corporations Act, as opposed to other offending by corporations and officers of corporations in fields such as occupational health & safety, industrial, health and public safety regulation, environment protection legislation and so on. I do not understand the subject to be so broad.

The Role of the Australian Securities & Investments Commission (ASIC)

ASIC is the independent federal authority which administers the Corporations Act 2001 (Cth) which was enacted, following necessary referrals of legislative power to the Federal Parliament to overcome the constitutional shortcomings identified by the High Court[1].

In performing its functions and powers ASIC must strive to:

(a) maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and

(b) promote the confident and informed participation of investors and consumers in the financial system; and

(d) administer the laws that confer functions and powers on it effectively and with a minimum of procedural requirements; and

(e) receive, process and store, efficiently and quickly, the information given to ASIC under the laws that confer functions and powers on it; and

(f) ensure that information is available as soon as practicable for access by the public; and

(g) take whatever action it can take, and is necessary in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it.[2]

ASIC has a wide regulatory responsibility extending to superannuation funds, life and general insurance companies, banks, credit unions, building societies, friendly societies, investment advisers, insurance agents and brokers, the Australian Stock Exchange Ltd and Sydney Futures Exchange, managed investments, companies, company auditors and liquidators.[3] To achieve its goals across this broad range of responsibilities ASIC has available to it a choice of enforcement paths.

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[1] Hughes (2000) 202 CLR. 535.

[2] Section 1(2) of the *Australian Securities & Investments Commission Act 2001*.

[3] ASIC Annual Reports.

ASIC is given extensive powers to investigate allegations of breaches of the laws under its responsibility and, to gather information about those alleged breaches. For example ASIC may undertake formal investigations, conduct examinations or seek and obtain records. It may hold hearings, obtain information through reporting requirements and from other Commonwealth agencies. Investigations undertaken for example by State Police Forces may provide not only details of alleged offending at a State level but also evidence necessary to evaluate an appropriate regulatory response by ASIC.

Not all instances of corporate and financial services wrongdoing will necessarily result in prosecution and, ultimately sentencing outcomes. The range of remedies available to ASIC enables it to develop regulatory strategies some of which may not give rise to a sentencing outcome. They are:

(a) Preservation remedies or the use of remedies such as injunctions, receivership and provisional liquidation. Reliance on these remedies is designed to prevent damage or prevent further damage occurring.

(b) Recovery and remedial remedies within ASIC's legislative framework which enable a person to recover either from the wrongdoer or a third party property of the company or damages following a breach of ASIC legislation.

(c) Disciplinary or protective remedies which include applications for banning of directors and financial services representatives and disciplinary applications to the Companies Auditors and Liquidators Disciplinary Board.

(d) Prosecution.

(e) Imposition of civil penalties and infringement notices.

Reliance upon any one of these strategies does not preclude use of another which may be undertaken or implemented at a different time. Civil enforcement action to preserve or protect will often need to be undertaken expeditiously and may be undertaken in the initial or early stages of an investigation into a matter.

ASIC may wish to develop a specific strategy in relation to a particular type of offending, and if breaches of ASIC legislation are particularly prevalent in some areas then this will inform ASIC's regulatory strategy. Whatever remedy ASIC seeks to apply to a particular type or types of offending is a matter of choice for ASIC however if allegations or an investigation or examination disclose serious offending then ASIC will involve the DPP. ASIC is the regulator but criminal prosecutions are the responsibility of the DPP.

The Role of the Prosecutor in the Sentencing of Corporate Offenders

The Commonwealth Director of Public Prosecutions is responsible for the prosecution of all offences under Commonwealth Criminal Law.[4] However the Commonwealth Director of Public Prosecutions has no investigative function. In undertaking its role as

[4] Section 6 of the *Director of Public Prosecutions Act 1983*.

an independent prosecuting authority the DPP receives briefs or matters for prosecution from ASIC and approximately forty other federal agencies or departments.

The Decision to Prosecute

Unlike prosecutions for State offences which, in the main, involve crimes against the person or property, many offences against Commonwealth law are generally investigated prior to an arrest and charging. In the area of corporate offending, unless there is a risk of flight, the nature of the alleged offending usually provides an opportunity, pre charge, for the investigative agency (ASIC) and prosecuting authority (DPP) to consider the state of the evidence, likely charges and the regulatory imperative of the regulator/investigator. Therefore it is not unusual with instances of serious corporate offending for ASIC and the DPP to liaise during the course of the investigation. The sole responsibility for the conduct of investigations however still rests with ASIC as does the ultimate responsibility for the conduct of prosecutions with the DPP. The pre-charge or pre-hearing liaison between investigator and prosecutor however informs the prosecutor of the regulatory goals being sought by the regulator through the chosen remedy, criminal prosecution and assists in the focus of investigations and prosecutions.

The decision to prosecute is made in accordance with the Prosecution Policy of the Commonwealth.[5] That decision involves a three stage process which considers the existence of a prima facie case and then examines the quality of that evidence to determine whether or not there are reasonable prospects of obtaining a conviction and, if there are, whether or not it is in the public interest that the prosecution not be commenced or continued.

Once the significant regulatory responsibilities imposed upon ASIC are understood and the range of remedies provided to it are seen as tools to achieve regulatory outcomes the unique nature of ASIC's interest in sentencing outcomes, if the enforcement penalty sought is by criminal process, is better understood.

The DPP understands ASIC's concerns in both the prosecution and sentencing process "ASIC and DPP have settled guidelines which have just been received for investigating and prosecuting corporate crime. The DPP provides early advice to ASIC in the investigation of suspected offences. This is particularly important in large fraud cases where investigations can be long and resource intensive. Early involvement by the DPP can assist ASIC in identifying those areas that are most likely to result in prosecution. There is regular liaison between ASIC and the DPP at Head of Agency, management and operational levels."[6] This liaison provides the prosecutor with a better understanding of the nature of the alleged breach, its impact upon the integrity of markets/systems or the regulation of corporations and leads to better understanding of the appropriate prosecutorial path to be taken and the position which the prosecutor will take in the sentencing process.

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[5] See publication: *Prosecution Policy of the Commonwealth.*

[6] Commonwealth Director of Public Prosecutions' Annual Report 2001 to 2002.

Prosecutions and Sentences Before the Courts

All prosecutions for Commonwealth offences are conducted in State Courts exercising federal jurisdiction.[7] This fact, and the requirement that offences prosecuted on indictment be prosecuted in the State where the offence was committed[8] create interesting issues in sentencing of corporate offenders, particularly in terms of consistency of sentencing outcomes and the question of general deterrence.

While most corporate offending of the nature covered by this presentation will be prosecuted under Commonwealth law, there are discreet State and Territory provisions creating offences in relation to corporations.[9] These provisions are a carry over from the period when the early corporations law and co-operative schemes were intended to operate in conjunction with other State and Territory offences. It is quite possible that a mixture of State and Corporations Act charges, or solely State charges, will be seen as a more appropriate outcome following an investigation. However it would be highly unlikely that an indictment, filed in anticipation of a trial on the facts would now contain a mixture of State and Commonwealth counts. (Although co-operative arrangements are in place with State and Territory DPPs for this to happen) I say this because of the application now of the Commonwealth Criminal Code provisions in relation to criminal responsibility to the federal offences in any such prosecution and the continuing requirement for unanimous verdicts in Commonwealth prosecutions[10] as opposed to majority verdicts for some States.

The penalties applicable to breaches of the Corporations Act are set out in the third schedule to the Act. I won’t discuss that schedule within the scope of this presentation, it extends for 26 pages and covers approximately 400 penalty items.

Part 1B of the Crimes Act 1914

The application of the sentencing provisions of the Crimes Act (Part 1B) by State Courts exercising federal jurisdiction was, initially, a difficult task not only for the courts but also for counsel. When first implemented the DPP resolved to provide assistance for the court and counsel to understand and apply these new provisions. My Office still provides that assistance. This has resulted in a more involved role for the prosecutor in the sentencing process which, coupled with the need to achieve consistency across the country by reference to other relevant sentencing precedents some years ago would have been seen to be inappropriate.

Part 1B is not a complete sentencing code for Commonwealth offences.[11]

I have said that ASIC has an interest in achieving a particular sentencing outcome and its views will be canvassed and taken into account in structuring the prosecution

[7].See Section 1338A of the *Corporations Act 2001* which excludes from application Sections 68, 70 and 70A of the *Judiciary Act 1903* and, Section 1338B, has confessed a wider jurisdiction on State and Territory courts.

[8] Section 80 of the Constitution.

[9] See for example Section 85 of the *Crimes Act* (Victoria) 1958 and Sections 133 to 177 of the *Crimes Act 1900* (NSW)

[10] *R v Cheatle* (1993) 177 CLR 541.

[11] See *El Kaharni v R*.(1990) 21 NSWLR 370 @387 and *R v Putland* 218 CLR 174.

submissions on sentence. The regulatory responsibility of ASIC and its desire to achieve enforcement outcomes give it a closer interest in the sentencing process and the prosecutors task in articulating ASIC's interest and desired outcome extends the involvement of the prosecuting Courts tend to encourage this involvement and assistance.

General Sentencing Principles

Section 16A(1) of the Crimes Act 1914 (Cth) provides that "in determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence."

Section 16A(2) provides a list of matters which the court "must" take into account if such matters are relevant and known to the court and these are in addition to any other matters. Obviously the list is not exhaustive but it includes:

- (a) the nature and circumstances of the offence;
- (b) other offences (if any) that a required or permitted to be taken into account;
- (c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character – that course of conduct;
- (d) the personal circumstances of any victim of the offence;
- (e) any injury, loss or damage resulting from the offence;
- (f) the degree to which the person has shown contrition for the offence:
  - (i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or
  - (ii) in any other manner.
- (g) if the person has pleaded guilty to the charge in respect of the offence – that fact;
- (h) the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences;
- (j) the deterrent effect that any sentence or order under consideration may have on the person;
- (k) the need to ensure that the person is adequately punished for the offence;
- (m) the character, antecedents, cultural background, age, means and physical or mental condition of the person;
- (n) the prospect of rehabilitation of the person;
- (p) the probable effect that any sentence or order under consideration would have on any of the person's family or dependants.

Section 17A also prevents a court from passing sentence of imprisonment on any person for a federal offence unless the court "after having considered all other available

sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case and a finding of guilt or plea".

On a finding of guilt or plea there are seven sentencing options available to the court under Section 1B ranging from dismissal (Section19B) through to Bonds and fines to imprisonment.

General Deterrence

The courts consider corporate offenders and white collar criminals and the principal sentencing factor applied in determining sentences is general deterrence.

The Court of Appeal in Victoria in *R v Jamieson*[12] in determining Jamieson's application to appeal against sentence said (per Young CJ (Fullagar J agreeing) at P888.

> I agree with the learned trial Judge that the principal sentencing factor is general deterrence. Offences of this kind, which may be said to be concerned with the "business morality" of the community, are hard to detect. When they do come before the Court they are often found to have been committed by persons who have been regarded as of good character and reputation. Often they are also well to do.
>
> In these circumstances the offence must also inevitably attract a custodial sentence and I think his Honour was entirely right to impose one. I think that in cases of this kind a gaol sentence is more likely to act as *a deterrent to others than in many cases that come before the Courts.*

Similar comments have been made by appellate Courts in most jurisdictions in Australia. More recently in the Court of Appeal in Victoria in dismissing sentence severity appeal O'Bryan AJA stated:

> Cases such as *DPP v Bulfin*, *R v Jamieson* and *R v Moffatt* indicate that the element of general deterrence is particularly significant in sentencing for crimes such as the present and should impact both on the total effective sentence and the minimum term which must be served before release.[13]

In South Australia the Court of Criminal Appeal dismissed a sentence appeal (9 years with 5 years non parole) imposed in relation to 55 offences against Sections 232(6)/1317FA, Corporations Law where a 36 year old stockbroker had transferred his trading losses and those associated clients to other clients. The trading gained him a profit of $183,000 and his clients losses of $570,000 were recovered through an indemnity scheme. In concluding that the sentence was at the high end of the range, but within it stated:

> In my opinion the time has arrived for an increase in the sentences imposed for substantial frauds of this kind for the reasons advanced by Debelle J.[14]

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[12] [1988] VR 879 (7 counts of secret commissions)

[13] *R v Brown* [2002] VSCA 99 O'Bryan AJA par 52 with whom Batt JA & Eames JA generally agreed. (The case involved guilty pleas to various Corporations offences.)

[14] *R v McLaughlin* p2004] SASC 232. (In NSW see *R v Hannes* (2002) 173 FLR 1 and *R v Rivkin* [2004] 59 NSWLR 284.

The Head Sentence

It has been argued that a 'principle' exists that because white collar criminals usually present with no prior criminal history and risk of re-offending that a shorter non-parole period should be imposed with the element of general deterrence being reflected in the head sentence.

The Court of Appeal in Victoria had identified sentences of this type as being a 'pattern' not a principle warning that:

> For persons first contemplating corporate criminality, a sentence which requires an offender to spend a substantial term in actual custody by virtue of the non-parole period fixed is, in my view, much more likely to focus their attention and have real deterrent impact than a longer head sentence, much of which is likely to be served on parole after the offender's release from custody. If this view be correct, to fix an unduly short non-parole period, would, in cases such as the present, be quite subversive to the whole concept of general deterrence, notwithstanding that a significantly longer head sentence was imposed. The sentencing practice discussed in Corbett must be understood with those considerations firmly in mind."[15]

A head sentence of 7 years with a non parole period of 5 imposed on a 55 year old man who stole approximately $5.3 million from his shareholders was recently upheld by the Court of Appeal in Victoria:

> Charles JA in that case (Bulfin) pointed out that the principle of general deterrence and the requirement for strong denunciation will be of particular significance in sentences relating to corporate crimes, both as to head sentence and non-parole periods.[16]

I think that it is safe to assume that the sentiments expressed by the Victorian Court of Appeal and the sentence recently imposed in New South Wales and Western Australia for corporate/white collar crimes, are all reflective of a more direct response from sentencing courts to the message of general deterrence.

Identification of the 'Regulatory Imperative' in Sentences

ASIC's responsibilities and goals while informing its approach to enforcement should also be reflected in sentencing outcomes, if properly represented in the sentencing process.

The efficacy and integrity of the market is of paramount importance to the confidence of the investing public. Insider trading strikes at the integrity of the market and sentencing for insider trading offences should reflect this.

In *R v Hannes*[17] James J accepted that:

> the kind of conduct in which Mr Harnes engaged undermines the efficacy and integrity of the market in public securities … Those involved in serious white collar crime must expect condign sentences. The commercial world expects executives and employees in positions of trust … to conform to exacting standards

[15] *DPP v Bulfin* [1998] VR 114 131–132 Charles JA (Winnecke P & Callaway JA generally agreeing).

[16] *R v Senese* [2004] VSCA 136 per Chernov JA at para 84.

[17] (202) 173 FLR1.

> of honesty. It is impossible to be unmindful of the difficulty in detecting sophisticated crimes of a kind involved here or of the possibility for substantial loss by the public…the element of general deterrence is an important element of sentencing for such offences."

Later, in Rivkin both at sentencing and on appeal the same position was taken. Whealy J, at sentence, identified general deterrence as important in sentencing insider trading offences concluding that this is so because of the difficulty in detecting and investigating such offences.[18]

On appeal it was argued on behalf of Rivkin that the offence of insider trading was "victimless". In rejecting that proposition the Court of Criminal Appeal said:

> nor is it correct to describe the offence of which the appellant was convicted as "victimless". The victim of any such offence is the investing community at large, the injury being that related to the loss of confidence in the efficient and integrity of the market in public securities.[19]

Cooperation Discount

Sentencing courts are required to take past cooperation in to account.[20]

The Crimes Act also provides for discount for future co-operation.[21] At sentence the prisoner's undertaking to co-operate and its extent is identified. If the sentence is reduced the court must specify the discount or reduction in sentence for that undertaking. If the prisoner fails to comply with the undertaking there is provision for appellate review provided the appeal is lodged by the DPP while the prisoner is under sentence.

Courts have recognised the benefits to the justice system through pleas of guilty and co-operation (past and future) and given substantial sentencing discounts:[22]

> It is clear in the public interest that offenders should be encouraged to supply information to the authorities which will assist them to bring other offenders to justice, and to give evidence against those other offenders in relation to whom they have given co-operation. (see also Coldrey J in *R v Jarrett*, unreported Vic Supreme Court 30/6/1994.)

The provision of assistance to investigators and in the trial process is recognised and given substantial weight, particularly when the assistance has provided insight in to wrongdoing which is difficult to detect and prove.

Questions of reimbursement and loss attributable to gambling addictions are not usually treated as mitigating but rather limiting or reducing aggravation.[23]

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[18] *R v Rivkin* (2003) 45 ACSR 366, 198 ALR 400.

[19] *R v Rivkin* (2004) 59 NSWLR 284 para 412.

[20] Section 16(2)(h) Crimes Act 1914.

[21] "Section 21E"

[22] *R v Howard* 2003 48 ACSR 438 Per Kirby J (arising out of the HIH collapse).

[23] *R v Burk (*2002) NSW CCA 353 (repayment) and *R v Atalla* (2002) VSCA 141 (gambling).

Disqualification

It is important to keep in mind that conviction for offences carrying a term of imprisonment exceeding 12 months result in an automatic disqualification order and courts are likely to treat these orders as penalties to be taken into account.[24]

Sentencing Corporations

There are good arguments to support the proposition that corporate wrongdoing, as considered in this paper, is the conduct of individuals and therefore the focus of regulatory sanctions and criminal prosecution should be on the individual.

There are few prosecutions of corporations for wrongdoing of the type considered in this paper. Personal or officer culpability will, in most cases, focus the prosecution against the individual.

Traditionally a fine is the sentence for corporations and such an outcome may be counter productive in terms of ASIC's objects, particularly if scarce shareholder and creditor resources are further eroded.

If a corporate culture of wrongdoing has existed within a company the prosecution of individuals may not deliver a sufficiently forceful message for the regulator and a prosecution of the corporation may also be called for.

While these issues are matters for the regulator to consider, if a corporation is to be sentenced they are also factors for the sentencing Courts, particularly the interests of shareholders and creditors.

The New South Wales Law Reform Commission in its Report "Sentencing Corporate Offenders" (2003) suggested that some reasons for considering fines of corporations as ineffective were:

1. the idea that corporations may view fines as simply a cost of doing business, particularly if the fine is seen as insignificant by comparison to the potential profits to be made from engaging in the illegal activity;
2. the fact that imposing a fine on a small corporation which would exceed its financial capacity to pay would be oppressive;
3. the fact that major corporations have the potential to pass the cost of the fine on to consumers;
4. the fact that paying fines may be considerably cheaper than the cost of taking appropriate rectification measures; and
5. the adverse impact of fines may spill-over on to a large number of people who may have no culpability in relation to the corporation's criminal conduct, eg shareholders and employees, or in the case of a corporation in liquidation, creditors.

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[24] *Rich v ASIC* (2004) 209 ALR 271).

Valid though these arguments are, I still believe that fines are, generally speaking, the most appropriate sentencing option for offending corporations.

The ALRC is considering these issues as we meet as part of its review "Sentencing of Federal Offenders". The Commission is considering an interesting range of sentencing options, a subject which is worthy of discussion at another time.