# Penalties for White-Collar Crime

## Submission #2

## Economics Reference Committee

### Terms of Reference

The inconsistencies and inadequacies of current criminal, civil and administrative penalties for corporate and financial misconduct or white-collar crime, with particular reference to:

a. evidentiary standards across various acts and instruments;
b. the use and duration of custodial sentences;
c. the use and duration of banning orders;
d. the value of fine and other monetary penalties, particularly in proportion to the amount of wrongful gains;
e. the availability and use of mechanisms to recover wrongful gains;
f. penalties used in other countries, particularly members of the Organisation for Economic Co-operation and Development [OECD]; and
g. any other relevant matters.

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# Recommendations

(a) A new provision be added to the ***Crimes Act 1914*** (Cth) related to the destruction of deeds, instruments, documents and court orders associated with regulated superannuation funds.

(b) The maximum penalty for destruction of such documents to be set at 15 years imprisonment given the legal status of trustees, the compulsory nature of superannuation and the amount of funds under the stewardship of trustees of regulated funds.

# Penalties for White-Collar Crime

## Introduction

White-collar crime has been defined as: "***financially motivated nonviolent crime committed by business and government professions***".

Note that white-collar crime is not restricted to the private sector.

Within criminology, the expression was first defined by sociologist Edwin Sutherland in 1939 as "***a crime committed by a person of respectability and high social status in the course of his occupation***".

The types of white-collar crime are infinite in variety, however common features are that white collar-criminals will often target those who do not have ready access to the law and will use deception to conceal their crimes.

Where ever there are large sums of money it can be guaranteed that white-collar criminals will not be far way.

Some types of white-collar crime can be described as "*victimless*" for example "*insider trading*" on the share market where the "*insider*" has an unfair advantage over other traders because of "*inside knowledge*". However the use of this inside knowledge does not lead to the financial ruination of the other traders who do not have this insider knowledge.

Other types of white-collar crime can leave its victims financial destitute since they have lost their life savings and in some cases even their own homes.

White-collar crime can be committed by "***a person of respectability and high social status***", with the best known example being the Bernard Madoff "***ponzi scheme***" fraud.

White-collar crime can be committed by a person in a position of power, with a well known example being the **Robert Maxwell Pensions Fund Fraud** in the UK in the early 1990s where Robert Maxwell "*misappropriated*" £454 million from the pension funds of the employees of the Mirror Newspaper Group which he controlled.

Many types of white-collar crime involve complex transactions and financial deception that means the crimes are often difficult to detect and difficult to successfully prosecute.

Often the financial assets will have been sent to overseas jurisdiction beyond the reach of Australian courts and authorities.

# Penalties for White-Collar Crime

The Courts have long recognised that there needs to be strong deterrent effect in the sentencing of white-collar crimes to discourage others from committing similar difficult to detect crimes.

White-collar crime associated with superannuation funds can be difficult for the members to detect since the Government does not provide any education to fund members as to their legal rights and the obligations of trustees. Dishonest trustees can use "***glossy reports***" and "***Member Handbooks***" to deceive members as to their lawful benefits.

Many funds have long histories and the consolidation of funds provides the perfect opportunity for white-collar criminals to cover-up their crimes.

The very nature of a superannuation fund makes it an ideal target for white-collar criminals since the retirement savings and entitlements of thousand of fund members are placed in the hands of a very small number of trustees or directors of a corporate trustee.

In some cases the purported trustee may not have even been lawfully appointed to the office of trustee.

## White-Collar Crime in the Superannuation Industry

**Submission #1** (listed as submission number 2 on the Committee website) was related to the deliberate concealment of the Deeds of a regulated superannuation Fund from persons who have a *beneficial interest* in that fund, for example the widows of former members of the fund.

However **Submission #1** was based on the assumption that the Deeds themselves had not been destroyed and would be discoverable once legal proceedings had been initiated against the trustee or purported trustee of the fund.

But what would be the situation if some of the Deeds have been deliberately destroyed in order to prevent the members and beneficiaries from being able to establish their claims for much higher benefit entitlements?

Over the last decade there has been a large reduction in the number of regulated superannuation funds as the memberships of one fund have been transferred to sub-funds of other larger funds in a process known as "*successor fund transfer*".

This process can be used as a means of concealing negligent conduct or fraudulent conduct in the superannuation industry.

# Legislation not Required for PMs, Senators and Public Servants

It is important to note that the proposed amendment is not required to protect the superannuation entitlements of Members of Parliament, Senators or Australian Public Servants since their superannuation entitlements are determined by statute.

Statutes are public documents which are readily available not only to the members of these funds but to the general public as well. The question as to the destruction of such documents therefore does not arise.

The superannuation entitlements of most Australians however are determined by trusts where the Deeds of the trust are not public documents and which have not been registered with a public registry.

The laws of trust assume that trustees will act honestly and safeguard the Deeds of the trust and make these Deeds available for inspection to persons who have a *beneficial interest* in the trust.

In the case of regulated superannuation trusts, statutory provisions require trustees to provide copies of these Deeds to persons who have a *beneficial interest* in the fund and who lodge a written request for copies of the Deeds.

However, given the large sums help by superannuation trusts (funds) there is a large temptation for trustees, whether lawfully appointed to the office of trustee or otherwise, not to act honestly and to conceal or destroy the earlier Deeds which provide higher benefits and to substitute fraudulent documents which purport to provide lower benefits.

By engaging in a "***Deed Substitution Fraud***", the dishonest trustees can produce a large actuarial surplus in the fund that can then be transferred from the fund using "***creative accounting***" techniques.

Large organisations will typically exploit access to the law as a means of defending their actions against individual victims. These organisations have a strategy of simply outspending any victims who seeks justice by means of the legal system.

In the case of superannuation funds, the negligent conduct or fraudulent conduct of the trustee will have impoverished the victims, making it extremely difficult for them to obtain appropriate legal advice let alone sustain a lengthy and expensive legal case.

# Penalties for White-Collar Crime

## The Beck vs Commonwealth Bank Case

A recent case in the Supreme Court of New South Wales illustrates the importance of having the Deeds of superannuation fund retained, even if members have been transferred to another fund {***Beck v Colonial Staff Super Pty Ltd & Ors*** [2015] NSWSC 723.}

Peter Beck, an employee of the Commonwealth Bank of Australia, received a lump sum payment from the Bank's staff superannuation fund worth **$1.4 Million** after being retrenched at the age of 51 after 24 years of service.

A valuable provision had been negligently deleted that would have provided members with a long period of service with a pension benefit.

Mr Beck was a senior executive and so he could afford legal advice as well as affording to sustain a lengthy legal case.

The Supreme Court of NSW ruled that Mr Beck was entitled to a pension benefit worth approximately **$4 million**.

Peter Beck was originally an employee of Colonial Mutual and a member of the Colonial Group Staff Superannuation Fund. When Colonial Mutual was acquired by the Commonwealth Bank of Australia, the fund membership of Mr Beck was transferred to Commonwealth Bank Officers' Superannuation Fund.

However along the way a provision that would provide a pension benefit to a member with a long period of service, but who was retrenched before the age of 55 had been deleted based on negligent legal advice.

Fortunately the Deeds of the Colonial Group Staff Superannuation Fund had not been destroyed after members had been transferred from this fund.

No allegations were made that trustees of either fund had acted dishonestly.

Therefore Mr Beck was able to provide evidence to the Supreme Court supporting his claim for an extra $2.6 million in benefits. Other members may also have been in a similar situation to Mr Beck.

If the Deeds of the Colonial Group Staff Superannuation Fund had been destroyed after all the members had been transferred to another fund, then Mr Beck would have been unable to support his claim and would have lost $2.6 million in additional benefits.

This is despite the fact that under a "***successor fund transfer***" arrangement the rights and benefits of members are supposed to be preserved pursuant ***Regulation 1.03*** of the **Superannuation Industry (Supervision) Regulations 1994.**

# Destruction of Evidence

The deliberate destruction of evidence gained a lot of public attention in the case of Rolah McCabe, who at the age of 51 was dying of lung cancer. Rolah took proceedings against British American Tobacco Australia (BAT) in the Supreme Court of Victoria**. {***McCabe v British American Tobacco Australia Services Limited* **[2002] VSC 73}.**

In April 2002, Rolah McCabe became the first person outside of the US to obtain a verdict against the tobacco industry in a personal injury claim, though the verdict was overturned on appeal later that year. Rolah obtained the verdict in her favour after the trial judge, Justice Geoffrey Eames, struck out British American Tobacco Australia's defence to the proceeding and ordered judgment for her, after finding that *'the process of discovery in this case was subverted by the defendant and its solicitor... with the deliberate intention of denying a fair trial to the plaintiff, and the strategy to achieve that outcome was successful*.'

Also refer to Cameron, Camille --- "***Hired Guns and Smoking Guns: McCabe v British American Tobacco Australia Ltd***" [2002] UNSWLawJl 42; (2002) 25(3) University of New South Wales Law Journal 768 {http://www.austlii.edu.au/au/journals/UNSWLJ/2002/42.html}.

Following public outrage of the McCabe case, the Victorian Government added **Section 254** to the ***Crimes Act 1958*** (Vic) which provided a maximum penalty of a fine and five years imprisonment for the offence of destroying evidence that was likely t be used in legal proceedings.

There is a similar offence provision set out in **Section 39** of the ***Crimes Act 1914*** (Cth). This provision provides that:

> "Any person who, knowing that any book, document, or other thing of any kind, is or may be required in evidence in a judicial proceeding, intentionally destroys it or renders it illegible or undecipherable or incapable of identification, with intent to prevent it from being used in evidence, shall be guilty of an offence."

The maximum penalty is 5 years imprisonment. However this provision is limited to where the judicial proceeding is a federal judicial proceeding.

These provisions have been considered by the Supreme Court of NSW in ***R v Selim*** [2007} NSWSC 362.

In that case the court found that it must be established, at the time when the document was destroyed that the person was aware, in the sense that they had a reasonable contemplation, that there was a possibility of judicial proceedings being initiated in the future.

It is the duty of a trustee to safeguard the Deeds of the Trust and not to destroy them, since the plainest duty of a trustee is to obey the terms of the trust and to seek judicial advice if the trustee wishes to seek the protection of the court for a personal liability for a breach of trust.

A beneficiary of a trust has the right at any time to seek advice from the court as to the construction of the terms of the trust.

**Section 39** relates to "***any person***" and does not draw a distinction between a person holding the office of trustee and any other member of the community.

A person who holds the office of trustee of a regulated superannuation fund has a legal obligation to act honestly and in the best interests of the members and beneficiaries of the fund {**Section 52** and **Section 52A** of the ***Superannuation Industry (Supervision) Act 1993***.}

Therefore there is justification for the imposition of a higher penalty on a responsible officer of a trustee of a regulated superannuation fund compared to another member of the community who might destroy evidence in anticipation of future legal proceedings.

# Proposed Legislative Amendment

The following provision to be added to the ***Crimes Act 1914*** (Cth):

## **Section 39A** of the **Crimes Act 1914**

### Destroying evidence related to regulated superannuation funds

(1) A responsible officer commits an offence if:

(a) the responsible officer knows that a deed, instrument, document or court order related to the governing rules of a regulated superannuation fund is, or may be, required in evidence in a judicial proceeding; and

(b) the responsible officer:

(i) destroys the deed, instrument, document or court order; or

(ii) renders the deed, instrument, document or court order illegible, undecipherable or incapable of identification; or

(iii) instructs others to destroy the deed, instrument, document or court order or

(iv) instructs others to render the deed, instrument, document or court order illegible, undecipherable or incapable of identification; and

(c) the responsible officer does so with the intention of preventing the deed, instrument, document or court from being used in evidence; and

(d) the judicial proceeding is a federal judicial proceeding.

**Penalty:** Imprisonment for 15 years.

(2) Absolute liability applies to the paragraph (1)(d) element of the offence.

Note: For absolute liability, see section 6.2 of the *Criminal Code* .

**Definitions:**

A "*responsible officer*" has the same meaning as a "*responsible officer*" in the **Superannuation Industry (Supervision) Act 1993**.

A "*governing rules*" has the same meaning as a "*governing rules*" in the **Superannuation Industry (Supervision) Act 1993**.

A "*regulated superannuation fund*" is a fund that has been registered with a Regulator and includes funds that have been registered and whose members have been subsequently transferred to another regulated superannuation fund.

# The High Court of Australia

The High Court of Australia has noted in ***Finch v Telstra Super Pty Ltd*** [2010] HCA 36; (2010) 242 CLR 254; (2010) 271 ALR 236; (2010) 84 ALJR 726 noted at [33].

> "For some people, superannuation is their greatest asset apart from their houses; for others it is even more valuable."

The High Court continued:

> "Superannuation is not a matter of mere bounty, or potential enjoyment of another's benefaction. It is something for which, in large measure, employees have exchanged value – their work and their contributions. It is "***deferred pay***" "

The High Court stated at [35]:

> "The government considers that the taxation advantages of superannuation should not be enjoyed unless superannuation funds are operating efficiently and lawfully."

# The High Court of England and Wales

Lord Neuberger, the current President of the Supreme Court of the United Kingdom stated as Neuberger J in ***Bestrustees v Stuart*** [2001] PLR 283, [2001] Pens LR 283, [2001] EWHC 549 (Ch), [2001] OPLR 341:

> "I bear in mind that a pension scheme is likely to continue for a substantial period of time and that those most affected by them and entitled to protection from the trustees, the employer and indeed the Court, will be people who are comparatively poor, who will not have easy access to expert legal advice, and who will not know what has been going on in relation to the management of the Scheme. In those circumstances, it seems to me that protection of the beneficiaries requires the Court to be very careful before it permits a departure from the plain wording and plain requirements of the trust deed."

If the original trust deed and earlier deeds of variation are destroyed, then Court will be unable to determine the lawful entitlements of members and beneficiaries of the fund.

# Recommendations

The recommendation to the Senate Economics Reference Committee in this submission is:

(c) A new provision be added to the ***Crimes Act 1914*** (Cth) related to the destruction of deeds, instruments, documents and court orders associated with regulated superannuation funds.

(d) The maximum penalty for destruction of such documents to be set at 15 years imprisonment given the legal status of trustees, the compulsory nature of superannuation and the amount of fund under the stewardship of trustees of regulated funds.

# Penalties for White-Collar Crime

This is what Harry Markopolos, the Bernie Madoff Whistleblower, stated before the United States Congress' House Financial Services Committee investigating the Madoff Fraud:

> ***"Government has coddled, accepted, and ignored white-collar crime for too long," he testified. "It is time the nation woke up and realized that it's not the armed robbers or drug dealers who cause the most economic harm, it's the white collar criminals living in the most expensive homes who have the most impressive resumes who harm us the most. They steal our pensions, bankrupt our companies, and destroy thousands of jobs, ruining countless lives".***

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This submission to the Senate Economics Reference Committee has been submitted by Phillip Charles Sweeney on behalf of all the members and beneficiaries of regulated superannuation funds in a compulsory superannuation system who are deserving of the "***Rule of Law***" and not the "***Art of the Deal***".