Additional comments from the Australian Greens

1.1 The Australian financial sector has been riddled with scandals in recent years. This, along with other instances of bribery and corruption that have been uncovered in business, would indicate that the current approach to white-collar crime is not sufficient to deter bad behaviour. Many companies seem to be factoring in relatively small fines to the cost of doing business. Many more simply get away with it. This must be rectified. The financial system depends on trust, and the economy works best when the playing field is level and the rules reward fair play.

Detection and deterrence: Fear is the key

1.2 The committee heard strong evidence that the thing most likely to stop people committing white-collar crime is the fear of getting caught. The level of this fear is, obviously, linked to the perceived likelihood that regulators can and will catch them. Creating a climate of fear requires properly empowered and properly resourced regulators—strong cops on the beat.

1.3 The Australian Greens support regulators being given more power to tackle white-collar crime. In response to the evidence heard by this inquiry, the Australian Greens support greater 'equalisation' of the standard of proof required for regulators to bring about successful civil proceedings—a weakening of the so-called Briginshaw test. Regulators should not be required to meet a standard of evidence in civil cases equivalent to that required for criminal prosecutions. Civil proceedings do not carry the magnitude of penalties or the level of dishonour that criminal proceedings do. The standard of proof required in civil proceedings should reflect this difference, irrespective of the magnitude of allegations.

Recommendation 1

1.4 That the government provide greater clarity regarding the evidentiary standards and rules of procedure that apply in civil proceedings involving white-collar offences with an emphasis on lowering the standard of proof.

1.5 Whilst beyond the terms of reference of this inquiry, the adequate resourcing of regulators and the protections available to whistle-blowers is also critical to the detection and deterrence of white-collar crime.

1.6 In response to the threat of a Royal Commission, the government has restored funding to the Australian Securities and Investments Commission (ASIC) and instituted an industry levy. However the Australian Taxation Office (ATO) remains critically underfunded. This is ridiculous given the level of tax evasion that goes undetected. Increasing funding to the ATO would be revenue positive.

1.7 The government also needs to act on providing the same protections to corporate whistle-blowers that are provided to public service whistle-blowers. In doing so, the government should also facilitate compensation for whistle-blowers in recognition of the impact their actions can have on their financial security, job security and mental health. Where whistle-blowers expose misconduct that enables regulators to reclaim money they should receive a portion of this reclaimed money as a reward.

Targeting those responsible

1.8 The committee heard strong evidence in favour of targeting the individuals responsible for white-collar crime, including those in positions of leadership who facilitate wrongdoing.

1.9 Corporate leaders set the culture of a workplace. Where this culture is bad, this can lead to wrongdoing. In some cases, this goes further. The committee heard evidence that some corporate leaders, who may not be directly committing offences themselves, tacitly endorse the activity of employees who are committing offences. This needs to be stamped out. The Australian Greens agree with the recommendation of the Australian Federal Police (AFP) that the law be amended to allow for the prosecution of 'ringleaders' who aid and abet those committing white-collar crime.

Recommendation 2

1.10 That the Criminal Code be amended to include 'knowingly concerned' as an additional form of secondary criminal liability.

Strong and consistent penalties: Make the time fit the crime

1.11 The committee heard multiple cases of inconsistency in the penalties available for white collar crime, including in both criminal and civil proceedings, and for monetary and custodial penalties. Some of these inconsistencies are historical anomalies. Others extend from the complicated and ever-evolving nature of wrongdoing that is considered to be white-collar crime.

1.12 Accordingly, the Australian Greens believe that an overarching principle should be adopted to standardise penalties for white-collar crime. Penalties should not be able to be gamed because of anomalies in the statute.

1.13 The default position in respect of the scope and level of criminal, civil and administrative penalties should be that they are the same; including for misconduct in the banking and financial services sector, for tax evasion, for breaches of competition and consumer law, and for bribery, fraud or anything else within the broad gamut of white-collar crime. Allowance should be made for variation for particular offences, but this should be the exception rather than the rule.

1.14 Monetary penalties should be available as an absolute amount or as a multiple of the wrongful gain in all cases.

Recommendation 3

1.15 That the default maximum custodial sentence for criminal wrong-doing be ten years imprisonment.

Recommendation 4

1.16 That the default maximum monetary penalty for criminal wrongdoing be the greater of $5 million or three times the benefit gained.

Recommendation 5

1.17 That the default maximum monetary penalty for civil and administrative penalties be the greater of $1 million or three times the benefit gained.

1.18 The Australian Greens strongly endorse the recommendation in the Chair's report that disgorgement powers be made available to ASIC so as to enable the recovery of ill-gotten gains. The absence of disgorgement powers is a gaping hole in the current regulatory framework that should be remedied as soon as practicable.

1.19 The Australian Greens also support the request by ASIC for the scope of civil offences to be reviewed with a view to making them more widely available, or at least consistently available. ASIC provided examples where, for no good reason, civil penalties are available to them for particular offences, but are not available for other similar offences. Again, the Australian Greens believe the underlying principle of standardisation should apply. However, the Australian Greens accept that this should not be done without due consideration of the particular nature of existing civil offences.

Recommendation 6

1.20 That the government conduct a review of the availability of penalties for civil offences with a view to making them more widely and consistently available to regulators.

Public reporting: name and shame

1.21 An important adjunct to the penalties imposed on those committing white-collar crime is the way in which information relating to this misconduct is made available to the public. Dr Mark Zirnsak noted in his submission that:

> …transparency is of itself a penalty for the person who committed the crime (being publicly exposed) and acts as a deterrent against further criminal activity, eroding the sense of security those contemplating such criminal activity may have that they will get away with it.[1]

1.22 ASIC has established an enforceable undertakings register, and a banned and disqualified register that makes information available to the public about certain white-collar criminals. However, this only represents part of the enforcement action undertaken by one regulator. Even then, the data in the banned and disqualified register is not presented in a fully open and navigable form.

1.23 Except for cases in which public disclosure would prejudice on-going legal action, regulators should make public, in full, the details of banning and disqualification orders, as well as the outcomes of court actions in which they have been successful. This is not an approach that the Australian Greens would endorse for most, if not all, other instances of wrongdoing. But white-collar crime is different. White-collar crime is seldom an act of impulse or necessity. It is most often well-planned, systemic, and fuelled by greed. The victims of white-collar crime are sometimes discrete, but often the breach of confidence and trust has far wider implications. White-collar crime is a threat to the financial system and to the economy, and the approach of government should take account of this.

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1 The Justice and International Mission Unit of the Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission 39*, p. 9.

1.24 The Australian Greens believe that a single 'register of corporate criminals' should be established to enable the public to see who has committed serious white-collar crime, what they have done, and what the penalty they received was. The register should cover white-collar crime in which regulators have successfully bought criminal or civil action to the courts. The register should also include the details of any individual or any company currently subject to a banning or prohibition order in relation to their business activity. Those who have committed wrongdoing would 'drop off' the register after a period of time has passed, or once a ban or prohibition has lapsed. However, the time spent on the register should be proportionate to the offence committed: the more serious the wrongdoing, the longer the 'naming and shaming' should go on.

1.25 This register will help inform those looking to engage in business with any individuals or businesses who they might either have cause to be wary of or steer away from altogether.

Recommendation 7

1.26 That the government establish a single 'register of corporate criminals' that provides, in full, data on individuals and corporations guilty of serious criminal or civil offences, or who are subject to banning or prohibition orders.

Senator Peter Whish-Wilson
Senator for Tasmania