A Rational Approach to Sentencing White-Collar Offenders

by

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COPIES OF PUBLICATIONS

1. (MARGINAL) GENERAL DETERRENCE DOESN’T WORK – AND WHAT IT MEANS FOR
   SENTENCING.
2. THE CAPACITY OF CRIMINAL SANCTIONS TO SHAPE THE BEHAVIOUR OF OFFENDERS:
   SPECIFIC
3. REHABILITATING TOTALITY IN SENTENCING: FROM OBSCURITY TO PRINCIPLE
4. FIRST-TIME OFFENDER, PRODUCTIVE OFFENDER, OFFENDER WITH DEPENDENTS: WHY
   THE PROFILE OF OFFENDERS (SOMETIMES) MATTERS IN SENTENCING
5. A RATIONAL APPROACH TO SENTENCING WHITE-COLLAR OFFENDERS IN AUSTRALIA
Abstract

The punishment of white-collar offenders poses a unique problem for sentencing courts in Australia. The paradigms for punishing non-white-collar offenders do not translate seamlessly to white-collar offenders, raising both conceptual and pragmatic difficulties for the criminal justice system generally, and sentencing courts specifically. The title of this thesis, ‘A Rational Approach to Sentencing White-Collar Offenders’, implicitly assumes that the current treatment of white-collar offenders is irrational. Certainly, that was the experience of Professor Bagaric and I in relation to the series of co-authored articles we published between 2011 and 2015. This thesis examines more closely the assertion that irrationality pervades this area of the law by undertaking and analysing detailed empirical research. As is discussed in the methodology part of the research (Chapter VII), the application of scientific rigour to research in the social sciences is a difficult task. Notwithstanding that difficulty, it is not novel. Other legal academics have undertaken similar research, albeit by adopting a different approach.

The arguments advanced in the articles were predicated on some underlying assumptions. First, the profile of the white-collar offender and the nature of the white-collar offence differ markedly from the usual criminal law construct. White-collar offenders do not fit traditional sentencing stereotypes: they are often of previous good character; come from a privileged social background rather than one of disadvantage or deprivation; their offences are pecuniary not violent; and, but for their offending, they are often conspicuous contributors to the community in which they live. Second, the paradigm sentencing models do not readily acknowledge or accommodate the unique consequences that usually follow the sentencing of white-collar offenders. The consequences of conviction can extend beyond the immediate hardship imposed by the sentencing court; they may include public embarrassment, loss of social standing and loss of employment prospects. These are consequences that are, arguably, visited upon white-collar offenders to a much greater degree than other offenders. The harm caused by such offending also often extends beyond an immediate identifiable victim or affects a multitude of victims in circumstances where they may be unaware that a crime has even been committed against them (for example, market manipulation offences or revenue offences). Third, in addition to the usual punishments of fines, imprisonment etc (formal punishment), the complexity of sentencing white-collar offenders is compounded by the additional burdens sometimes imposed on white-collar offenders by cognate legislation, such as civil penalties and director disqualification (informal punishment).

Some of these assumptions were tested in the research I undertook. The results of the research reveal that white-collar sentencing is, in some respects, inconsistent and irrational. The data also allowed me to identify with greater accuracy and clarity why the tentative conclusions expressed in the articles were, in the main, correct. However, this thesis represents a return to theory: to demonstrate why the current approach to sentencing is erroneous; and to justify the changes to sentencing practice and proposals for legislative reform that I ultimately make. Neither the sentencing statutes in the State or Federal jurisdictions, nor the common law, have developed clear principles relevant to the infliction of formal punishment on white-collar offenders, nor articulated the relative weight to be given to informal punishment when meting out ‘just punishment’.
The sole authored part of the thesis provides a doctrinal justification for the views that have been expressed in the articles and provides some proposals for a reform of the law to achieve what I argue is a more rational approach to sentencing white-collar offenders.
CHAPTER I
INTRODUCTION AND CHAPTER SUMMARIES

‘All our knowledge begins with the senses, proceeds then to the understanding, and ends with reason. There is nothing higher than reason.’

Immanuel Kant, *Critique of Pure Reason*, 1781

A Composition and Arrangement of Thesis

This thesis (in part) by publication draws together five co-authored articles, which were written and published in law journals between 2011 and 2015 and examined what I, and my co-author Professor Bagaric, perceived as systemic flaws in the sentencing of criminal offenders generally, and white-collar offenders specifically.¹

The publication details of the five articles are as follows:


The five articles (copies of which are attached at the end of the thesis) each involve an analysis of one or more aspects of sentencing law. They systematically and comprehensively examine key themes and unresolved issues relating to sentencing. What emerged from the articles was that there are a number of flaws in the current sentencing orthodoxy: flaws that require a review of the framework in which theorists conceptualise, and jurists undertake, the process of sentencing.

¹ An earlier article I co-wrote with Professor Bagaric was not included in the thesis due to limited capacity. However, ideas and arguments from the article are considered throughout the dissertation. See Mirko Bagaric, Theo Alexander and Athula Pathinayake, ‘The Fallacy of General Deterrence and the Futility of Imprisoning Offenders for Tax Fraud’ (2011) 26(3) *Australian Tax Forum* 511.
This document is approximately 80,000 words, and hence, satisfies the length required for a PhD thesis. All of the research, analysis and writing in this document are my sole work. Nonetheless, the five articles identified above also form part of the thesis. My contribution to the five articles amounts to approximately a further 20,000 words. Accordingly, the total length of the thesis is approximately 100,000 words. My exact contribution to each of the articles is set out in the Author Contribution Statements included at the end of the thesis, and the manner in which each of the articles links in with the contentions in the thesis are recorded below under the subheading ‘Overview of Articles’.

Broadly, the main hypotheses set out in the thesis are contained in ‘A Rational Approach to Sentencing White-collar Offenders in Australia’ (‘Rational Approach Article’). This article was written in 2011 and 2012. In it, Professor Bagaric and I more fully explore the jurisprudential, normative and, most importantly, empirical underpinnings of the assumptions and premises which have formed the substratum to the arguments that we have advanced across the series of articles. The article examines more deeply the theoretical underpinnings of punishment and sentencing law, in order to provide an overarching framework for the sentencing of the white-collar offenders. Of particular relevance is Chapter VIII of this thesis, which constitutes new research undertaken after the Rational Approach Article was published in the Adelaide Law Review. As far as I have been able to discover, research of this type has not been undertaken by any other Australian academic. The purpose of that research was to empirically test one aspect of sentencing law: the (in)consistent application of certain aggravating and mitigating factors by courts when sentencing white-collar offenders. The findings in Chapter VIII essentially result in a firmer commitment to the primary recommendations in the Rational Approach Article, but in some instances, has necessitated slight changes to those recommendations.

This thesis is intended to be a coherent, independent and exhaustive narrative of the research and recommendations that were separately considered across the five articles. Thus, it should be read first. Following that, each article should be read in order to provide a wider backdrop and justification to the recommendations in the thesis.

B Introduction to Thesis

Despite its ancient pedigree, sentencing law in Australia suffers from what may be contemporarily termed a strategic failure. Indeed, the commonality between the

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3 In science, research design refers to the strategy chosen to integrate different parts of the study in a logical way to effectively address the problem. Therefore, where the results do not address the
processes of industry (from whence the term derives) and the legal system, is that both seek to achieve an outcome: in the former case, usually some type of product; in the latter case, a human result.\(^4\) If the desired product or result is not achieved by the process or system, then the outcome is termed a failure. In sentencing law, the evidence of failure is obvious: ever-higher rates of incarceration and stagnating or increasing rates of recidivism.\(^5\)

Most other areas of human knowledge or endeavour respond to failure by seeking to review as many components, assemblies, and subsystems as possible to identify failure modes, and their causes and effects.\(^6\) Remedial action based on those findings then follows. For example, in the realm of finance, economic failure may be met with adjustments to interests rates, with austerity measures, or a stimulus package. In the automotive industry, a recall notice may be issued. In the health sciences, failure might require a return to the laboratory to reassess the problem, test and re-test hypotheses and thereby develop new solutions. The legal system, in terms of sentencing law, has largely failed to achieve its objectives, but unlike other areas of human endeavour, it has also failed, or refused, to identify and articulate the failure modes; to rationally examine the root causes and effects; to institute meaningful action to precipitate change; or to persist with change, however elusive it may appear. It is a form of intellectual and imaginative indolence that would not be tolerated in any other social faculty. Whilst contemporary society venerates reason, the law seems incapable of learning from the ‘logic of failure’.

To quote Dörner:

> It appears that, very early on, human beings developed a tendency to deal with problems on an ad hoc basis. The task at hand was to gather firewood, to drive a herd of horses into a canyon, or to build a trap for a mammoth. All these were problems of the moment and usually had no significance beyond themselves. The amount of firewood the members of a Stone Age tribe needed was no more a threat to the forest than their hunting activity was a threat to wildlife populations. Although certain animal species seem to have been overhunted and eradicated in prehistoric times, on the whole our prehistoric ancestors did not have to think beyond the situation itself. The need to see a problem embedded in the context of other problems rarely arose.\(^7\)
Indeed, sentencing law is perhaps an archetypal example of a (necessarily) *ad hoc* problem, or more accurately, set of problems, being dealt with in an (unnecessarily) *ad hoc* manner. But that fact magnifies, rather than diminishes, the importance of a rational approach to sentencing. As we point out in our research, it is a failure of both proof and inquiry.⁸

Helpfully, Dörner also provides a possible solution to the problem:

Real improvement can be achieved, however, if we understand the demands that problem solving places on us and the errors that we are prone to make when we attempt to meet them. Our brains are not fundamentally flawed; we have simply developed bad habits. When we fail to solve a problem, we fail because we tend to make a small mistake here, a small mistake there, and these mistakes add up. Here we have forgotten to make our goal specific enough. There we have overgeneralized. Here we have planned too elaborately, there too sketchily.⁹

The many, relatively small flaws, which the articles identify in sentencing law can be distilled to a single larger failure: the discord between the empirical evidence and the objectives of sentencing. It is the benign indifference of the courts and the legislature to that discord which perpetuates the failure.

Unlike the ‘embedded problem’ hidden in a thicket of other problems, that sentencing law has failed, is known. Hutton says that sentencing law is ‘neither formal nor rational ... [i]t is one part of a modern legal system which has remained substantive and irrational.’¹⁰ Further, the discord between evidence and outcome is known. As Judge Michael Marcus, a US circuit court judge, frankly observes:

> Our persistence in ignoring research when exercising sentencing discretion exceeds even offenders’ persistence in crime. Although academia and corrections agencies have learned a great deal about how to reduce recidivism, we judges ignore their wisdom while they are content to defer to and even enable our hubris. We adhere to a liturgy of just deserts that celebrate aggravation and mitigation. We invoke reformation only rarely, and then only by assumption – with no more attention to results than when we purport to ‘send a message.’¹¹

In order to advance beyond the hubris, the five articles we published and this thesis, attempt to reconcile the theories and empirical evidence with what judges are (or should be) doing when sentencing white-collar offenders. The articles, and the thesis, draw on the earlier work of my supervisor, Professor Bagaric, entitled ‘Punishment and Sentencing: A Rational Approach’.¹² However, the thesis enjoys the advantage of over a decade of further scholarly output, considers sentencing directly in relation to the white-collar offender subset, and draws conclusions based on empirical

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⁹ Dörner, above n 7, 7.
research which I conducted specifically for the purpose of examining the recommendations contained in the articles.

C Purpose of Thesis: Identification of Failure and Reform

The purpose of the body of work comprehended by this thesis is to identify the failure mode and to create a platform for change through action.

Because many of the recommendations in the articles suggest reform which requires jettisoning long-held and deeply ingrained ideas about sentencing, the written part of this thesis attempts to more closely examine the two basic conclusions which the articles have produced: (a) that the criticisms of the current approach to sentencing generally, and specifically in relation to white-collar offenders, are justified; and, (b) the current approach to sentencing is irrational and the recommendations for reform set out in the articles are supported by evidence.

In order to test the validity of the first conclusion, this thesis contains a comprehensive series of charts setting out the results of some empirical research regarding the considerations that, in practice, actually influence the sentencing of white-collar offenders. This data examines over 60 white-collar cases drawn from the Victorian and Federal jurisdictions. The illuminating aspect about the empirical research is that it not only identifies the exact considerations which most influence the sanctions imposed on white-collar offenders, but also highlights the discord between sentencing principles and practice in some aspects of sentencing white-collar offenders.

In relation to the second conclusion, this thesis explores the theoretical and philosophical justifications for sentencing and considers how these manifest in the sentencing objectives pursued by the courts. What constitutes a rational approach to sentencing is examined in light of the theories that underpin sentencing and the data. The sentencing of white-collar offenders, while raising some unique considerations, also involves the application of general sentencing principles and objectives; indeed, the substrata to sentencing white-collar offenders are the general sentencing principles and purposes. In order to provide an overarching account of the most appropriate manner for dealing with white-collar offenders, it is necessary to analyse the operation of the key sentencing objectives, and in particular, those that typically apply to white-collar offenders. Generalizations and conclusions made in relation to all offenders should then logically be applied to the white-collar offender subset, unless a relevant difference can be identified. The corollary of these two conclusions is the stark realization that the current approach to sentencing must, in some respects at least, be completely reimagined.

D Focus of Thesis: White-Collar Crime

This thesis focuses on sentencing in the area of white-collar crime. That is because, as we point out in Rational Approach Article, white-collar crime stands apart from other criminal offences, predominantly because of certain characteristics attributed to
these offences of this type and/or those who commit such offences. 13 This offender/offence dichotomy is particularly important in relation to defining what constitutes white-collar crime: a necessary step in its theoretical analysis and its judicial application. These issues are explored in greater detail in Chapter VI.

Certainly, the concept of white-collar crime is not new. Wakelam identifies an early reference to the white-collar offender in the work of Ross:

In 1907, controversial American sociologist Edward Ross took early theories on economics and corporate offending and steered them towards what would eventually become known as white-collar crime. He introduced the concept of the criminaloid, ‘a social type who enjoys a public image as a pillar of the community and a paragon of virtue, but beneath the veneer of respectability [lies] a very different persona; one committed to personal gain [by] any means necessary’. Ross described the criminaloid as one acting not on evil impulse, but through a lack of moral sensibility; he or she prefers to prey on the anonymous public, while shielded behind an image of virtue. Despite this obvious leap towards an early definition of the white-collar criminal, it would be another 30 years before that phrase entered the criminological vocabulary. 14

Braithwaite traces the development of the criminological theory of the white-collar offender (for it was, at first instance, a sociological phenomenon rather than a legal one) from the early 1900s American sociologists, through the Dutch Marxist Willem Bonger, in his 1916 work Criminality and Economic Conditions, to Edwin Sutherland, who coined the term in the title to his Presidential Address to the American Sociological Society in 1939: “The White Collar Criminal.” 15 In the stratified, class-based society in which Sutherland located the white-collar criminal, the paradigmatic offender was a man of low station, perhaps also of low birth, and whose crime was committed out of emotion or perhaps avarice, but which almost always involved acts of violence towards other members of society for some gain. Braithwaite sees the acceptance and development of the subset as “…a rare case of sociological scholarship having a substantial impact on public policy and public opinion.” 16

The examination of subsets within the criminal law is itself not new. Children, 17 women, 18 indigenous, 19 addicted 20 and insane 21 persons have also occupied the minds

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16 Ibid.
17 See, eg, Children, Youth and Families Act 2005 (Vic), which deals, inter alia, with the sentencing of children.
of lawyers and sociologists. So too have violent offenders and sex offenders; both the subject of specific legislation creating a unique set of sentencing objectives.22

More specifically, the justification for the focus on white-collar offending in this thesis is consistent with the public perception that white-collar criminals, as a group of offenders, are sui generis and a serious threat to social order. For example, the Australian Bureau of Statistics (‘ABS’) Research Methodology Monograph entitled Measuring Wellbeing: Frameworks for Australian Social Statistics identified white-collar crime as a separate category in the area of social concern to be identified in data collection and measurement by the ABS.23 In terms of seriousness, Grabosky et al have reported that the public perceives many forms of white-collar crime as more serious, and more deserving of condign punishment, than many forms of common crime.24 The same view has been reported in some overseas jurisdictions including the United States,25 the United Kingdom26 and Sweden.27

E. Overview of the Articles

The first article, ‘(Marginal) General Deterrence Doesn’t Work – and What it Means for Sentencing’ (‘General Deterrence Article’), looks at the objective of general deterrence. This is a universal sentencing objective and key sentencing consideration throughout all Australian jurisdictions. It is a justification for increasing the harshness of a sentence. Moreover, it is a consideration that is particularly important in the sentencing of white-collar offenders. The article analyses the efficacy of criminal punishment to reduce crime through the imposition of harsher sentences. It concludes that there is no correlation between harsher penalties and a lower crime rate. It argues that this logically means that general deterrence should not influence the choice of sanction in the case of general crimes or, by extrapolation, in white-collar crimes. Thus, this article examines general deterrence in the context of all offence types. It is relevant to this thesis because the general conclusions in this article apply to the specific case of white-collar offences. This is especially pertinent given that, as I shall demonstrate, general deterrence is one of the key sentencing objectives that informs sentences for white-collar offences.

The second article that forms part of the thesis, ‘The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn’t Work, Rehabilitation Might and the Implications for Sentencing’ (‘Specific Deterrence Article’), explores two further general sentencing objectives, namely, specific

22 See, eg, Crimes Amendment (Gross Violence Offences) Act 2013 (Vic); Sex Offenders Registration Act 2004 (Vic) where the paramount consideration is community protection.
26 Grabosky, Braithwaite and Wilson, above n 24.
deterrence and rehabilitation. Following the review of the evidence regarding the relationship between specific deterrence, rehabilitation and recidivism rates, it concludes that specific deterrence is an unobtainable sentencing goal and that there is insufficient empirical data to determine if rehabilitation can be achieved. It follows, so we argued, that neither of these considerations should weigh heavily in the sentencing of offenders in general, or white-collar offenders in particular. Thus, this article examines specific deterrence and rehabilitation in the context of all offence types. The general conclusions in the article apply to the specific case of white-collar offences.

The third article, ‘Rehabilitating Totality in Sentencing: from Obscurity to Principle’ (‘Totality Article’), analyses the issue of totality. Unlike (marginal) general deterrence, specific deterrence and rehabilitation, totality is a principle of sentencing, rather than an objective.\(^28\) However, because it involves one of the ‘small mistakes’ that lead to systemic failure, it comprises an important part of the program for change. The principle arises in relation to a large number of criminal offences but is particularly apposite with regard to white-collar offences, given that many offenders are sentenced on the basis of the commission of more than one offence. People who commit white-collar crime tend to not stop after the first offence (for example, repeated tax evasion offences),\(^29\) and hence there is a particular need to ascertain how this principle ought to operate in relation to white-collar offenders. In this article, we conclude that the current justification for the totality principle is misconceived, and that a different rationale is necessary to ground the principle. This is found in the fact that offenders who are not sentenced cumulatively for their offences are denied the opportunity of reforming or correcting their behaviour. Thus, this article examines the principle of totality in the context of all offence types, and is relevant to the thesis because its general conclusions apply to the specific case of white-collar offences. This is especially pertinent given that, as I shall demonstrate, most cases of white-collar offending involve multiple offences.

The fourth article, ‘First-time Offender, Productive Offender, Offender with Dependents: Why the Profile of Offenders (Sometimes) Matters in Sentencing’ (‘First-time Offender Article’), looks at specific mitigating factors which are often relevant in the case of white-collar offenders. Again, mitigating factors represent a different part of the sentencing calculus: this time examining not an objective or principle, but rather a specific set of factors which impact upon sentence. These factors involve considerations that stem from the profile of the offender; the absence of prior convictions, previous good deeds, and where offenders have financial and physical dependents. The article concludes that only the first and last of these considerations should mitigate penalty for offenders in general and white-collar offenders in particular. The offender traits considered in this article are especially relevant in the context of white-collar offending given that many white-collar offenders have no criminal history and are employed at the time of offending and often have financial dependents.

The fifth article, which constitutes the final publication, Rational Approach Article, captures and examines the current approach to sentencing white-collar offenders and

\(^{28}\) See Sentencing Act 1991 (Vic): s 5(1) expresses the purposes for which sentences may be imposed, however, s 5(2F) expresses that a sentence must ‘reflect the totality of the offending…’.

\(^{29}\) Bagairc, Alexander and Pathinayake, above n 1.
identifies what we saw as the flaws with that approach. The article includes a discussion of the principles that the superior courts have articulated regarding the sentencing of white-collar offenders. In essence, it provides the base recommendations set out in Chapter X. The fact that there is not only a paucity of jurisprudentially sound sentencing principles for white-collar offenders but also a discord between the principles that do exist and current practice, further highlights the need for greater clarity and certainty in this area of law. As indicated above, some of the recommendations set out in the article have been adapted following the results of the empirical analysis of the cases, which are discussed in Chapters VIII and XI.

Collectively, the articles expose the various aspects of sentencing law which contribute to the systemic failure of sentencing law to achieve its objective, and which justify the criticism that it is irrational. The sole authored part of the thesis, which I summarise below, examines the conclusions reached in the articles and tests those conclusions for theoretical and practical soundness before reconsidering the previous recommendations for reform against the empirical research.

F Chapter Summaries

I commence in Chapter II, by exploring the basic concepts that underpin the law of sentencing: punishment and sentencing. I consider the theories of punishment upon which sentencing, as a social practice, is based. It is trite to observe that no proposal for sentencing reform can be meaningful unless it is consonant with the basic theories broadly propounded as justification for criminal punishment. This chapter explains what it is that the imposition of a sentence might sensibly be intended, and able, to achieve.

In Chapter III, I articulate the sentencing schema to provide some terminological consistency, and to provide a locus to the reform proposals which I later make. I then set out the current approach to sentencing law and practice in respect to white-collar crime. This chapter provides the tableau against which the process of sentencing takes place.

In Chapter IV, I discuss what rationality in law might mean, and then attempt to discern what constitutes rationality in sentencing law. The analysis applies to sentencing in globo in order to establish the normative benchmark against which the measurement of white-collar sentencing can be set.

In Chapter V, I examine the general problems with current sentencing practices revealed by the research, and make some further observations about the veracity of the conclusions reached in the articles.

In Chapter VI, I set out the specific problems in sentencing white-collar offenders and the definitional problems of white-collar crime. This includes an analysis of whether or not white-collar offences, and white-collar offenders, are indeed a sui generis and therefore warrant separate treatment. The existing tension within academia between constructing white-collar crime as a type of offence or as a type of offender is explored. I establish the qualitative differences between white-collar offending and other types of crime to help explain the unique features of sentencing white-collar offenders.
In Chapter VII, I set out the process by which the cases that I analysed were selected, the research methodology employed and the limitations inherent in analysing sentencing decisions. The specific analysis of the individual cases appears in Appendix A – Research.

In Chapter VIII, the results of the research in relation to the eight selected sentencing variables (quantitative results) and judicial observations regarding the reasons for the specific treatment of those variables (qualitative results) are recorded and tabulated.

In Chapter IX, I review, interpret and discuss the data from the empirical research. The data is used to examine, test, and sometimes adapt, the assertions made in the five articles. The conclusions which flow from the results of the research provide a further foundation for the reform proposals.

I conclude in Chapter X, by advancing a series of reform proposals which the discussion in the preceding eight chapters have precipitated, as well as examining the reform proposals that were previously set out in the five articles; specifically testing them against the results of the research and the theoretical analysis contained in the thesis. I then make some final observations regarding the need for a rational approach to sentencing.
CHAPTER II
PUNISHMENT AND SENTENCING

‘The imposition of punishment requires justification. We should not be satisfied with 
the proposition that anyone who commits any offence forfeits all rights, and may be 
dealt with by the state in whatever manner the courts decree. That would be to 
suggest that any convicted person is entirely at the disposal of the criminal justice 
system…Instead, we should seek strong justifications for contemporary sentencing 
practices, not least because of the increasing use of imprisonment and the greater 
restrictiveness of non-custodial sentences in many countries.’

Andrew Ashworth QC, Sentencing and Criminal Justice (6th ed, 2015) 74

A Introduction

As established in the Specific Deterrence and Rehabilitation Article, sentencing is a 
purposeful endeavour. But the elegant simplicity of this observation belies the 
obscurity of its meaning: what is that purpose? Or are there many purposes? 
Whether there be one or many purposes, how are they to be identified and 
elucidated? What happens if the purposes conflict? What if they cannot be achieved?

The concepts of punishment and sentencing have been the subject of consideration 
far beyond the confines of the law. Within the social sciences, the major disciplines 
of philosophy, criminology, sociology, economics, and even psycho-analytics, have each contributed to the dialogue about the purpose(s) of punishment and 
sentencing. Perhaps more than all other areas of the law, sentencing captures public 
attention most often and most acutely (through media and other fora). And yet, 
simultaneously, sentencing law is necessarily the most reflexive of all areas of the 
law – exhibiting a bidirectional relationship between flexibility and certainty – an 
area where nuance and subtlety and instinct are an unavoidable part of a just 
outcome. The offender, the victim and the community each expect sentencers and 
sentences to exhibit a wisdom commensurate with the judgment of King Solomon;

30 Jeremy Bentham was a philosopher, jurist and social reformer; Thomas Hobbes, Immanuel Kant, 
Georg Wilhelm Friedrich Hegel, Igor Primoratz and Robert Nozick were philosophers; Cesare 
Beccaria was a criminologist, jurist, philosopher and politician; John Stuart Mill was a philosopher, 
political economist and civil servant.
31 Donald Carveth, ‘The Unconscious Need for Punishment: Expression or Evasion of the Sense of 
32 Karen Gelb, Sentencing Advisory Council, ‘Myths and Misconceptions: Public Opinion versus 
Opinion and Sentencing Policy’ in Sue Rex and Michael Tonry (eds), Reform and Punishment: The 
Future of Sentencing (Routledge, 2002); Sir Anthony Mason, ‘The Courts and Public Opinion’ 
(Speech delivered at the National Institute of Government and Law Inaugural Public Lecture, 
Parliament House Canberra, 20 March 2002); John Walker, Mark Collins and Paul Wilson, ‘How the 
Public Sees Sentencing: an Australian Survey’, (Trends & Issues in Crime and Criminal Justice, 
Report No 4, Australian Institution of Criminology, April 1987); Kate Warner et al, ‘Gauging Public 
Opinion on Sentencing: Can Asking Jurors Help?’ (Trends and Issues in Crime and Criminal Justice, 
Report No 371, Australian Institute of Criminology, March 2009).
but what constitutes a just sentence is probably more difficult to ascertain than the maternity of an infant.  

B The Relationship Between Punishment and Sentencing

Philosophers have long sought to explain punishment as a social instrument and mechanism of justice. The chief aim of this instrument has been to attain a system of criminal law which is more just, humane and rational, the achievement of which would be a ‘win for’ the cause of humanity. These broad and aspirational statements satisfactorily express the basic reason for law, but do little to identify the role of punishment within the law.

In the sentencing process, punishment has been described as the ‘logical prior inquiry’ and thus the two concepts are related. Arguably, if it can be shown that punishment in the form of current sentencing practices is empirically, economically or even morally effective, then it does not require reform at all. Indeed, assessing the rationality of sentencing white-collar offenders in Australia necessarily involves articulating, as a first step, why we impose punishment on offenders. Only once the purpose of punishment has been identified is it possible to make a normative assessment of the purposes themselves, or of the process by which those purposes are sought to be achieved. Construed in this light, the true purpose of this ‘purposeful endeavour’ becomes clearer: sentencing is intended to achieve those aims which are said to justify the infliction of punishment. Punishment is the fulcrum: sentencing the lever. A simple example makes the point: if the purpose of punishment is only to demonstrate to the offender that certain behaviour is socially unacceptable, any punishment which constitutes a hardship to the individual would suffice. If the purpose of punishment is to ensure that other potential offenders do not repeat the offending behaviour, then a punishment which constitutes a hardship to the individual and which will act as a deterrent to other individuals would be necessary. The ultimate sentence in those two cases might look very different, because that which is sufficient in one case may not be sufficient in the other. Thus, the purpose of sentencing is simply to achieve the aims identified as desirable according to the claimed theoretical justifications for the infliction of punishment.

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33 This is not to undervalue King Solomon’s achievement. Of course, he is reputed to have had the assistance of the Divine. Most sentencers are not so lucky.


37 This will be discussed in detail in Chapters IV and VI.

38 Materni, above n 34, 265. Along with morality in the criminal law, Materni identifies sentencing as another reason why we should care about criminal punishment and the pursuit of justice.
C Competing Theories: Retributivism, Utilitarianism and Just Deserts

Haist provides the context in which the main theories of punishment have been considered as follows (citations omitted):

Punishing what society deems wrong or unwise seems to be an integral part of any civilization. Specific guidelines for punishment date back to Hammurabi’s Code, while theoretical and philosophical justifications for punishment can be seen as early as Aristotle. Simply put, criminal justice is, and has always been, at the center of public concern, so much so that modern societies often view and compare themselves to one another through the lens of what we now call criminal justice.  

According to Stearns, punishment is the ‘outgrowth of private vengeance, …[an immediate] reaction to annoyance and irritation…[that is]…almost reflex in character’ and is ultimately imposed for the purpose of ‘individual or social defense.’ The social defense justification arises as a result of the commission of an offence that constitutes a breach of the implied social contract to which all citizens are party. The earliest recorded punishments appear to originate from Mosaic Law whereby the focus was, often vengefully, on equalizing the punishment with the crime. It is here that we see the genesis of the (modern day) concept of proportionality; that the punishment must fit the crime, albeit very strictly interpreted at its inception. Secular philosophers later coined this concept retributivism.

The fathers of retributive theory, Kant and Hegel, justify the imposition of punishment as a consequence of the commission of a crime. Kant goes as far as categorising punishment as a ‘right of the sovereign’ and a high moral duty. In this way evil is compensated by evil (of no more than equal value). Therefore, retribution and just punishment have been described as strongly resembling ‘public vengeance at the hand of the state.’ Modern-day retributivism says that state-

41 Kateb, above n 40, 284. He identifies the social contract as the Constitution.
43 Stearns, above n 40, 221. This is where the phrase ‘eye for an eye’ originates and is known as the lex talionis approach.
44 Materni, above n 34, 271-277. This is, along with utilitarianism, are the two modern justifications of punishment.
45 Kant of course adopted the lex talionis concept from Mosaic law: see Immanuel Kant, Die Metaphysik der Sitten (1797-8). It has been argued that Kant was concerned with identifying a rational basis of the idea of retribution and did this by linking two basic ideas of his moral philosophy: the categorical imperative and the respect of persons. The categorical imperative is derived from the identification of a specific obligation. Kant says that ‘the principle of punishment is a categorical imperative’ (MS, 6:331): see Nelson T Potter Jr, ‘The Principle of Punishment Is a Categorical Imperative’ in Jane Kneller and Sidney Axinn (eds), Autonomy and Community: Readings in Contemporary Kantian Social Philosophy (SUNY Press, 1998) 169, 169-70.
46 Ibid, 272. See also Kateb, above n 40, 293–5 for Mill’s similar belief that crime entails punishment.
47 Materni, above n 34, 271.
49 Materni, above n 34, 275–7.
imposed punishment of the guilty is, in itself, justice, where justice is the ‘reparation of the wrongs suffered; the restitution of the losses incurred; [and] the compensation for the suffering endured.’\textsuperscript{50} The modern retributivist distinguishes justice from vengeance on the grounds of power – that it is imposed by the state, as opposed to the aggrieved.\textsuperscript{51} It is for this reason that punishment has been described as the necessary and lesser evil,\textsuperscript{52} its necessity arising partly from the protection which it offers the offender from ‘excessive or unjust retaliation’\textsuperscript{53} at the hands of the aggrieved, and partly from its restorative function with respect to the altered status and power imbalance which eventuates between an offender and victim upon the commission of an offence.\textsuperscript{54} Recent research confirms that retributivism maintains its position as a popular theory and justification for punishment and is, to an extent, dependent on the social identity of the offender and the victim.\textsuperscript{55}

Between the time of Mosaic Law and the eighteenth century, the major change to punishment theory concerned the locus of the authority to impose punishment. During the Classical period, it was the head of the family; during the Draconic period it was the King; and during the Middle Ages it was the punishing class.\textsuperscript{56} The polity with the authority to punish was always co-extensive with the holder of social authority; no separate justification was necessary.

It is only during the mid-eighteenth century that an intellectual search for a more rational justification for punishment commenced. Cessare Beccaria, in his then controversial book, \textit{On Crimes and Punishment}, prompted the abolition of capital punishment in many countries around the world as a result of his re-imagining of established penal culture.\textsuperscript{57} For example, because Beccaria thought that the laws against suicide were ineffective, he argued that suicide laws should be eliminated, leaving punishment of suicide to God. De-coupling religious dogma from man-made law was not unprecedented. Rather, it echoed a more ancient ideology that was to re-emerge centuries later.\textsuperscript{58} The provenance of this conception of punishment was first recorded as advocated by Plato, who expressed it in his dialogue \textit{Protagoras}:

\begin{quote}
In punishing wrongdoers, no one concentrates on the fact that a man has done wrong in the past, or punishes him on that account, unless taking blind vengeance like a beast. No, punishment is not inflicted by rational man for the sake of the crime that has been committed (after all one cannot undo what is past), but for the sake of the
\end{quote}

\begin{itemize}
\item \textsuperscript{50} Ibid 283.
\item \textsuperscript{52} Materni, above n 34, 288, quoting David Dolinko, ‘Three Mistakes of Retributivism’ (1992) 39 \textit{University of California Los Angeles Law Review} 1623, 1656; See also Kateb, above n 40, 302.
\item \textsuperscript{53} Stearns, above n 41, 221.
\item \textsuperscript{55} Ibid 454. See also Kevin Carlsmith, John Darley and Paul Robinson, ‘Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment’ (2002) 83(2) \textit{Journal of Personality and Social Psychology} 284. It was found that ‘individual sentencing decisions seemed driven exclusively by just deserts concerns.’
\item \textsuperscript{56} Stearns, above n 40, 223.
\item \textsuperscript{57} Ibid 224. See also Bessler, above n 35.
\item \textsuperscript{58} Materni, above n 34, 289. ‘But he who desires to inflict rational punishment does not retaliate for a past wrong which cannot be undone, he has regard to the future…he punishes for the sake of prevention.’ This concept later emerged as the basis of utilitarianism.
\end{itemize}
future, to prevent either the same man or, by the spectacle of his punishment, someone else from doing wrong again. But to hold such a view amounts to holding that virtue can be instilled by education; at all events the punishment is inflicted as a deterrent.  

The renewed criticism that punishment without purpose is liable to turn man into a beast resulted in a shift in the winds from eighteenth century onwards. Substituting vengeance for deterrence was a key theme of penology in the late-eighteenth and early-nineteenth centuries.  

Jeremy Bentham and John Stuart Mill applied the social theory of utilitarianism to legal theory. Utilitarian penal law is framed in terms of the principle objective of deterrence; but it also embraces the secondary ends of disablement, moral reformation, and compensation. In other words, unlike retributivism – which is backward looking – utilitarianism is forward looking; with its predominant goal being deterrence, and its ancillary goals being community protection (generally through incapacitation) and rehabilitation. While retributivism focuses on deliberate infliction of pain on the offender for its own sake, the focus of utilitarian punishment is ‘neither to torment or afflict a sentient being, nor to undo a crime already committed,’ Sir James Fitzjames Stephen, the English jurist, legal scholar and political theorist, perhaps best embodied l’esprit du temps of the late Victorian era; a blend of both retributive and consequentialist (utilitarian) thinking which permeated the criminal law. His writings have been sufficiently broad as to be labelled both retributive and utilitarian. This era gave birth to poor laws and prison reform (the panopticon), but retained the criminalisation of homosexuality and capital punishment. Transportation was justiﬁed not only as an economic and political expedient, but also as a means of reform: the creation of a number of British colonial polities in America, Australia and New Zealand were the result of an experiment in utilitarian penology.  

60 Morissette v United States, 342 US 246, 251 (1952) where the following was stated ‘tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation of public prosecution.’
66 Gross immorality without any evidence of any damage.
67 See Death Penalty Abolition Act 1973 (Cth); Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010 (Cth) which stops any state or territory attempting to reintroduce the death penalty. See also Murder (Abolition of Death Penalty) Act 1965 (UK).
Science entered the fray in the late nineteenth century, when we see the first psychological studies of individual criminals. The main goal of punishment advanced in this period adopted psychological perspectives and embraced the possibility of behavioural change, a clearly utilitarian motivation. It was in the mid twentieth century, in 1938 and 1944, that Skinner and Estes conducted studies on punishment that applied behavioural psychology to controlling conduct. The results showed punishment to be ineffective in eliminating undesirable behaviour in rats.

However, later studies yielded contrary results, showing that punishment could be an effective tool for suppressing behaviour and may even have long-term economic benefits as a result of increased cooperation. However, the translational problem was never adequately addressed: results from behavioural studies on animals did not apply directly to humans, such that the results could only be applied to humans with some circumspection. Further, it is obviously unethical and impractical to conduct such studies directly on humans. Notwithstanding the lack of confirmation as to the true efficacy of punishment from a scientific standpoint, it appears that our ‘willingness to engage in costly punishment may be part of human psychology’ and something from which we derive pleasure. Despite the lack of evidence, punishment continued to be imposed on the assumption that it works. In the 1960s, Herbert Morris expressed a conceptually modern view of punishment, suggesting that it is a fundamental human right, necessary for the respect and maintenance of human dignity, through the imposition of rehabilitation and treatment, as opposed to purely retributivist aims.

Theoretical development continued into the 1970s. In 1976, Von Hirsch advocated a more sophisticated perspective known as ‘just deserts’ theory to justify punishment. Edney explains the basic premise of the theory:

Von Hirsch outlined a theory of punishment that did not concentrate on either the rehabilitation of the offender or the type of punishment that would deter the offender

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69 Ibid 228.
70 Ann Sanson et al, ‘Punishment and Behaviour Change: An Australian Psychology Society Position Paper’ (1996) 31(3) *Australian Psychologist* 157, 158. Sanson et al describe punishment as ‘the response-contingent application of an unpleasant or aversive event in an attempt to suppress, or prevent the recurrence of that response.’
72 Ibid 414.
73 Simon Gächter, Elke Runner and Martin Sefton, ‘The Long-Run Benefits of Punishment’ (2008) 322 *Science* 1510, where it was stated that ‘punishment not only increases cooperation, it also makes groups and individuals better off in the long run because the costs of punishment become negligible and are outweighed by the increased gains from cooperation.’
74 It is clear what a severe punishment is to a rat (large shock c.f. small shock) however, in relation to humans, severity requires a much more subjective analysis: see also Singer, above n 71.
77 Herbert Morris, ‘Persons and Punishment’ (1968) 52(4) *The Monist* 475. See also Materni, above n 34, 274.
or others tempted to break the criminal law. Instead, the focus was on the offence committed by the offender. Punishment under such a model would only be justified by reference to the harm produced by the offender’s conduct in conjunction with her or his level of culpability. The offender’s deserts were the key to determining the level of intervention by the state in the offender’s life through the sanctions of the criminal law. Such an account of punishment was justified independently of the efficacy of punishment in deterring or reforming the offender. Punishment was to be allocated to an individual on the basis of the harm caused by her or his criminal behaviour, coupled with a consideration of her or his individual culpability. The concept of just deserts, in contending that punishment should be calibrated between offence, harm and culpability, is very similar to the concept of proportionality as understood under Australian criminal law.79

As is evident, the confounding aspect of the just deserts theory is that whilst it reflects a retributivist approach towards the imposition of punishment, it is predicated upon a scale of measurement (matching harm with culpability) that is part of the Australian sentencing landscape under the rubric of the principle of proportionality. Whilst there has been strong academic criticism of the theory as a satisfactory justification for punishment overall,80 its utility as a justification seems misplaced in light of the development of the proportionality concept as a mechanism of severity control in such High Court cases as Veen v The Queen,81 Chester v The Queen,82 and Hoare v The Queen.83 Nonetheless, today, just deserts is an attractive theory in an era where legislative and judicial responsiveness to public outrage about increasing crime rates is mooted as an important aspect of victims’ rights and public law-and-order agendas. The risk that the theory presents is that it provides an avenue by which potentially misinformed and emotionally driven opinions84 are injected into the sentencing process, while judges are still asked to sentence in a ‘just, impartial and independent’ manner.85 Of course, in both the Victoria and the Federal jurisdictions, public opinion is already imported into the sentencing process,86 at least in so far as informing offence seriousness,87 moral outrage and notions of dehumanisation.88

80 See, eg, Barbara Hudson, Penal Policy and Social Justice (Macmillan, 1993) 56.
82 (1988) 165 CLR 611.
83 (1989) 167 CLR 348.
86 Punishment expresses moral condemnation and conveys the values people want to see upheld: see Wenzel and Thielmann, above n 54, 453. See also Bagaric, ‘From Arbitrariness to Coherency’, above n 36, 358.
87 Bagaric, ‘From Arbitrariness to Coherency’, above n 38, 358.
88 Bastian, Denson and Haslan, above n 82.
D Competing Theories: Objectives and Justifications

From the survey of the contemporary theories of punishment outlined above, it is possible to elucidate the central objectives and justifications of each theory. This is a necessary anterior step in the process of determining why punishment should be inflicted, and which punishment best serves that purpose.

For retributivists, punishment is justified because an offender who commits a wrongful act morally deserves to suffer a proportionate punishment. The act of punishment itself is intrinsically good — without reference to any other good that might arise.\textsuperscript{89} Whilst retributive theories may not require any further moral justification,\textsuperscript{90} it has been argued that offenders deserve punishment to pay back a debt to victims or society, or simply to provide a response in kind (the biblical lex talionis), or as a form of sublimated vengeance,\textsuperscript{91} or to stop the growth of private vigilantism.\textsuperscript{92} This means that punishment can be inflicted, and the severity determined, without identification of, or regard to, deterrent or rehabilitative effects.

For consequentialists, the justification for punishment is teleological. It is encapsulated in Bentham’s observation: ‘all punishment in itself is evil ... [I]f it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.’\textsuperscript{93} Criminal punishment is only acceptable if it increases future pleasure or decreases future pain. As Haist notes, the application of economic theory to law during the twentieth century created and supported policies revolving around deterrence. He cites Professor Albert Alschuler’s example of federal income tax evasion penalties (citations omitted):

> Even though physically stealing $100,000, for example, from the government would appear to most of us as worse than avoiding paying $100,000 worth of income tax, income tax evasion was punished much more severely than outright theft. The justification was that tax evaders were caught less often than thieves; therefore, harsher penalties were necessary to create a sufficient deterrent effect.\textsuperscript{94}

Thus, consequentialist theory requires demonstration of the pro-social benefit of punishment in the forms of deterrence and rehabilitation to justify sentence severity. Denunciation and incapacitation also play an ancillary role.

\textsuperscript{89} The question about the relationship between deontological and teleological perspectives of morality are relevant. Some theorists believe that retributivism and deontology go hand in hand, in the sense that one requires the other. Yet deontology as such does not require retributivism to be true: see Michael S Moore, *Placing Blame: A Theory of the Criminal Law* (Oxford University Press, 1997).

\textsuperscript{90} The plural is used because there John Cottingham famously distinguished nine ‘varieties of retribution’, arguing that much discussion of retributive justice is confused because people are not clear what they mean: see John Cottingham, ‘Varieties of Retribution’ (1979) 29 *Philosophical Quarterly* 238.


\textsuperscript{93} Bentham, above n 61.

\textsuperscript{94} Haist, above n 39, 798.
By contrast, the just deserts theorist argues that criminal activity is a choice, and justifies punishment as its corollary. As Starkweather explains:

The concept of just deserts seeks to preserve human dignity through punishment. It asserts that a person is a rational individual with the free will to make a moral choice whether or not to engage in conduct known to be prohibited. Retribution under a just deserts principle treats a defendant as a dignified human being by responding to his or her conduct in a way that respects his or her choice to engage in wrongful behavior. This concept differs radically from the utilitarian theories of rehabilitation and deterrence.  

The essential task of punishment in the just deserts theory is to ‘… [r]estore the relationships that have been broken, [so] a defendant must be punished only to the extent necessary to restore the relationships.’ The just deserts theory engages a nuanced objective: it is essentially restorative and directed towards the recalibration of the human relationship between the offender and the victim. The recognition of free will and its sequels are the base justifications for punishment.

E Competing Theories: Challenges

Although the utilitarian theory dominated punishment models for a good part of the eighteenth and nineteenth centuries, it has not remained pre-eminent. There has been what Weisberg calls ‘a robust revival of retributivism’ (including both pure retributivism and just deserts theory) which, he argues, has led to the mass incarcerations in the United States. In Australia, where incarceration rates have also increased in almost all states and territories, there has also followed a steady rejection of the utilitarian model. Ultimately however, both theories appear to have failed to reduce, or even account for, current imprisonment rates. Some academics have suggested that a misguided intellectual attachment to these theories lies at the heart of the problem. As DeGirolami notes:

In the last fifty years, punishment theorists have developed ‘hybrid’ or mixed theories of punishment, which blend strands of retributivist and consequentialist theories in philosophically precise portions. But the emergence of hybrid accounts has in many ways served exactly to highlight and reinforce the orthodox categories within which scholars think about punishment. For in reflecting on new directions for understanding punishment, the methodology of systemization – of carefully distinguishing the reasons that should count from those that should not in constructing an integrated whole – inescapably imprints and reproduces itself. So

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96 Ibid 857.
98 See Australian Bureau of Statistics, ‘Prisoners in Australia’ (ABS Catalogue No 4517.0, 17 December 2015) <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>. The national imprisonment rate increased by 6% since 2014, and is currently 196 prisoners per 100,000 adult population.
powerful is the attachment to system in punishment theory that it is difficult even to imagine what thinking about punishment might be like without it.²⁰

Thus, when we identify sentencing as ‘unprincipled and a jurisprudential wasteland’ in the Totality Article,¹⁰¹ that conclusion follows from the fact that neither theory – nor their cultivars – is universally accepted or applied. Each has been largely ineffective in providing a rational or global justification for the imposition of one form of punishment over another. Despite the ostensible importance of achieving some theoretical or doctrinal consistency to underpin the sentencing process, this has remained elusive: there is little concordance between Australian legislatures and courts as to why punishment is to be inflicted, what the desired outcome of the punishment might be, and how a particular sentence might achieve that outcome. However, even achieving agreement about the importance of this task in sentencing law is itself contentious. Zimring and Hawkins examined the relationship between such theories and imprisonment rates and concluded that ‘there is no necessary concordance between a particular set of jurisprudential principles and the extent of the prison population resulting from the application of those principles.’¹⁰² Contrarily, Weisberg points out that this lack of evidence is not decisive:

But this empirical difficulty hardly exonerates those who place the rarefied jurisprudence of punishment at the center of the academic world of criminal justice at a time when the metastasis of punishment has become a defining feature of their society.¹⁰³

F Identifying the Purpose of Punishment is an Important but Not Essential Step Towards Rationality

The complaint that there is no unifying or overarching rationale to imposing punishment is not simply polemical, but constitutes a serious practical failing in sentencing law. That is because of the potential mutual incompatibility of the objectives. The incompatibility arises because of the tension between the objectives. For example, pursuing (general or specific) deterrence might require a harsher sentence whereas rehabilitation might require a lighter sentence.¹⁰⁴ Denunciation might be best achieved by immediate imprisonment, whereas community protection might be adequately achieved by professional disqualification. Further, if the purpose for which a sentence is imposed cannot be achieved, then the justification for imposing that sentence is – both practically and theoretically – indefensible.

It is beyond the scope of this thesis to finally resolve these difficulties. Deciding which purposes or objectives should be pursued is fundamentally a debate between relativist and normativist ethics.¹⁰⁵ Moreover, whilst it is important to understand the

¹⁰⁰ DeGirolami, above n 65, 701.
¹⁰³ Weisberg, above n 97, 1205.
central reasons for which a sentence is to be imposed, it is not essential. That is perhaps because the two main theories have gestated similar sentencing objectives that can – in pragmatic terms – substitute as the purpose for a particular sentence, and thus obviate any pressing need to identify the true source of, or justification for, a particular objective. In any event, some commentators have suggested that we are looking in the wrong place for the answers when we seek to determine the ideological source of the objectives of punishment. Although dealing with American jurisprudence, the observations of Bruce Western, cited by Weisberg, are apt:

The penal system that Western documents has no rational connection to either retributive (individual desert) theories of punishment or deterrence or other consequentialist rationales. It is a system that, deliberately or not, reinforces the economics and demographics of diminished social status, and does so in reckless disregard of its measurable consequences.

Whilst academics observe the ‘dizzingly complex’ array of punishment theories, and frankly admit that it is difficult to predict in which direction future academic trends may take punishment theory, there remains the more immediate problem of passing sentence.

**G A Practical Compromise: Identifying Common Objectives**

Courts have historically been disinclined to concern themselves with the provenance of the purposes for which an offender is punished. As is evident from the cursory historical review of the theories of punishment above, neither retributivism, nor consequentialism, nor any hybrid of either has found universal application. It is clear that each theory directs its attention to a different outcome or set of outcomes when justifying the imposition of punishment: retributivist theory holds that just deserts is itself a sufficient reason to punish; consequentialist theory requires the identification of some positive outcome to punishment: deterrence, community protection, or rehabilitation.

This duality has been bridged with admirable pragmatism by the courts. They have professed a desire to satisfy some or all of those outcomes simultaneously. For example, in *Re Forbes*, the New South Wales Supreme Court said that while it was important to be merciful when obtaining justice, ‘the exemplary and deterrent effect of punishment should be held steadily in view.’ In the 1900s, we see a further application of mixed sentencing objectives when the court said that ‘in imposing a sentence [it] must give careful consideration to three aspects of a case…the retributive aspect, the reformatory aspect and the deterrent aspect.’ The classic statement of Lawton LJ of the English Court of Appeal in *R v Sargeant* reflects this curial conflation:

106 Arguably, if the legislature performed this task it may well provide a far greater degree of certainty than any other measure that the legislature might undertake in relation to sentencing law because a corollary of articulating the purpose(s) of sentencing would be the marshalling of all the other aspects of the sentencing calculus in line with a unified theory.

107 Weisberg, above n 97, 1207.
108 DeGirolami, above n 65, 707.
109 (1887) 8 LR(NSW) 111.
110 Here we see conflicting goals.
111 *R v Goodrich* (1952) 70 WN (NSW) 42.
[R]etribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have these four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing.\textsuperscript{112} The difficulty with this final statement of the ‘principles’ is of course that retribution is properly characterised as a theory of punishment, whereas deterrence, prevention and rehabilitation represent the consequentialist justification for punishment.\textsuperscript{113} This judicial \textit{faux pas} has not gone unnoticed by academics, who have termed it part of the ‘policy free-for-all’ upon which the English courts embarked in the 1970s.\textsuperscript{114} This observation continues to apply fifty years later half a world a way.

**II Relationship Between Theories of Punishment and Sentencing Objectives**

At least insofar as is evident when considering the Victorian and Federal sentencing legislation, the identified sentencing objectives are reflective of the two main theories of punishment. By distillation of the theories into these objectives, a concrete means by which the theories can be pursued is possible. The approach of sentencing courts provides some doctrinal cohesion between punishment theory and sentencing practice.

<table>
<thead>
<tr>
<th>Statutory objective</th>
<th>How it achieves retribution</th>
<th>How it achieves utilitarianism</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proportionality</td>
<td>Seeks to achieve justice through punishment. This is retributivism.</td>
<td>No identifiable relationship.</td>
</tr>
<tr>
<td>Deterrence</td>
<td>Designed to teach offender and others a lesson, and this justifies the infliction of pain through punishment in the retributivist sense.</td>
<td>Also is a social defence mechanism designed to prevent crime. In this sense the focus is on prevention rather than punishment and this is the utilitarian aspect.</td>
</tr>
<tr>
<td>Rehabilitation</td>
<td>No identifiable relationship.</td>
<td>Seeks to achieve behavioural change (also refer to psychological justifications for punishment)</td>
</tr>
<tr>
<td>Denunciation</td>
<td>The extent of denunciation informed by moral outrage also goes to offence seriousness in the retributivist sense.</td>
<td>Seeks to ‘stamp ignominy on crime’ (Bentham).\textsuperscript{115} This expression of moral outrage is designed to promote respect for the law.</td>
</tr>
</tbody>
</table>

\textsuperscript{112} (1974) 60 Cr App R 74, 77.  
\textsuperscript{113} Even more confusingly, there has also been a move to synthesise these purposes into a single one, ‘the protection of the public’: \textit{R v Radich} [1954] NZLR 86; \textit{R v Cooke} (1955) 72 WN(NSW) 132; \textit{Channon v The Queen} (1978) 33 FLR 433, 437. See also \textit{R v Casey} [1977] Qd R 132; \textit{Veen v The Queen} (1979) 143 CLR 458. \textsuperscript{114} Michael Cavadino and James Dignan, \textit{The Penal System: An Introduction} (Sage, 3\textsuperscript{rd} ed, 2002) 117.  
### Table 1: Comparison showing how the legislative sentencing objectives achieve justifications for punishment pursuant to the theories of retribution and utilitarianism.

<table>
<thead>
<tr>
<th>Community protection</th>
<th>Satisfies the idea of social defence through incapacitation, that is, inflicting punishment by removing the offender from society for a period of time.</th>
<th>This also achieves prevention of future crime which is a utilitarian objective.</th>
</tr>
</thead>
<tbody>
<tr>
<td>A combination of two or more of those purposes.</td>
<td>This shows that the current sentencing system allows for, and may even expect, convergence between the two main theories of punishment, from which the objectives are largely derived.</td>
<td></td>
</tr>
</tbody>
</table>

**I Conclusion**

A sentence is the embodiment and practical application of a punishment theory, which both justifies and dictates the form of a sentence. Despite the unsettled state of the theoretical basis for punishment, and the inconsistent and sometimes conflicting directions in which objectives of punishment might take a sentencing court, the key objectives of punishment in the form of general deterrence, specific deterrence, rehabilitation, denunciation and incapacitation are now firmly entrenched in most common law sentencing jurisdictions. Whether they are properly characterised as the aims of punishment or of sentencing, as objectives or justifications, they represent the current orthodoxy regarding the reasons professed by courts for imposing one type of sentence over another. An important part of this thesis is to test the validity of some of these reasons. As I demonstrate in Chapters VII and VIII, current learning, the empirical evidence and my research casts doubt about the legitimacy of these reasons for imposing ever harsher sentences.
CHAPTER III

SENTENCING CALCULUS IN AUSTRALIA:
THE CONCEPTUAL FRAMEWORK

‘My object all sublime,
I shall achieve in time-
To let the punishment fit the crime,
The punishment fit the crime’

Sir William Schwenk Gilbert, The Mikado, 1885

A Introduction

As set out in Chapter I, the critique of sentencing law upon which we embark in the series of articles spans each aspect of the sentencing arc. In order to locate and examine the utility of those critiques, it is beneficial to survey the conceptual framework in which the sentencing calculus takes place in Australia. The word ‘calculus’ is used in this context to denote the method or system of calculation or reasoning by which a sentence is devised. By way of background, in their seminal text, Fox and Freiberg précis the history of sentencing law in the following terms:

Over the past 200 years, sentencing has evolved from a ritual to a decision-making exercise. When the common law prescribed death as the mandatory punishment for most felonies, the allocutus provided the prisoner with his or her only formal right to address the court and seek mitigation of the penalty through the device of benefit of clergy. The sentencer’s discretion broadened in the nineteenth century as statutes allowing a choice of both type and quantum of penalty replaced capital punishment. The only substantial limit imposed on the exercise of these new powers was that the sentence should not be greater than that prescribed by law. The sentencing discretion was otherwise unfettered. In writing, in 1863, on the capriciousness of the criminal law, Sir James FitzJames Stephen drew attention to the discrepancy that existed between the attention paid to detail during the trial, and the perfunctory manner in which the sentencing function was performed: ‘…without consultation, advice, or guidance of any description whatsoever.’ ‘Yet’, he commented, ‘the sentence is the gist of the proceeding. It is to the trial what the bullet is to the powder.’

The matrix in which sentencing takes place is now much more complex. It is comprised of a number of inter-linked aspects that are considered below. The High Court jurisprudence on sentencing has been claimed to be sufficiently developed that Australia now enjoys ‘…a distinctly Australian approach to the sentencing of offenders…’ which includes ‘…a comprehensive range of authorities concerning basic and fundamental aspects of the sentencing process that apply throughout Australia…’ Those aspects are considered in detail in this chapter.

The high order purpose of the criminal law generally is the reduction of crime. Sentencing law is contributive: having any punishment helps to deter crime. This purpose is consistent with the concept of absolute general deterrence, considered in the General Deterrence Article. However, as Ashworth has pointed out, despite the dispositive function of sentencing law in crime prevention and reduction, its effectiveness in that role is limited:

In cases where [crime] prevention has not worked, the state must be prepared to respond to an offence that has been committed. However, there are well-documented reasons why sentencing cannot and should not be expected to function efficiently as a crime prevention mechanism.

The Australian Law Reform Commission makes a similar observation:

It is the criminal justice system, taken as a whole, with all its components, which deters crime. While punishment is a significant part of the way the criminal justice system deters, it is inaccurate and imprecise to speak of punishment, or any other component of the criminal justice system, as alone deterring crime.

As Daly argues, this dispositive function of sentencing law is itself inherently contradictory: sentencing decisions are guided by values of both proportionality (which restricts the amount of punishment) and crime prevention (which suggests that the greater the punishment, the lower the crime rate). The relative importance of those two values is not settled, and indeed, are often in conflict. Notwithstanding these observations, and although only part of the social response to crime, the primary function of imposing punishment, through the mechanisms established by sentencing laws, must logically be the prevention and reduction of crime.

In Chapter II, I traced the history of the predominant theories of punishment: retributivism and consequentialism. I adumbrated the conflict between the two theories. I also noted there are many and varied hybrid theories which have developed to attempt to capture, explain and justify the diverse objects for which sentencing laws are promulgated across Australian, and other common law, jurisdictions.

As I further pointed out, the theoretical compromise that informs the approach taken by sentencing courts to these two theories is probably unassailable when the task at


119 Ashworth makes the distinction between *processual* decisions (about processing the case from charge to trial) and *dispositive* decisions (about the disposal of a case before and after trial). The ‘well documented reasons’ include the very limited number of cases which ultimately proceed to sentence, meaning that sentencing can only play a minor role in the overall reduction of crime.


122 *Sentencing Act 1991* (Vic) s 1(d)–(iv). Indeed, one of the expressed purposes of the *Sentencing Act 1991* (Vic) is ‘to prevent crime and promote respect for the law.’
hand is to examine the current approach to sentencing white-collar offenders. It is sufficient to note two points: first, that neither the Victorian nor the Federal sentencing landscape can be characterised as a pure model of either retributivism or consequentialism and both theories inform current sentencing practices; second, that any inconsistencies between the two theories may not practically matter in the end. DeGirolami explains why it does not matter (albeit that the comparators are ‘expressivism’ and ‘communicative retribution’)123 in the these terms:

In a significant number of criminal cases, if given a choice between these conceptually distinct – and even conflicting – options, why should one not say, — ‘both’? It seems plausible that legislators who fashion sentencing schemes would want punishments both to express social stigma or condemnation and to communicate moral and political values to the offender. That it is possible logically to distinguish expressivism from communicative retribution does not mean that someone contemplating the justifications of punishment might not sensibly be thinking simultaneously about both sorts of reasons. Indeed, the reasons may be called up in the legislator’s mind together, as a justification with two moving parts, and it is not clear that breaking them apart serves a purpose other than to suggest falsely to the legislator that she must choose for the sake of theoretical order.124

In other words, different and sometimes competing theoretical foundations may not adversely affect, or may even enhance rather than corrupt, the sentencing calculus. Indeed, there is no ‘theoretical order’ to be found in sentencing law because State and Federal sentencing legislation includes values ascribable to both theories. At least one attempt in Queensland to impose some theoretical discipline on sentencing law resulted in strident criticism.125 Potas notes that a clear theoretical framework is desirable to promote consistency in sentencing, but laments that (citations omitted):

Neither the courts, which have embraced the maxim that in sentencing 'the only golden rule is that there is no golden rule' nor leading commentators such as Walker (1980) who have endorsed an eclectic stance, have provided an adequate formula for indicating whether sentences are intended to be primarily utilitarian, and concerned with future crime prevention and community protection, or retributive, where the emphasis is on bringing the offender to account through an appropriate measure of punishment for the particular offence which he or she has committed.126

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124 DeGirolami, above n 65, 710.
125 Mason, above n 99.
However, it is tolerably clear that the reasons for the imposition of punishment in the modern Australian sentencing calculus are both retributivist and consequentialist. Because it is necessary for society and the victim to retaliate, and to facilitate the reformation of the offender and his or her return to civil society.

**D Third Aspect – Sentencing Objectives**

Irrespective of the theoretical foundations set out in Chapter II, identifiable objectives for courts passing sentence can be found in both the State and Federal legislation. As we set out in each of the articles, there is considerable uniformity in the sentencing objectives in each of the nine Australian jurisdictions. The objectives of sentencing provide some (albeit marginal) guidance as to the reasons for which a sentence can be imposed.

In the Federal jurisdiction, whilst there is no express statement of the objectives or purposes of sentencing in the *Crimes Act 1914* (Cth), section 16A includes a list of matters to which the court must have regard in passing sentence: specific and general deterrence, punishment and rehabilitation.127

The Victorian *Sentencing Act 1991* (Vic) (‘Sentencing Act’), expressly states the ‘only purposes’ for which sentences may be imposed are: just punishment, specific deterrence, general deterrence, rehabilitation, denunciation, and protection of the community, or a combination of ‘two or more of those purposes’.128 Nonetheless, there is no legislative guidance in either statute as to how those purposes should be combined or prioritized or what weight should be given to any particular purpose. That selective process occurs through the ‘instinctive synthesis’ of the sentencer, who may have regard to some, and must have regard to other, of the objectives. As the table below reveals, there is a substantial degree of commonality between the identifiable objectives in the two jurisdictions.

<table>
<thead>
<tr>
<th>Objective</th>
<th>Federal <em>Crimes Act 1914</em> (Cth)</th>
<th>Victoria <em>Sentencing Act 1991</em> (Vic)</th>
</tr>
</thead>
</table>
| **Proportionality** | a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence: s 16A(1)  

the need to ensure that the person is adequately punished for the offence: s 16A(2)(k) | to punish the offender to an extent and in a manner which is just in all of the circumstances: s 5(1)(a) |
| **General deterrence** | the deterrent effect that any sentence or order under consideration may have on other persons: s 16A(2)(ja) | to deter … other persons from committing offences of the same or a similar character: s 5(1)(b) |

127 ss 16A(2)(j), (ja), (k), (n).
128 ss 5(1)(a)–(f).
Specific deterrence: the deterrent effect that any sentence or order under consideration may have on the person: s 16A(2)(j) to deter the offender … from committing offences of the same or a similar character: s 5(1)(b)

Rehabilitation: the prospect of rehabilitation of the person: s 16A(2)(n) to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated: s 5(1)(c)

Denunciation: Not included to manifest the denunciation by the court of the type of conduct in which the offender engaged: s 5(1)(d)

Incapacitation: Not included to protect the community from the offender: s 5(1)(e)

| Table 2: Comparison between Federal and Victorian legislative objectives. |

1 Statutory Recognition of the Sentencing Objectives

The statutory inclusion of sentencing objectives is relatively new notwithstanding that they have ostensibly been pursued for centuries.

In Victoria, in the legislation preceding the current Act, from The Criminal Law and Practice Statute 1864 to the Penalties and Sentences Act 1985 (Vic), no mention was made of the objectives of sentencing. Between the 1985 legislation and the commencement of the current Sentencing Act, there was community concern in relation to the sentencing of sexual and violent offenders. This prompted the establishment of the Victorian Sentencing Committee in October 1985 and a review of sentencing practices. The Committee’s report, released in 1988, recommended, amongst other things, the introduction of clear sentencing objectives to provide sentencers with guidance ‘as to the policies underlying the statutory sentencing system.’ According to Douglas, the Committee’s recommendations involved ‘no more than the codification of existing principles.’ The draft Act recognised only five grounds for sentencing: ‘retribution, special and general deterrence, rehabilitation, denunciation, and incapacitation.’

The Federal legislation followed a similar course, although the objectives are not listed explicitly. In its 2006 report, the Australian Law Reform Commission recommended the introduction of a federal sentencing Act with ‘clearly stated objects’, including the ‘promotion of greater consistency in the sentencing of federal

132 Douglas, above n 131, 330.
133 Ibid 328.
offenders’, in order to ‘ensure that federal offenders are treated in a more consistent manner by state and territory courts.’

2 Role of the Sentencing Objectives

The function of the sentencing objectives was explained most clearly by the High Court in *Veen v The Queen [No 2]* where Mason CJ, Brennan, Dawson and Toohey JJ said:

… sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.

To that can be added Gleeson CJ’s observations in *R v Engert* (after discussing *Veen v The Queen [No 2]*):

A moment’s consideration will show that the interplay of the considerations relevant to sentencing may be complex and on occasion even intricate…

It is therefore erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances. In every case, what is called for is the making of a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise.

And finally the observations of McHugh J in *AB v The Queen*:

Many, probably the large bulk of, sentences reflect compromises between conflicting objectives of sentencing. One objective is to impose a sentence that reflects adequate punishment for the culpability of the convicted person, having regard to the community's view concerning the need for retribution, denunciation, deterrence, community protection and sometimes vindication. Another objective is to impose a sentence, with or without conditions, that will further the public interest by encouraging and not discouraging the convicted person to renounce criminal activity and to re-establish himself or herself as a law-abiding citizen. Still another objective is that the sentence should reflect an allowance for those circumstances, personal to the convicted person, which call for mitigation. These objectives and others have to be achieved within a conceptual framework that requires that there should be parity between sentences, that the sentence should be proportional to the circumstances of the crime and that, where more than one sentence is involved, the total sentence should not exceed what is appropriate for the overall criminality of the convicted person.

137 *AB v The Queen* [1999] HCA 46 [14].

The principles of parsimony, totality, consistency and proportionality are each fundamental aspects of the sentencing process. These common law principles circumscribe, and guide, the exercise of the sentencing discretion. They apply when offenders are sentenced to the extent that they are consistent with the provisions of sentencing legislation, such as Part IB of the Crimes Act 1914 (Cth) or section 5 of the Sentencing Act. They each operate in a different way but all are, except for consistency, designed to mitigate the harshness of a punishment.

1 Parsimony

Parsimony requires the imposition of a sentence that is no more severe than is necessary to achieve the objectives of the sentence. In Webb v O’Sullivan, Napier CJ described the principle in the following terms:

Our first concern is the protection of the public, but, subject to that, the court should lean towards mercy. We ought not to award the maximum which the offence will warrant, but rather the minimum which is consistent with a due regard for public interest.138

The Victorian Sentencing Act explicitly enunciates parsimony as a sentencing principle.139 The Federal Crimes Act recognises a limited form of parsimony: eg it provides that the court is not to impose a sentence of imprisonment unless it is satisfied that no other sentence is appropriate in all of the circumstances of the offence.140

2 Totality

The totality principle applies in cases of multiple offences to reduce the total effective sentence that is imposed on offenders. This is normally achieved by either making some or all of the individual sentences concurrent, or by reducing the length of the individual sentences.141 In Mill v The Queen the High Court adopted the expression of the principle from a scholarly text:

The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is ‘just and appropriate.’142

139 Sentencing Act 1991 (Vic) ss 5(3)–(4).
140 Crimes Act 1914 (Cth) s 17A.
3 Consistency

In the context of sentencing, consistency essentially means that similar cases should be treated similarly. Gleeson CJ articulated the principle in *Wong v The Queen*:

All discretionary decision-making carries with it the probability of some degree of inconsistency. But there are limits beyond which such inconsistency itself constitutes a form of injustice. The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in a like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency.143

4 Proportionality

Proportionality requires courts to impose sentences that bear a reasonable, or proportionate, relationship to the criminal conduct in question. Courts are required to impose a sentence on an offender which is of a severity that reflects the objective seriousness of the offence. The objective seriousness of the offence is determined by reference to the maximum statutory penalty for the offence, the degree of harm caused by the offence, and the degree of culpability of the offender.144 It has been argued that proportionality is linked to retributivism,145 and may itself form part of a justification for sentencing.146 However, proportionality has also been relied upon to support utilitarian goals of punishment, such as deterrence. The High Court has repeatedly emphasised that proportionality is a central tenet of sentencing law, which trumps all other principles except by legislative fiat.147 The importance of the principle has been widely accepted. In *R v Scott*, Howie J, Grove and Barr JJ of the New South Wales Court of Appeal agreeing, said that:

There is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed and the circumstances of the crime committed. This principle arose under the common law: *R v Geddes* (1936) SR (NSW) 554 and *R v Dodd* (1991) 57 A Crim R 349. It now finds statutory expression in the acknowledgment in s 3A of the Crimes (Sentencing Procedure) Act that one of the purposes of punishment is ‘to ensure that an offender is adequately punished’.148

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143 *Wong v The Queen* (2001) 207 CLR 584, 591.
148 *R v Scott* [2005] NSWCCA 152 [15].
Fifth Aspect: Discretionary and Mandatory Sentencing Factors

Section 16A(2) of the *Crimes Act 1914* (Cth) sets out a non-exhaustive list of thirteen matters that a court must take into account in sentencing an offender, to the extent that they are relevant and known to the court. That section reads as follows:

(2) In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court:

(a) the nature and circumstances of the offence;

(b) other offences (if any) that are 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;

(ea) if an individual who is a victim of the offence has suffered harm as a result of the offence – any victim impact statement for the victim;

(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;

(fa) the extent to which the person has failed to comply with:

   (i) any order under subsection 23CD(1) of the Federal Court of Australia Act 1976; or

   (ii) any obligation under a law of the Commonwealth; or

   (iii) any obligation under a law of the State or Territory applying under subsection 68(1) of the Judiciary Act 1903;

   about pre-trial disclosure, or ongoing disclosure, in proceedings relating to the offence;

(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;

(ja) the deterrent effect that any sentence or order under consideration may have on other persons;

(k) the need to ensure that the person is adequately punished for the offence;
(m) the character, antecedents, 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.

As is apparent, the list of factors includes matters that are properly considered sentencing objectives as well as identifying a list of matters that are conventionally called aggravating or mitigating factors.

In Victoria, the *Sentencing Act 1991* (Vic) sets out a list of mandatory factors to which the court must have regard; discretionary factors to which the court may have regard; and forbidden factors to which the court must not have regard. The mandatory factors are set out as follows:

(2) In sentencing an offender a court must have regard to—

(a) the maximum penalty prescribed for the offence; and

(ab) the baseline sentence for the offence; and

(b) current sentencing practices; and

(c) the nature and gravity of the offence; and

(d) the offender's culpability and degree of responsibility for the offence; and

(da) the impact of the offence on any victim of the offence; and

(da) the personal circumstances of any victim of the offence; and

(db) any injury, loss or damage resulting directly from the offence; and

(e) whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so; and

(f) the offender's previous character; and

(g) the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances.

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149 *Sentencing Act 1991* (Vic) s 5(2).
In addition to the mandatory factors, the legislation lists certain factors to which the court may have regard (s 5(2A)(a), (ab), (c)) and those to which a court must not have regard (ss 5(2AA), 5(2A) (b), (d), (e), (f)). These latter factors relate to the forfeiture of property, automatic forfeiture of property and pecuniary penalty orders. The categories of discretionary and mandatory sentencing factors, whether mitigating or aggravating, are not immutable. As Bagaric and Edney point out (citations omitted):

…it is important to recognise that for the purpose of sentencing the categories of aggravating – and mitigating – factors are not closed but will continue to evolve as not only new offences emerge but also research into human behaviour may disclose reasons for offending behaviour.150

G Sixth Aspect: Sentencing Method

Along with the high order purpose of sentencing, the theories of punishment, and the sentencing objectives, another key aspect of the sentencing calculus is the way in which the task of sentencing is to be approached in order to impose just punishment. In Australia, judges are enjoined by the High Court to engage in an instinctive synthesis of all the relevant considerations, rather than taking a two-step approach.151

As Gaudron, Gummow and Hayne JJ said in Wong:

Secondly, and no less importantly, the reasons of the Court of Criminal Appeal suggest a mathematical approach to sentencing in which there are to be ‘increment[s]’ to, or decrements from, a predetermined range of sentences. That kind of approach, usually referred to as a ‘two-stage approach’ to sentencing, not only is apt to give rise to error, it is an approach that departs from principle. It should not be adopted.

It departs from principle because it does not take account of the fact that there are many conflicting and contradictory elements which bear upon sentencing an offender. Attributing a particular weight to some factors, while leaving the significance of all other factors substantially unaltered, may be quite wrong. We say ‘may be’ quite wrong because the task of the sentencer is to take account of all of the relevant factors and to arrive at a single result which takes due account of them all. That is what is meant by saying that the task is to arrive at an ‘instinctive synthesis’. This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which, in the case of an offence like the one now under discussion, balances many different and conflicting features.152

In like vein, in Markarian, Gleeson CJ, Gummow, Hayne and Callinan JJ said (citations omitted):

Following the decision of this Court in Wong it cannot now be doubted that sentencing courts may not add and subtract item by item from some apparently subliminally derived figure, passages of time in order to fix the time which an

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152 Wong v The Queen (2001) 207 CLR 584, 611-2.
offender must serve in prison. That is not to say that in a simple case, in which, for example, the circumstances of the crime have to be weighed against one or a small number of other important matters, indulgence in arithmetical deduction by the sentencing judges should be absolutely forbidden. An invitation to a sentencing judge to engage in a process of ‘instinctive synthesis’, as useful as shorthand terminology may on occasions be, is not desirable if no more is said or understood about what that means. The expression ‘instinctive synthesis’ may then be understood to suggest an arcane process into the mysteries of which only judges can be initiated. The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public.\(^{153}\)

This approach requires a consideration of not only the legislative objectives,\(^{154}\) which admittedly remain unprioritised, unproven and conflicting,\(^{155}\) but also the relevant aggravating and mitigating factors, of which there are almost three hundred identifiable possibilities at common law.\(^{156}\) It also requires (or at least permits) reference to sentencing statistics\(^ {157}\) and minimum and standard penalties.\(^ {158}\)

Approval of the instinctive synthesis approach is neither absolute nor universal. In \textit{Makarian}, McHugh J’s reference to the ‘pseudo-science of two-tier sentencing’ was countered by Kirby J’s implied accusation that the instinctive synthesis approach defies the rule of law.\(^ {159}\) The United States adopts a two-tier grid system. Whichever approach better reflects the reasoning that actually occurs in the judicial mind, the instinctive synthesis method prevails in the sentencing calculus in both Victoria and Federally.

\textbf{H Seventh Aspect: Statutory and Curial Guidelines}

The final part of the landscape is relatively new: statutory guidelines in the form of baseline sentencing and curial guidelines in the form of guideline judgments.

In Victoria, baseline sentences are specified prison sentences that the Victorian Parliament intends as the median sentence for seven nominated offences: murder, trafficking in a large commercial quantity of drugs, persistent sexual abuse, two types of incest, sexual penetration of a child and culpable driving. Victorian courts must sentence on a charge of a baseline offence in accordance with that intention if the offence is committed on or after 2 November 2014. Judges are required to sentence in order to achieve that median. However, in relation to that requirement a bench of five of the Victorian Court of Appeal unanimously held in \textit{DPP v Walters}:

\begin{quote}
In the baseline sentencing provisions, Parliament’s stated intention (as applicable to the present case) is that, at some unspecified time in the future, the ‘median sentence’ for the offence of incest will be a sentence of 10 years’ imprisonment. Parliament has thus expressed its intention using the language of statistics. ‘Median’ is a statistical term used to identify the middle number in a series of numbers ...
\end{quote}

\(^{153}\) \textit{Markarian v The Queen} (2005) 228 CLR 357 [39].  
\(^{154}\) See \textit{Sentencing Act 1991} (Vic) s 5; \textit{Crimes Act 1914} (Cth) s 16A.  
\(^{155}\) Bagaric, ‘From Arbitrariness to Coherency’, above n 34.  
\(^{156}\) Ibid.  
\(^{157}\) \textit{Hili v The Queen} (2010) 242 CLR 520.  
\(^{158}\) \textit{Muldrock v The Queen} (2001) 244 CLR 120.  
\(^{159}\) \textit{Markarian v The Queen} (2005) 228 CLR 357 [84] (McHugh J), [132] (Kirby J).
In the present case, the defect in the legislation is incurable. Parliament did not provide any mechanism for the achievement of the intended future median, and the Court has no authority to create one, as the Director of Public Prosecutions (‘the Director’) properly conceded. To do so would be to legislate, not to interpret. Acknowledging the absence of the necessary statutory language, the Director was constrained to rely on the aspirations of the Minister as stated in the second reading speech, but those statements could never have been a substitute for the missing statutory language.160

The baseline sentence guidelines are not being followed at present and are set to be repealed in their current form.161 In any event, as framed, they do not have application to white-collar offences.

The power of the Victorian Court of Appeal to give a guideline judgment is conferred by Part 2AA of the Sentencing Act, which was inserted in 2003. Guideline judgments are common to several other Australian jurisdictions, but there is no Commonwealth equivalent. The former Chief Justice of the New South Wales Supreme Court, James Spigelman, set out their purpose and effect as follows:

Sentencing guidelines as promulgated by the NSW Court of Criminal Appeal are not binding in a formal sense. They are not precedents that must be followed. They represent a relevant indicator for the sentencing judge. They are not intended to be applied to every case as if they were binding rules. The sentencing judge retains his or her discretion both within the guidelines as expressed, but also the discretion to depart from them if the particular circumstances of the case justify such departure.162

In relation to guideline judgments, and the first such judgment in Victoria, Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen, the Court of Appeal said:

The provision of a guideline judgment can promote consistency and public confidence in the sentencing process by articulating elements that must be taken into account in a particular sentencing context, and by giving guidance as to a unified approach. It can also facilitate the development of coherent sentencing practice by way of unified application of principle and, in turn, assist the identification of relevant similarities and differences between cases.163

Hewton considered how these two forms of guidance ‘fit’ with the instinctive synthesis approach. He found that:

Both forms of guideline are very new. It is in New South Wales that the stronger initiatives on guidelines, particularly for robbery and drugs offences, have occurred. A clear tendency to quantify penalties for such offences has emerged in that state in a way inevitably creating tension between the High Court and NSW State authority, as indicated by Wong and Markarian. In Wong the High Court considered a NSW

160 [2015] VSCA 303 [5], [8].
161 Attorney-General’s Department (Vic), ‘Sentencing Reform for State’s Most Serious Crimes’ (Media Release, 10 June 2016). See also: Sentencing Advisory Council, Baseline Sentencing Report, May 2012
163 [2014] VSCA 342 [40]. Boulton v The Queen, for example, discusses the circumstances in which a community corrections order may be appropriately imposed.
State guideline judgment, in the form of a detailed grid of sentencing options, in its application to a drug offence. Markarian was a NSW drugs case which hinged on the application of a State statutory penalty scheme which measured the severity of the offence by the quantity of drugs involved. In both cases the High Court rejected the State guidelines for their lack of flexibility, excessive mathematicisation of penalty, and general unsuitability to provide a satisfactory sentencing outcome.\(^{164}\)

**1 Conclusion**

The sentencing calculus is a highly complex process requiring consideration of many, and sometimes conflicting, factors. Thus Potas notes:

> In order to achieve consistency of approach in sentencing, it is desirable to have a structure or theoretical framework in which that objective can be promoted. However, there are many competing philosophies and many judicial officers from diverse backgrounds, with differing attitudes, and this task of achieving consistency of approach is not a simple one.\(^{165}\)

In practice, sentencing decisions require balancing the crime prevention objects of sentencing with both retributivist and consequentialist theories, as well as the application of the statutory and common law sentencing objectives and principles, with an array of aggravating or mitigating factors, all by way of the highly discretionary instinctive synthesis approach. The statutory and curial guidelines, in their current form, do little to assist in untangling this mass of considerations. Whether this relatively amorphous mass that constitutes the sentencing landscape is capable of yielding a rational sentencing framework will be examined next.

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\(^{165}\) Potas, above n 126, 97.
CHAPTER IV

RATIONALITY IN LAW

‘Reason is the life of the law; nay, the common law itself is nothing else but reason’


A Introduction

It is possible to conceive of the law as comprising four identifiable parts: the law itself; those who write it; those who apply it; and, those to whom it applies. Of those four parts – the law itself, those who write it and those who apply it – each are conventionally assumed to be rational, or to look towards rationality as the aim. However, the rationality of those to whom it applies is neither presumed nor generally relevant.\(^\text{166}\) In order to ensure fairness and even treatment, the law must apply, and be applied, to all persons equally, whether rational or irrational. By that process, the law achieves consistency and validity. However, that exception does not apply to sentencing law.\(^\text{167}\) Sentencing law requires that those to whom it applies are also rational in order to achieve the purposive function of sentencing law (being the First and Second Aspects of Sentencing Law referred to in Chapter III). In other words, the efficacy of a sentence is predicated on the assumption that the punishment will have the effect intended by the sentence on the offender. That assumption is conditioned on a number of premises:

\[
\begin{align*}
(P1) & \quad \text{that the law is rational;} \\
(P2) & \quad \text{that those who write the law and those who apply it act rationally;} \\
(P3) & \quad \text{that those to whom it applies act rationally;} \\
(C) & \quad \text{that predictable consequences will follow from the application of the law because the law is rational and the actors act rationally.}
\end{align*}
\]

Because all assumptions are inherently unreliable (or arbitrary), and therefore logically unsound, it is necessary to examine each premise which is said to support the assumption. If those premises are sound (or non-arbitrary), then the assumption itself is a valid assumption.\(^\text{168}\) However, before embarking on that enquiry, I commence by examining the central concept of rationality.

B What is Rationality?

\(^{166}\) Exceptions apply to physically irrational people – such as mentally ill people.

\(^{167}\) See, eg, \(R v \text{Verdins}\) (2007) 16 VR 269. This case is a good example of mitigating principles required in the event that a person is mentally sound.

\(^{168}\) Peczenik applies this use of arbitrary and non-arbitrary premises to the process of legal reasoning specifically, however it applies with equal validity to assessing legal outcomes, because both reasoning and outcome must be justifiable in order to be called rational: see, eg, Aleksander Peczenik, ‘On the Rational and Moral Basis of Legal Justification’ (1985) 71(2) Archives for Philosophy of Law and Social Philosophy 263; Aleksander Peczenik, ‘Rationality of Legal Justification’ (1982) 68(2) Archives for Philosophy of Law and Social Philosophy 137.
The function of rationalism in Western thought is undoubted. It is rationality which distinguishes humans from animals and is therefore the ‘crucial component of the self-image of the human species...[and] [u]nderstanding [it] brings deeper insight into our nature and into whatever special status we possess.' What constitutes rationality has been the subject of continuous debate, but it is beyond the scope of this thesis to trace the development of those arguments. It is sufficient to note that strict theoretical rationalism says that understanding is – a priori – through the use of logic, and is thus independent of sensory experience, whereas strict theoretical empiricism holds that the source of knowledge is through experience – a posteriori – either through the external senses or through inner sensations. Rationalism is thus defined as a methodology ‘...in which the criterion of the truth is not sensory but intellectual and deductive....’ However, both rationality and empiricism are epistemologically useful – they provide a foundation for the holding of a belief, or its justification, and a method by which such beliefs can be tested. Accordingly, Alberto Ramos has defined rationality as a ‘social construction in which to describe and justify our understanding of the world around us.’

Thus, to be rational, ideas, beliefs or knowledge must withstand logical scrutiny (in the form of deductive or inductive reasoning) and accord with observable data or experimentation (in the form of empirical evidence).

Sociologists and philosophers have proposed a number of taxonomic approaches to the theories of rationality. The most familiar, and perhaps comprehensive, theory is that advanced by Max Weber. Weber identifies four primary types of rationality: practical rationality, theoretical rationality, substantive rationality and formal rationality. He defines practical rationality (zweckrationalität) as ‘man’s capacity for means-end rational action’ through expectation about the behaviour of others and the calculated attainment of ends in accordance with those expectations. Theoretical rationality, according to Weber is the ‘conscious mastery of reality through the construction of increasingly precise abstract concepts rather than through action’, substantive rationality is value-rational action (wertrationalität); and

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172 The theory of justification is a part of an epistemology that seeks to identify the justifications for propositions and beliefs. It identifies a number of categories into which such supporting arguments can be placed. There are a number of popular theories which identify the base from which justification can be properly said to arise, e.g. externalism, foundationalism, internalism, skepticism etc: see, eg, Paul K Moser (ed), *The Oxford Handbooks of Epistemology* (Oxford University Press, 2002); Paul H Robinson and John M Darley, ‘Testing Competing Theories of Justification’ (1998) 76 *North Carolina Law Review* 1095.
176 Ibid 1151-2.
177 Ibid 1152.
178 Ibid 1155.
formal rationality is the ‘structure of domination that acquired specific and delineated boundaries only with industrialization,’ such as in the case of bureaucracy. These typologies are useful insofar as they provide a framework in which to consider the desirability or utility of a specific mode of decision-making. In other words, it can be expected that law and legal decision-making should conform to the norms of one of these categorisations of rationality. Further, Weber uses the term ‘rationalisation’ to describe the social phenomenon of demystification or disenchantment: the narrowing of the religious or spiritual elements of the world, a defining feature of modernity, and an essential step towards a secularised society free from the effects of superstition and mystery. In addition, ‘failing to employ reason implies exercising non-rational processes, including blind faith, wishful thinking, guessing, or careless obedience to some kind of authority.’ Of course value-rational action could still take into account these mystifying factors if they are part of the value system of the actor, but the means-end actor could find no place in a legitimately rationalising process. The form of rationality that most closely approximates to the sentencing discretion is practical rationality, because sentencing is a ‘means-end’ activity. Whether the objective of punishment is retributive (send a message) or consequentialist (create change) or both, the act of punishment in the form of sentencing is identically teleological.

Rationality in sentencing law requires a logical relationship between the means and the ends, viz, the means are only justifiable if they are capable of achieving the ends.

The brief analysis engaged in above suggests rationality transcends subjective factors. However, while reason and logic are necessary elements of rationality, they do not constitute the only elements. Absent from the dictionary definition of rationality are the inevitably human aspects of rationalisation: emotion, morality and biological evolution. Rationality has been described as a ‘moral or prescriptive science and not merely a factual or descriptive one.’ As Paton observes, if we assume ‘that all problems can be solved purely by logical deductions from actual rules in force, we are depriving the law of all power to develop, and the dead hand of the past will crush its growth.’ The human elements of rationality cannot be disregarded since rationality can only be defined by human standards of reason and logic which are inevitably influenced by human factors. By inclusion of these additional elements, the concept of rationality is injected with a set of higher order values which inform the decision-making of most individuals. De Sousa identifies

181 Maria Amoretti and Nicla Vassallo (eds), Reason and Rationality (Ontos, 2013) 9-10.
186 Epstein, above n 182, 14-5.
187 Questioning reason and rationality is a necessary exercise to attain ‘truth, liberty, egalitarianism and emancipation.’ Maria Amoretti and Nicla Vassallo (eds), Reason and Rationality (Ontos, 2013) 15.
a limitation in the universal acceptance of \textit{a priori} arguments, even by a strict rationalist:

\ldots whether I can or cannot accept the substantive conclusions of an \textit{a priori} argument must depend on whether it is less implausible than the rejection of (the premises or of) the argument. And that, in turn, will depend on my circumstances and my history, which will determine what seems obviously true or false to me as I approach the argument.\textsuperscript{188}

Thus, identification of a form of universal reason admitting of only a single conclusion regardless of epistemic background is unlikely to be found. But what may be distilled from this excursus is a conception of the role of reasoning as a negative: that is, the purpose of reason is not to reveal truth, but to expose falsehood, or at least, rational unacceptability.\textsuperscript{189}

The concept of rationality outlined above provides a useful heuristic: rationality does not seek to prove that which must or does work, but rather, it seeks to reveal that which does not work. If evidence demonstrates that a law does not work, or is applied inconsistently\textsuperscript{190} such that the law becomes \textquote{a wilderness of single instances},\textsuperscript{191} it is irrational.

Further, having identified that which does not work, rationality also implies the willingness to recognise error and to correct behaviour to avoid future error. As de Sousa observes:

For when faced with evidence that I would be more likely to reach a better conclusion if I proceeded differently, it would be, not reasonably stupid, but irrationally silly not to adopt the improved strategy.\textsuperscript{192}

The application of that observation to legal knowledge is nonetheless subject to some limitation, because corrective responsiveness is more problematic in law than in other areas of knowledge:

[a] scientist is free to modify any theories which he finds inaccurate – his loyalty is to scientific truth and not to tradition. He is not bound to worship the golden idols of the past if they have feet of clay, but while a judge may not revere he is bound to follow such precedents as are binding upon him. The common law doctrine of binding precedent has prevented final courts from engaging in tentative experiments and from correcting the mistakes of the past.\textsuperscript{193}

\textsuperscript{188} Ronald de Sousa, ‘A Profession of Stupidity’ in Berit Brogaard and Barry Smith (eds), \textit{Rationality and Irrationality} (OBV and HPT Publishers, 2001) 77, 91.
\textsuperscript{189} Ibid 92.
\textsuperscript{190} Bibi Sangha and Robert Moles, \textquote{MacCormick’s Theory of Law, Miscarriages of Justice and the Statutory Basis for Appeals in Australian Criminal Cases} (2014) 37(1) \textit{University of New South Wales Law Journal} 243, 244. See also Herbert Hovenkamp, \textquote{Rationality in Law & Economics} (1992) 60(2) \textit{George Washington Law Review} 293, 295 regarding the same standard of rationality in economics.
\textsuperscript{192} De Sousa, above n 188, 91.
\textsuperscript{193} Paton, above n 185, 153.
Even accepting that limitation, making or applying laws which are known not to work would be illogical, as there can only be one logic for any given law, and applying a law known to be contrary to that logic would be, according to Frege, a ‘type of madness.’

In the face of demonstrable failure or error, a rational system of law must be subject to correction – whether self-correction (by judges) or correction by external actors (by law-makers).

Much of the philosophical discussion about the rationality of the law focuses on those who apply it, predominantly, magistrates and judges. The judicial decision process has been described as a social event, one involving ‘psychology, economics, and political theory, in addition to law.’ Daniel Epstein accords rationality of the law with its ability to achieve logical and social legitimacy. Epstein suggests that striving for legitimacy of judicial reasoning and analysis as opposed to rationality of the black-letter rules eliminates the biases created by emotion rather than reason, and this in itself rationalises the law. Epstein endorses a functionalist approach to rationalism whereby the focus is on empirical validity of the decision-making process. Such an approach, according to Epstein, would yield ‘better, more accurate, and less arbitrary’ decisions, making the process more legitimate and rational. Although Epstein acknowledges that law is not a science, he recognises that the testing of theories ‘yields insight into the practice of jurisprudence.’

In the end, the objectives that the law (including the law of sentencing) seeks to pursue are themselves theories, generally derived from the common law and generally untested. However, the testing process begins when judges apply the law to various factual scenarios and in this way society, emotion, morality, and reality enter into the decision making process. It is only then that we can determine the rationality and legitimacy of the law. This explains why the law itself ‘cannot exist without some theory of human rationality.’

Judges should perform their sentencing function in a way that demonstrates internal consistency (as between judges) and yields mostly predictable outcomes. This can be empirically tested.

Even if a rational law is applied rationally by judges, an enquiry into the rationality of the result of such a law is incomplete without consideration of the final actor: the potential or actual offender. Broadly stated, the question is whether those to whom the law applies act rationally. Both the promulgation of a law by parliament and the exercise of the sentencing discretion by a judge presume that potential and actual offenders engage in a set of identifiable, and pre-determined logical steps before considering or actually committing an offence. In the General Deterrence Article we explicitly identified the series of premises underpinning sentencing law and that are,

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195 Epstein, above n 182, 2.
196 Ibid.
197 Ibid 25.
198 Ibid.
199 Ibid 38.
200 Hovenkamp, above n 190, 293.
so the theories assume, prefatory to offending. In that article, we observe that the empirical evidence contradicts that assumption. The data should demonstrate that harsher penalties lead to less crime: however, the data does not accord with that assertion. According to Nicholas Rescher:

The rationality of our actions hinges critically both on the appropriateness of our ends and on the suitability of the means by which we pursue their cultivation. Both of these components… are alike essential to full-fledged rationality.

Rescher bases this idea on human diversity – that as humans we have multiple valid needs and that we act not only according to reason but also pursuant to ‘anxiety, cupidity, habit and impulse.’ According to this theory the evaluation of these needs is ‘at the very heart and core of rationality.’ If these needs are evaluated as inappropriate, all rationality would cease. This rests on the notion of cost-benefit analysis derived from economic rationality, whereby a person weighs up the costs and benefits associated with a particular end in order to determine its value and consequently the rationality in attempting to achieve that end.

The unspoken theory upon which sentencing law relies, and from which it claims legitimacy and efficacy, is the rational choice theory. Whilst the theory was first developed by neo-classical economists to explain microeconomic theory, its application to scholarly disciplines broadened beyond economics after the 1900s. Siegel explains the theory in criminological terms, developed in response to the perceived failure of rehabilitative techniques and the increase in the officially recorded crime rates during the 1970s and 1980s, as follows:

According to this view, law-violating behavior should be viewed as an event that occurs when an offender decides to risk violating the law after considering his or her own personal situation (need for money, personal values, learning experiences) and situational factors (how well a target is protected, how affluent the neighborhood is, how efficient the local police happen to be). Before choosing to commit a crime, the reasoning criminal evaluates the risk of apprehension, the seriousness of the expected punishment, the value of the criminal enterprise, and his or her immediate need for criminal gain.

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202 Nicholas Rescher, Reason and Reality: Realism and Idealism in Pragmatic Perspective (Rowman and Littlefield, 2005) 156. See also Amoretti and Vassallo, above n 181, 13 citing Max Weber, The Methodology of the Social Sciences (Free Press, 1949) regarding axiological rationality where, if a creature’s ends are inappropriate, it would be difficult to consider such a creature a fully rational one.
203 Rescher, above n 202.
204 Ibid 157.
The concept informed criminological theories of punishment for about twenty years. But as Leclerc and Wortley observe, it was ‘…one of the most influential and criticised criminological models to emerge in the latter quarter of the twentieth century….’ Economists comprised the earliest vanguard of critics. Levin and Milgrom identify two basic flaws with the theory: real-world choices often appear to be highly situational or context-dependent, and in reality, many choices are not considered. This criticism required either further refinement of the theory or development of a new theory which took into account the vicissitudes and vagaries of human behaviour. Blending behavioural science (a discipline within psychology) with economics promised to provide just such a theory: behavioural economics. The central tent of behavioural economics is that cognitive biases often prevent people from making rational decisions, despite their best efforts. This prescript has been adapted to the criminal actor construct. For example, Jolls, Sunstein and Thaler in A Behavioural Approach to Law and Economics, quote from a study specifically considering the effect of increased sentence lengths on the minds of offenders:

Another interesting piece of empirical evidence concerns offenders’ views of sentences of different lengths. One study found that they view a five-year term of imprisonment as, on average, only twice as bad as a one-year term; the five-year term had a perceived severity of 200, compared to 100 for the one-year term. This alone is also consistent with a high discount rate—a rate of roughly 0.5. But with that discount rate, the difference between a five- and ten-year term should be quite small (approximately 6 on the severity measure); in fact, the difference was 300. Thus, no overtly rational overlay could be identified for the dissonant perceptions of severity by offenders. The constellation of factors which might lead potential or actual offenders to view a five year sentence as only twice as bad as a one year sentence (rather than five times as bad) are not easily identifiable and certainly not easily factored into sentencing law generally or the sentencing calculus specifically. But Korobkin and Uren conclude that this does not deny that actual or potential offenders are still acting rationally:

Our contention that traditional conceptions of rational choice theory are flawed in important ways does not suggest that we believe people are ‘irrational’. Most of the observed deviations from behavior predicted by rational choice theory are quite sensible and understandable, and many seem quite rational in a ‘global’ sense,

208 Derek B Cornish and Ronald V Clarke (eds), The Reasoning Criminal: Rational Choice Perspectives on Offending (Springer-Verlag, 1986).
211 An intermediate step was to attempt to reconcile rational choice theory (acting to optimize outcomes) with hermeneutics (attempt to understand the purpose of the act in terms of the internal perceptions and beliefs of the person who performed it): see Roher Koppl and Douglas Glen Whitman, Rational-Choice Hermeneutics (2004) 55(3) Journal of Economic Behavior and Organization 194.
although they result in behavior that violates the predictions of rational choice theory on the more ‘local’ level on which legal scholarship generally operates.\textsuperscript{214}

The point is that acting rationally is not necessarily coextensive with acting in a way that optimizes well-being, and yet such decision-making might still be termed rational. That is because behavioral science reveals that choices are made in the context of ‘…three important ‘bounds’ on human behavior, bounds that draw into question the central ideas of utility maximization, stable preferences, rational expectations, and optimal processing of information.’\textsuperscript{215} The conclusions which we reach regarding specific deterrence and rehabilitation in the \textit{Specific Deterrence and Rehabilitation Article} are explained by this synthetic approach to law and behavioural science.

\textit{The drivers of, and motivations for, human behaviour are so diverse that the rational choice model does not sufficiently accommodate them. Therefore, without empirical validation, the rational choice model is not a good predictor of behaviour and is an unreliable heuristic for determining the way in which potential or actual offenders will respond to punishment. Combining behavioural science and law provides a more robust platform for policy change.}

\textbf{C Conclusion}

Rationality, in all its forms, is integral to a system of law that is functional and achieves just outcomes. As such, it must have both rational ends and rational means of achieving those ends if it is to be effective. This can be tested in an empirical manner to assess the rationality of existing law so that appropriate reform can be enacted. The law in this area has not been sufficiently responsive to the empirical and theoretical repudiation of rational choice theory. It is possible to identify the failure mode of the current law by reference to some essential integers of rationality. Those essential integers are:

(a) that the law is capable of clear and consistent application;

(b) the outcomes of individual cases are relatively predictable;

(c) the law is designed to accord with known human behaviour;

(d) the law is responsive to change when obviously required.

In the next two chapters, I consider these rational prescripts and how general sentencing law and white-collar offending meet or fail to meet them in the context of the five articles.


\textsuperscript{215} Jolls, Sunstein and Thaler, above n 213, 1476.
CHAPTER V

GENERAL PROBLEMS IN SENTENCING

‘One is absolutely sickened, not by the crimes that the wicked have committed, but by the punishments that the good have inflicted; and a community is infinitely more brutalised by the habitual employment of punishment than it is by the occasional occurrence of crime.’

Oscar Wilde, The Soul of Man Under Socialism in Fortnightly Review, 1891

A Introduction

As is evident throughout the articles, there are two primary problems that are endemic to sentencing all types of offenders under the current sentencing regime in Australia. Firstly, the instinctive synthesis approach to sentencing is opaque and therefore susceptible to inconsistency and, in turn, unfairness. Secondly, some of the objectives of sentencing such as incapacitation, deterrence and rehabilitation cannot reliably be achieved, and therefore should not be consistently employed to justify the imposition of a sentence. In this chapter, I consider the empirical and theoretical flaws that give rise to those problems, and provide an explanation that justifies reforming the sentencing model for all offenders.

B Instinctive Synthesis: The Risk of Inconsistency

As I outline in Chapter III, unlike the two-step approach adopted by the United States judiciary, Australian courts have steadfastly endorsed an instinctive synthesis approach of sentencing. This approach entails the judge instinctively reaching a determination on how a combination of variables and circumstances should impact a sentence. Thus, instinctive synthesis ostensibly allows for the requisite subjectivity of criminal cases to be appropriately considered to ensure ‘individualised justice.’

The most significant criticism associated with this approach is that it has become used as a justification for inconsistent sentencing outcomes and application of principles. This criticism has been judicially acknowledged but then defended: ‘instinctive synthesis produces outcomes upon which reasonable minds will differ’. The courts acknowledge the importance of consistency to a rational and fair system of law, yet they adhere to instinctive synthesis model, which is

219 Elias v The Queen (2013) 248 CLR 483, 494-5 [27].
220 Bagaric, ‘From Vagueness to Arbitrariness’, above n 215, 82.
221 Hudson v The Queen (2010) 205 A Crim R 199, 206.
222 Lowe v The Queen (1984) 154 CLR 606, 610-11. See also Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen (2014) 46 VR 308, 318 [34].
inherently unstable. Not only can sentence outcomes become inconsistent, it is in principle difficult to imagine how a uniform application of sentencing principles could be achieved in this model. The reason is the inevitable interjection of the personal biases, prejudices, journeys, and interpretations of different judges – an unavoidable fact of human nature. Given that instinctive synthesis relies on an undisclosed and subjective application of generalised principles, the weight that a sentencing judge attributes to a particular sentencing factor ‘is almost always untestable.’ In Markarian, Kirby J opined that ‘the thought that there descends upon a judicial officer, following appointment, a mystical ‘instinct’ or ‘intuition’ that ensures that he or she will get the sentence right ‘instinctively’’ was unrealistic. While instinctive synthesis is lauded as an ‘exercise in which all relevant considerations are simultaneously unified, balanced, and weighed by the sentencing judge’ it remains open to doubt as to whether it is anything more than a ‘gut feel.’ Justice Hulme has described the instinctive synthesis approach as akin to ‘plucking figures from the air.’ This opacity is often highlighted during appellate review of a sentence. In R v Demaria the Victorian Court of Appeal said:

Whether or not a sentence is manifestly excessive is often said as not admitting of much argument. The question raised is whether the sentence is outside the range of sentences available to his Honour in the exercise of sound discretionary judgement. Once the relevant circumstances are ascertained, the sentence appears plainly excessive or it does not.

Of course, what ‘appears plainly excessive’ to a court of appeal presumably would not be so readily apparent to a judge at first instance. The High Court has rejected these criticisms. In Hili, the Court said consistency in the sentencing realm is the uniform application of proper sentencing considerations, rather than numerical equivalence in the quantum and type of sentence. As the instinctive synthesis model is so deeply engrained in the Australian sentencing landscape, and has been endorsed repeatedly by the High Court, I have not proposed a move to two-step sentencing. However, the importance of the other reform proposals is magnified by the retention of this sentencing method. Professor Bagaric has observed that: ‘the instinctive synthesis approach undermines the need for jurisprudential rigour in the development and application of the law.’

224 Bagaric, ‘From Vagueness to Arbitrariness’, above n 218, 88.
225 Ibid 105.
226 Ibid 110. Bagaric thinks implicit bias may be reduced if a two-step process is adopted.
227 DPP (Vic) v Terrick (2009) 24 VR 457, 459-60 [5].
228 Markarian v R [2005] HCA 25, 51 [130].
231 [2008] VSCA 105 [18].
233 Bagaric, ‘From Vagueness to Arbitrariness’, above n 218, 93.
It is unjustifiable to increase the severity of a punishment if the purpose is to achieve an outcome that cannot demonstrably be achieved.\(^{234}\) Of course, in theoretical terms, if the purpose of increasing the severity of punishment is simply for the sake of punishment itself, this problem does not arise. The General Deterrence Article and the Specific Deterrence and Rehabilitation Article consider this problem at length. I consider these sentencing objectives further below.

In penological terms, deterrence is divided into two broad types – general and specific deterrence – the former aims to deter the commission of crimes by quiescent offenders, and the latter aims to deter the commission of further crimes by the subject offender. General deterrence is further divided into two sub-types: absolute general deterrence, being the deterrent effect of a criminal sanction in the context of a criminal justice system including policing and sanctions; and marginal general deterrence, being the effect of changes to the law such as increases in penalty (severity effects) or, less often, the risk of detection (certainty effects).\(^{235}\) Deterrence, both general and specific, is a classically utilitarian sentencing objective,\(^{236}\) often used to justify incapacitation and stricter punishment policies.\(^{237}\) However, the concept relies heavily on two assumptions: firstly, that people are in fact ‘deterrable’ and secondly, that potential offenders ‘know the certainty and severity of punishment’\(^{238}\) and weigh up the risk of detection and punishment against the possible proceeds of their crimes according to rational choice theory.\(^{239}\) The validity of these assumptions has been the subject of much research and discussion, primarily assessed against re-imprisonment statistics.

According to a 2010 ABS report on prisoner statistics, 56 per cent of the prison population in 2009 had been in prison before. Furthermore, two in five people in the 1994–1997 cohort tested in the research had been re-imprisoned within 10 years of their release.\(^{240}\) The ABS report linked re-imprisonment with youth, Aboriginal or Torres Strait Islander descent, and being male.\(^{241}\) The latest 2016 ABS report recorded that at least half the prisoners in all states and territories, except for South

\(^{234}\) This is the basis upon which a sentence is to be imposed under Victorian and Federal legislation. Whether this unjustifiability is the result of deontological, ethical, or moral grounds is debatable. Rousseau argues that because this is a rational requirement, it is an essential part of acting humanely: ‘Then only, when the voice of duty takes the place of physical impulses and right of appetite, does man, who so far had considered only himself, find that he is forced to act on different principles, and to consult his reason before listening to his inclinations.’ See Jean Jacques Rousseau *The Social Contract or Principles of Political Right* (E.P. Dutton & Co, 1913).


\(^{237}\) Bagaric, ‘From Arbitrariness to Coherency’, above n 36, 374-5.


Australia, were recorded as having had prior adult imprisonment under sentence. In Australia, 44.3 per cent of prisoners released during 2012–13 returned to prison within two years. Over the same period, 51.1 per cent of prisoners returned to corrective services (including prison sentences and community orders). In Victoria, the rate of return to prison (44.1%) was comparable with the Australian average (44.3%). The Northern Territory had the highest rate of people returning to prison at 57.5 per cent. In terms of global trends, Seena Fazel and Achim Wolf from the University of Oxford attempted to conduct a systematic review of criminal recidivism rates worldwide; however they concluded that the available recidivism data is currently not valid for the purposes of international comparisons and recommended better reporting practices.

In relation to overall imprisonment rates, the 2016 ABS report found that imprisonment rates had reached their highest since 2005 in: Queensland (198 prisoners per 100,000 adult population); South Australia (204 prisoners per 100,000 adult population); Western Australia (278 prisoners per 100,000 adult population); the Northern Territory (885 prisoners per 100,000 adult population); and the Australian Capital Territory (131 prisoners per 100,000 adult population).

These metrics suggest that neither specific deterrence (evidenced by the high reimprisonment rates) nor marginal general deterrence (evidenced by the increasing overall imprisonment rates) are achievable sentencing objectives: a conclusion that was echoed by the Victorian Sentencing Advisory Council (‘VSAC’) in 2013. Some empirical support for these conclusions can be found in the academic literature. In a 2011 study, Cullen et al found that, along with there being ‘little evidence that prisons reduce recidivism,’ there was also ‘some evidence to suggest that [prisons] have a criminogenic effect …[by influencing] inmates’ attitudes toward crime and violence, peer networks, ties to the conventional order, and identity,’ and therefore a continued adherence to imprisonment as a deterrence tool is not only costly but also ultimately makes society less safe. In addition, the authors observed that imposing a custodial versus a non-custodial punishment had no discernible impact on recidivism rates. Cullen et al analogize imprisonment with hospitalization – imprisonment must be shown to make offenders ‘better’ or else it would be futile to imprison them, in the same way that it would be futile to send sick people to hospitals if they could otherwise be treated and made better in the community.

The VSAC agreed with these findings, concluding that the empirical evidence showed that the ‘threat of imprisonment [generated] a small general deterrent effect…[and that] increases in the severity of penalties, such as increasing the length of terms of imprisonment, do not produce a corresponding increase in

242 Australian Bureau of Statistics, Prisoners in Australia, above n 98.
244 The authors aim to publish the first report in 2018; Seena Fazel and Achim Wolf, A Systematic Review of Criminal Recidivism Rates Worldwide: Current Difficulties and Recommendations for Best Practice (2015) 10(6) Public Library of Science One 1 <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0130390>.
245 VSAC, ‘Reoffending’, above n 223.
246 Cullen, Jonson and Nagin, above n 239, 53S.
247 Ibid 50S.
248 Ibid 50S, 53S.
As VSAC noted, if deterrence were successful, it should prevent the commission of crimes. However, from the discussion above, it appears that the evidence against deterrence is overwhelming, indicating that the assumptions on which this sentencing objective depends are incorrect.

Accordingly, as we argue in the General Deterrence Article, the emphasis on deterrence by the legislature, and in judicial sentencing, is misconceived and the appeals to marginal general deterrence as a justification for increasing sentence length are unsustainable.

D Ineffectiveness of Imprisonment

In an article that I co-authored, but which is not part of this thesis, I considered the strong appetite expressed by legislatures for imprisonment as a form of punishment. As a cost effective means of community protection, and as a path to offender reform, the data suggest that it is a flawed mechanism.

Imprisonment is the harshest form of incapacitation and involves rendering an offender incapable of committing further offences through geographical and physical restriction. It revolves around the ‘segregation of criminals from the rest of the society.’ Imprisonment is employed where deterrence fails, as a mechanism to facilitate community protection. This method of apparent societal protection is only effective where it can be established, with some degree of certainty, that the subject offender would commit further crimes if he or she were not otherwise physically restrained, viz, if not imprisoned. Accordingly, imprisonment relies on a prediction of dangerousness. However, it has been noted that ‘dangerousness’ is highly subjective and that it is more likely that criminal tendencies fluctuate over time such that ‘even calm and peaceful people may, even if rarely, lapse into committing crimes.’

Notwithstanding the consensus that there can be no accurate method to determine the dangerousness of a human being, it is commonly held that first time offenders, remorseful offenders and provoked offenders are less dangerous than repeat, 249

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249 Ritchie, above n 236, 2.
250 Ibid 11.
251 Note there is some evidence to suggest that specific deterrence may be worthwhile in relation to drunk driving offenders: see, eg, Michael Weinrath and John Gartrell, ‘Specific Deterrence and Sentence Length’ (2001) 17(2) Journal of Contemporary Criminal Justice 105.
252 Crimes Act 1914 (Cth) s 16A(2)(j), the deterrent effect that any sentence or order under consideration may have on the person; s 16A(2)(ja), the deterrent effect that any sentence or order under consideration may have on other persons; Sentencing Act 1991 (Vic) s 5(1)(b): to deter the offender or other persons from committing offences of the same or a similar character.
254 Mungan, above n 238, 166.
256 Mungan, above n 238, 162-3.
unremorseful and unprovoked offenders; thus justifying the mitigatory nature of
good character, remorse and provocation respectively.257

The efficacy of imprisonment can only be assessed with reference to reduced
recidivism. Although it would seem that imprisonment could be said to be effective
if it results in fewer offences being committed by the offender while they are
incapacitated compared to if they were in the community, Cullen et al argue that ‘a
more balanced question is whether more crime is saved through incapacitation versus
placing offenders in high-quality community treatment programs.’258 Overall, this
proposition is sound, because comparing the number of crimes an offender commits
in the community during their period of incarceration unrealistically assumes that the
offender has not been sanctioned in another way.

Imprisonment has also been justified from an economic perspective: ‘an offender
ought to be imprisoned if and only if his potential to cause harm, per unit of time
free, exceeds the cost, per unit of time, of imprisonment.’259 The relevance of this
economic analysis is crucial because, as set out above, imprisonment rates in
Australia have increased in recent years.260 In particular, the number of prisoners in
adult corrective services custody increased by 8% from 36,134 prisoners at 30 June
2015 to 38,845 at 30 June 2016. That increase results in significant costs: between
2013 and 2014, the cost of keeping a prisoner in prison was assessed at $269.56 per
day or $98,389.40 per year. By contrast, not imprisoning offenders results in
significant savings: the cost of keeping an offender in the community (community
corrections) was $26.97 per day or $9,844.05 per year.261 As set out above, the 2010
and 2016 ABS reports tend to suggest that imprisonment has a recidivistic effect on
almost half of all prisoners.262 Thus, if imprisonment results in increased recidivism
(or does not deter recidivism), then this must be factored into the cost of harm/time
in prison calculation. There is some contrary data nonetheless. In the United States,
an increased use of imprisonment has coincided with a reduction in violent and
property crimes.263 However, it is still essential to assess whether the usually minor
reductions in crime rates attributable to imprisonment are in fact cost effective.264

A further layer of complexity to the justifiability of imprisonment is whether the
benefit it yields – community protection and potentially lower rates of crime –

257 Ibid 167-8. See also Julian V. Roberts, Mitigation and Aggravation at Sentencing (Cambridge
University Press, 2011) 16, 57, 112-3; Arie Freiberg and Felicity Stewart, Provocation in Sentencing
(Sentencing Advisory Council, 2nd ed, 2009).
258 Cullen, Jonson and Nagin, above n 235, 51S.
259 Mungan, above n 238, 178 citing Steven Shavell,
260 See Australian Bureau of Statistics, ‘Prisoners in Australia’, above n 98; Australian Bureau of
261 Department of Justice and Regulation, State Government of Victoria, Corrections Statistics: Quick
+quick+reference>.
263 See Janet L Lauritsen and Maribeth L Rezey, US Department of Justice, Measuring the Prevalence
of Crime with the National Crime Victimization Survey (2013) 1; Don Weatherburn, Jiuzhao Hua and
Steve Moffatt, ‘How Much Crime Does Prison Stop? The Incapacitation Effect of Prison on Burglary’
264 Weatherburn, Hua and Moffatt, above n 263, 9.
outweigh the burden on offenders. Although the greatest burden which prison imposes on offenders is a deprivation of liberty, it also deprives offenders of goods and services, heterosexual relationships, security, autonomy and, to some extent, average life expectancy.\textsuperscript{265} The circumstances that justify this form of punishment have not been adequately examined or explained, and yet, in many if not most cases, imprisonment is said to be the only sentencing option for many white-collar crimes, such as serious tax fraud, in the absence of powerful mitigating circumstances.\textsuperscript{266}

Finally, focusing on incapacitation as a form of recidivism control or community protection might obscure consideration of the causes which potentially underlie the crime rates. In 2006, Bruce Western observed that a lack of education increased the likelihood of offending, regardless of race.\textsuperscript{267} Therefore it is likely that shifting the focus to addressing educational and financial inequality\textsuperscript{268} would be a more worthwhile endeavour than pursuing incapacitation.

### E Rehabilitation: No Clear Evidence Supporting its Application

As discussed in the Specific Deterrence and Rehabilitation Article, although there is some evidence that rehabilitation may work, even in a custodial setting, ‘the current state of knowledge about the capacity to reform offenders is so rudimentary that it does not strongly support any change in the law or policy changes.’\textsuperscript{269} Sentences are sometimes mitigated for the purpose of attitudinal reformation of an offender.\textsuperscript{270} Mungan notes that there is a ‘belief that criminals’ attitudes are hard to change through institutions.’\textsuperscript{271} This scepticism is not new and was expressed by Robert Martinson in his 1974 report,\textsuperscript{272} which later became referred to as ‘Nothing Works!’\textsuperscript{273} The courts in Australia generally view rehabilitation to be more important than general deterrence in relation to youthful offenders in light of its potential to benefit both the offender and the community,\textsuperscript{274} but a secondary consideration for adult offenders. On the whole, there is consensus that Western criminal justice systems have become heavily geared towards punitive rather than rehabilitative ideals.\textsuperscript{275} According to a study in prison programs in the United States, ‘rehabilitation has increasingly become equated with re-entry-related life skills programs’ as opposed to academic programs.\textsuperscript{276} However, Cullen and Gendreau are unconvinced by this wholesale rejection of the effectiveness of rehabilitation: ‘the

\textsuperscript{267} Bruce Western, \textit{Punishment and Inequality in America} (Russell Sage, 2006) 73.
\textsuperscript{268} Ibid 67.
\textsuperscript{269} Bagaric and Alexander, above n 8, 161.
\textsuperscript{270} Ibid 160.
\textsuperscript{271} Mungan, above n 238, 176, 183.
\textsuperscript{276} Ibid 33.
doctrine of nothing works is best seen as a socially constructed reality [rather than] an established scientific truth. There is some evidence in support of restorative justice programs for non-violent offenders that involve victim participation. Doubt still remains about the capability of rehabilitative programs to reduce recidivism because these programs are generally based on deterrence, incapacitation and control. However, there has been more promising evidence relating to the efficacy of rehabilitation where it is based on education.

Thus, although rehabilitation is conventionally called in aid of an offender to mitigate or reduce the severity of a sentence, it is equally unjustifiable if there is no empirical evidence to support that approach. As we identify in the Specific Deterrence and Rehabilitation Article, there is some evidence that imprisonment may provide a means of effective reform for some offenders in some circumstances. However, the evidence is so scant that pursuing this objective is unjustifiable until clear data can provide guidance as to the effect of all forms of sanction, including imprisonment, on the general offender population.

F Conclusion

These factors – the opaque instinctive synthesis methodology and the unachievable objectives of sentencing – represent fundamental problems with the approach to sentencing in Australia. It is essential to revisit the rationality of old ideas because ‘virtually every moral [or political] belief becomes false and an incitement to injustice the moment it becomes unquestioned or unquestionable.’ Whilst the instinctive synthesis model is unlikely to be superseded by any better approach to sentencing in the foreseeable future, the objectives which are pursued within that methodology should at least be re-cast in light of the data. Law reform should be enacted to ‘[cut] out the inconvenient relics of the past ... [which] are now for the benefit of none.’ Whilst these general problems with sentencing law apply to all offenders, in the next chapter I turn to consider the specific problems that confront courts when sentencing white-collar offenders.

278 However victim involvement is observed as controversial: see D A Andrew and James Bonta, The Psychology of Criminal Conduct (Routledge, 2010) 453.
282 Admittedly, two-tier sentencing may not be the better model: see, eg, United States v Adelson, 441 F. Supp. 2d 506 (S.D.N.Y. 2006), [511]-[515] Judge Rakoff was required to sentence an offender who filed false reports after discovering fraud committed by others in the company. The judge arrived at a sentence according to the guidelines under the two-step process. However, he refused to apply the sentence. In his sentencing memorandum, he described the Guidelines’ recommendation as ‘barbaric[,]’ and ‘patently absurd on [its] face.’
283 Paton, above n 185, 196.
CHAPTER VI
WHITE-COLLAR CRIME: CONCEPTUAL DEVELOPMENT AND SPECIFIC PROBLEMS

‘For the love of money is a root of all kinds of evil, and in their eagerness to be rich some have wandered away from the faith and pierced themselves with many pains’

Timothy 6:10

A Introduction

This chapter narrows consideration to the problems identified in relation to white-collar offenders which appear throughout the five articles. A necessary preliminary step is to identify, with some particularity, the category of offenders who may be described as white-collar. In order to assess the adequacy or inadequacy of current sentencing practices, it is necessary to first understand what constitutes white-collar crime. In light of the distinctive features of white-collar crime (being offenders or offences depending upon the definitional approach adopted), I discuss the problems which, as I identify in the Rational Approach Article, makes white-collar crime stand apart from other criminal conduct.

B Conceptual Development of White-collar Crime

White-collar offences have existed since long before Edwin Sutherland coined the term ‘white-collar crime’ in his 1939 presidential address to the American Sociological Society entitled The White Collar Criminal.284

The English common law in the late Middle Ages, if not earlier, included the offences of regrating, engrossing, and forestalling.285 Regrating involved acquiring and stockpiling market commodities in order to resell them at higher prices. Engrossing referred to buying entire supplies of goods with the intention of retailing them at monopoly prices. Forestalling related to acquiring goods before they entered the public market, with the intention of selling them at higher prices. The three market offences were punishable by discretionary fine and/or imprisonment, and were finally repealed in approximately 1772.286 Corresponding offences can now be found in competition law.

In 1907, Edward Ross described the white-collar criminal without the modern label. To Ross, the white-collar criminal was ‘a social type who enjoys a public image as a pillar of the community and a paragon of virtue, but beneath the veneer of respectability [lies] a very different persona; one committed to personal gain [by] any

286 Ibid.
means necessary’. This is someone acting not on evil impulse, but moral insensibility; he or she prefers to prey on the anonymous public, while impersonating the good citizen.

Up until 1939 sociologists and criminologists had criticised what is now known as white-collar crime, however, they did not take it seriously. Rather, sociologists associated crime with poverty, lack of organised recreation, broken homes, slum neighbourhoods, intellectual inferiority, and emotional instability, among other things. They did not study crime committed by professionals and elites. Consequently, theories and public policies rarely dealt with white-collar offenders.

In his 1939 speech, Sutherland defined white-collar crime as ‘crime committed by a person of respectability and high social status in the course of his occupation’. He defines crime, without reference to mens rea or nature of punishment, as ‘behaviour which is prohibited by the State and against which the State may react, at least as a last resort, by punishment’. Earlier, in 1938, Sutherland gave a speech to students at DePauw University, Indiana, in which he stated that ‘white collar criminal’ refers to ‘a person in the upper socioeconomic class who violates the law designed to regulate his occupation ...’ These speeches highlighted not only the existence of white-collar crime, but also its prevalence. Sutherland’s objective was to bring white-collar crime into mainstream criminological thought, however it is still primarily considered a smaller category of crime, to be contrasted with common crime, which dominates criminological studies.

Sutherland’s various definitions are offender based definitions. This means the qualities of the offender determine whether the crime is a white-collar crime, rather than the qualities of the offence itself. In his book White Collar Crime, Sutherland says that his definition is not meant to be definitive, rather, it is aimed at bringing attention to crimes that are not usually considered within the scope of criminology.

It is interesting that Sutherland sought to debunk class-based understandings of crime, yet he included class in his definition of white-collar crime. The inclusion of class renders the definition forensically inadequate because notions such as

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290 Roy Lewis, White Collar Crime and Offenders – A 20 Year Longitudinal Cohort Study (Writers Club Press, 2002) 14.
293 Edwin Sutherland, White Collar Crime: The Uncut Version (Yale University Press, 1983) 46 (‘Uncut Version’).
295 Weisburd, Waring and Chayet, above n 291, 2.
296 Sutherland, Uncut Version, above n 293, 7.
‘respectability’, ‘social status’ and ‘socio-economic status’ are too obscure to be meaningful.  

Included within Sutherland’s concept of white-collar crime are offences committed by corporations and individuals, and offences punishable by civil penalty only. Sutherland’s view was that offenders should be considered white-collar criminals because of what they had done, even if the criminal justice system did not label them as criminals. His analogy involved tuberculosis. Sutherland argued that tuberculosis is tuberculosis, whether it is treated with poultices and bloodletting, or with streptomycin. Similarly, a crime is a crime, whether treated civilly or criminally. Sutherland adopted a wide definition of crime, therefore he considered certain conduct criminal even where the legislature did not.

**C Expanding Definition of White-collar Crime**

In the 1970s and 1980s, offence-based definitions of white-collar crime became more popular. Offence-based definitions included organisational or corporate crime, as well as individual crime. Herbert Edelhertz, a federal prosecutor from the US Department of Justice, argued that white-collar crime is democratic, and should be defined more broadly, by reference to the modus operandi and objectives of the offenders, rather than the characteristics of the individual offenders. Edelhertz posited that the definition must be broader because opportunities for white-collar crime offending were no longer confined to the elites and members of the upper middle classes. Rather, society had become much more vulnerable to abuses of trust through the increase in marketing, distribution and variety of media through which consumer needs were being created.

He defined white-collar crime in 1970 as ‘an illegal act or series of illegal acts committed by non-physical means and by concealment or guile to obtain money or property, to avoid the payment or loss of money or property, or to obtain business or personal advantage.’ As a starting point, Edelhertz identified four types of white-collar crime:

1. Personal crimes, which are committed by individuals on an individual basis (for example, credit card fraud, welfare fraud, and individual income tax violations);

2. Abuses of trust, which are committed in the course an individual’s occupation and in breach of a duty or loyalty to an employer or client (for example, embezzlement by employees, insider trading, and bank violations by employees);

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299 Sutherland, *Uncut Version*, above n 293, 61.
300 Ibid.
301 Braithwaite, above n 297.
303 Ibid 3.
304 Ibid 6-7.
305 Ibid 3.
3. Business crimes, which are committed in furtherance of business operations, but not as the principal business pursuit (for example, competition law violations, tax violations, and food and drug violations); and

4. Confidence games, which are committed as the principal business pursuit (for example, Ponzi schemes, charity and religious frauds, and personal improvement schemes).  

However, Braithwaite contends that a definition limiting white-collar crime to ‘acts committed by non-physical means’ diverts attention away from white-collar crimes that cause physical harm.  

White-collar crimes that cause physical harm include unnecessary surgery, waste dumping, failure to label poisonous materials in the workplace, and the manufacture of faulty goods. Braithwaite also notes that Edelhertz’s definition does not require the criminal conduct to be committed in the course of the individual’s occupation. In relation to white-collar crime committed by individuals, Braithwaite argues that the definition should be neutral in terms of social standing, but include an occupational nexus which would ensure welfare and credit card frauds, or personal crimes as Edelhertz labels them, fall outside the definition.

Geis, who believed that Sutherland’s concept was too broad and would fall into disuse unless it was tightened, initially attempted to limit the scope of white-collar crime to offences by corporations, but later revised his definition to include crimes committed by individuals. He also agreed with Braithwaite, suggesting that the offender specific element of Sutherland’s definition should be retained, so that welfare cheats and credit card frauds would not be captured by the definition.

Geis points out that Edelhertz’s definition is not clear on whether an act can be a white-collar crime without formal adjudication as such. Given the legalistic nature of Edelhertz’s definition, pursuant to that definition, an act is only a white-collar crime if formally adjudicated as such. A divide therefore becomes apparent between legal scholars’ definitions of white-collar crime, and sociologists’ definitions. The former tend to be more formal, and the latter tend to be looser and more encompassing.

In their book *Criminal Behaviour Systems: A Typology*, Clinard and Quinney suggest that white-collar crime can be separated into two categories; occupational crime, and organisational or corporate crime. Clinard and Quinney point out that in the decades that followed Sutherland’s definition, the concept was gradually expanded to include offences occurring in the course of any occupation, regardless of social class. Following that trend, they defined occupational crime as crime committed by people at all socio-economic levels, involving ‘violation of the criminal law in the course of
activity in a legitimate occupation’. This subcategory would therefore catch a photocopy room employee who happens across inside information and breaches insider trading laws. Organisational or corporate crime refers to corporate officers offending against their corporation, and also to offences committed by the corporation itself.

The second subcategory addresses the perceived confusion in Sutherland’s definition in relation to corporations. Clinnard and Quinney complain that Sutherland condemned corporations for their crimes, but seemed to focus on the officials. Indeed, Geis also highlighted the confusion in Sutherland’s definition, and suggested that Sutherland’s solution to the difficulty in deciding which of the corporation and its officials is the criminal, was to say that the crimes of the corporation are the crimes of the executives and managers.

Braithwaite endorses Clinard and Quinney’s approach of separating white-collar crime into occupational and corporate subcategories. He suggests that while the latter category is more homogenous than the former, and is conducive to a useful theory on crime, theories on the former category of white-collar crime could be as elusive as general theories of white-collar crime.

In the 1980s a bifurcated approach to defining white-collar crime developed. The first approach, espoused by Geis, focused on the ‘structural positions of white-collar offenders, their control over property and people, and the ways in which those positions allow some to carry out white-collar crimes’. This approach does not look at prestige and status, which are mere perceptions in the community. The second approach focused on wrongdoing by corporations and/or by their officers acting in corporate capacities, and the harm caused to the environment and to individuals. In the same decade, the US Department of Justice, Bureau of Justice Statistics, conducted research into white-collar crime and defined it as:

[n]onviolent crime for financial gain committed by means of deception by persons whose occupational status is entrepreneurial, professional or semi professional and utilizing their special occupational skills and opportunities; also, nonviolent crime for financial gain utilizing deception and committed by anyone having special technical and professional knowledge of business and government, irrespective of the person’s occupation.

This is an example of the first approach, where the focus is on the offender’s special occupational skills and opportunities, rather than their social status. It is also an example of a formalistic/legalistic definition.

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315 Ibid.
316 Braithwaite, above n 297.
317 Ibid.
319 Ibid.
In the early 1990s, the Yale White Collar Crime Project also used a similar definition to Edelhertz’s in that it removed the element of high social status, respectability and trust. This study suggested that the opportunities to commit white-collar crime in Sutherland’s time were centralised in the hands of the elite. In modern times, with the advent of computers and the internet, increased access to education, and the growth in white-collar jobs, opportunities for white-collar criminality are widespread among the middle class. The authors wrote:

Contrary to the portrait of white-collar crime generally presented by scholars and in the press, we find a world of offending and offenders that is very close to the everyday lives of typical Americans…the majority [of offenders] occupy positions in society that are neither far above nor far below the middle, and their crimes do not necessitate, nor do their defences rely upon, elite social status. Opportunities to commit these crimes are available to average Americans.

Accordingly, the study defined white-collar crime as ‘economic offenses committed through the use of some combination of fraud, deception or collusion’. This definition lacks a connection to occupation, and therefore expands the study catchment beyond the middle class. Indeed, the study analysed some offences which are likely to be committed by many lower socio-economic offenders, otherwise than in the course of their occupation. By removing offender characteristics from the definition of white-collar crime, the investigators were able to select eight offences that fell within the definition, then include in their study all convictions in relation to those offences, irrespective of whether the offender was a bank executive or an unemployed person. The eight federal offences studied were securities law violations, antitrust law violations, bribery, bank embezzlement, mail and wire fraud (offences where the postal service or other regulated communication systems are used to defraud individuals or organizations), tax fraud, false claims and statements, and credit or lending institutions fraud.

Expanding the definition to include the middle class was an approach favoured by Weisburd, Waring and Chayet. They argue that most people who are convicted of white-collar offences belong to the middle class, and are not people of high status and respectability. A more useful study, they suggest, does not exclude the bulk of people who are prosecuted and convicted of white-collar crimes. Also in the 1990s, Susan Shapiro sought to liberate the concept of white-collar crime from existing labels of ‘white-collar’, ‘organisational/corporate’, and ‘occupational’. Such labels were said to focus on actors rather than acts, and not provide any guidance on the characteristics of the acts committed or norms violated:

Sutherland created the white-collar crime concept in order to bring the offenses of the elite into criminological theory and thereby to enrich knowledge in the discipline. Ironically, his pathbreaking work has in part had the opposite effect,
segregating the rich and the poor and removing intensive inquiries about those of privilege from mainstream criminology... After 50 years, it is time to integrate the ‘white-collar’ offenders into mainstream scholarship by looking beyond the perpetrators’ wardrobe and social characteristics and exploring the modus operandi of their misdeeds and the ways in which they establish and exploit trust.328

This approach resembles Geis’s focus on structural positions and opportunities to commit white-collar offences.

After casting aside Sutherland’s traditional definition, Shapiro uses a less cited passage of his work as the foundation of her formulation:

> These varied types of white-collar crimes in business and the professions consist principally of violation of delegated or implied trust, and many of them can be reduced to two categories: (1) misrepresentation of asset values and (2) duplicity in the manipulation of power. The first is approximately the same as fraud or swindling; the second is similar to the double-cross.329

Shapiro therefore defines white-collar crime as the violation or abuse of trust. Three possible violations or abuses of trust are offered; deception, self-interest and incompetence. The abuse of trust formulation of white-collar crime is not without its problems. Shapiro concedes that her definition does not completely divert attention away from actors. When analysing deception, self-interest and incompetence, one must consider offender knowledge, intent and variability of talent and other offender characteristics.330 Further, many deviant acts that fall within the rubric of white-collar crime under other definitions, such as waste dumping and price fixing, will not amount to white-collar crime under the abuse of trust model.

Other commentators have suggested that white-collar crime is just another form of criminal conduct which should not be treated differently from other criminal conduct, and that ‘any theory of crime that makes claim to generality should apply without difficulty to the crimes of the rich and powerful, crimes committed in the course of an occupation, crimes in which a position of power, influence or trust is used for the purpose of individual or organizational gain’.331 Hirschi and Gottfredson suggest that analysing white-collar crime separately from other forms of crime is useful for policy purposes, including the control of white-collar crime, however this does not mean it has different causes.332

**D A Working Definition of White-Collar Crime**

As we point out in the *Rational Approach Article*, a workable definition of white-collar crime has proved elusive. However, a working definition of white-collar is crucial to the coherent analysis of existing jurisprudence, to the process of informed decision-making, and to the promulgation of any proposals for reform.

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328 Ibid.
330 Ibid.
332 Ibid.
As seen above, there is no universally accepted definition of white-collar crime. Sutherland’s formulation has never been abandoned. It has merely been refined in various ways. The various definitions that have succeeded Sutherland’s definition all intersect with each other in some way.  

For instance, definitions that focus on respectability or high status, definitions that deal with occupation, and definitions that speak of economic crime committed by non-physical means. People of higher status are more likely to be in white-collar occupations, and people in white-collar occupations are more likely to have the opportunity to commit economic crimes by non-physical means.

There is a core group of white-collar criminals who would be labelled as such by all the major definitions. It is notable that modern definitions of white-collar offenders do not focus on the classic formulation of characteristics – being respectability and high social status – but rather, focus on the structural position, power, influence and opportunities of the offender.

The tension between offender-based and offence-based definitions is longstanding. Green notes that lawyers seek definitions that focus on conduct with criminal law like characteristics, while sociologists and criminologists are more concerned with patterns of behaviour and their causes. The emerging trend, however, is to define white-collar crime by reference to both the type of offence (being one which is archetypally a white-collar offence such as insider trading) and by reference to the type of offender (which may mean that a general offence takes on the attributes of a white-collar offence because of the characteristics of the offender who commits it). In this way, a working definition of white-collar crime and white-criminal coalesce, because the definitions of each include reference to both the offence type and the offender characteristics.

Thus, for the purposes of this thesis, and the research I undertook, white-collar crimes sensu stricto and white-collar criminals exhibit the following features:

- a nonviolent criminal act or omission (offence type);
  - committed in the course of an occupation (offence type and offender type); and
  - in pursuit of financial gain to the individual to the loss of another/others (offence type);
- by an individual who is in a position of significant power, trust or influence (offender type).

There are several items to note about this definition.

First, in terms of Edelhertz’s four types of white-collar crime, the definition adopted by this paper encompasses abuses of trust, and business crimes.

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333 Weisburd, Waring and Chayet, above n 291, 9.
334 Ibid.
Second, it only includes conduct that amounts to a crime under the law as it stands. This means that conduct punishable by civil penalty only is not included within the definition.

Third, ‘nonviolent’ refers to the means by which the act or omission is committed/made. It does not refer to the harm caused by the act or omission.  

Fourth, the requirement of significant power, trust or influence, excludes from the definition the photocopier who discovers inside information and breaches insider trading laws.

Finally, it is conceded that white-collar crimes may be committed by corporations; however this definition is limited to individual offenders, due to the thesis’ focus on sentencing trends applicable to individuals.

This definition of white-collar crime, which creates a distinction from common crime, naturally also creates a distinction between white-collar criminals and non-white-collar criminals. Such sub-grouping is not unusual, but rather is a legitimate exercise observed in relation to numerous other subsets, such as young offenders or Aboriginal offenders.

E. Sequelae of the Distinction between White-collar Crime and Non-White-collar Crime

The consequences of distinguishing white-collar crime from more general crime are mostly observed at the sentencing stage. These differences are said to facilitate, and justify, the differential treatment of mitigating or aggravating factors that may be raised for or against an individual offender. As alluded to the Rational Approach Article, there are nine main differences between the curial treatment of white-collar crime and other types of crime. These differences can be identified across a number of sentencing variables, namely:

(i) good character;
(ii) public opprobrium;
(iii) reduction of employment or career prospects;
(iv) large amount of money involved;
(v) high level of planning and sophistication;
(vi) high level of harm to victims;
(vii) restitution;
(viii) ancillary orders.

These are the sentencing variables that were tested in the research I conducted, and which are considered in detail in Chapter VIII.

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However, the distinction can also be observed more generally in the curial approach to sentencing white-collar offenders. That approach has been the subject of criticism – in relation to five principal aspects – across the co-authored articles.

F The problematic approach to aspects of sentencing White-collar Offenders

In the Rational Approach Article, we argued that there are some problems in the approach taken by courts when sentencing white-collar offenders:

1. That even though the principle of proportionality would suggest that offences against individuals are more serious, this is not observed in white-collar sentencing;

2. That restitution is not afforded sufficient mitigatory weight in the sentencing exercise;

3. That previous good character is often disregarded on the basis of its ubiquity;

4. That extra-curial punishments are often disregarded on the basis that they are expected or are not exceptional – I argue that they should reduce penalty where they can be tangibly measured;

5. That the courts continue to place a strong emphasis on general deterrence despite the evidence that it does not work.

In relation to problems 1 to 4, each problem stems from the differential treatment of white-collar offenders: principally, whether that different treatment is justifiable or unjustifiable.

Admittedly, as I demonstrate in Chapter I, there are meaningful differences between white-collar crime and other types of crime and, arguably, these differences can and should justify differential treatment for this subset; for example, sentencers should disfavour imprisonment given that these offenders do not pose any physical risk to the community.\textsuperscript{338} Similar differences already apply to the sanctions imposed on children or the mentally ill. These are acceptable grounds for differentiation.

However, the approach taken by sentencing courts is problematic in the ways identified in problems 1 to 4 because the differential treatment is not justified. In relation to the different treatment, the justifications advanced in the case law and in the scholarship do not provide a doctrinally sound basis for the generally worse treatment received by white-collar offenders.

Below, I re-consider these five problematic aspects in greater detail, and in light of the findings of the empirical research.

\textsuperscript{338} Bagaric, Alexander and Pathinayake, above n 1.
how and why certain sentencing factors have been, but should not be, treated differently when the offender falls within the identifiable class of white-collar offender.

**G Proportionality: offences against individuals are not treated more seriously**

The empirical research that I conducted (see Chapter VII) reveals that harm was inflicted on the public or financial institutions in approximately 30% of cases (19 out of 64 cases), while the remaining cases involved harm against individuals. In about 75% of cases (49 out of 64 cases), a high level of harm was a relevant sentencing consideration.

The principle of proportionality is dependent on objective seriousness of the wrongful conduct. In the white-collar context, assessment is often informed by factors such as level of harm, level of planning and sophistication, and amount of money involved, all of which proportionately increase objective seriousness. The level of harm and amount of money involved are features referable to the victim of the crime, thus identifying the victim of a white-collar offence is relevant in sentencing. As an example, Ormiston JA of the Victorian Court of Appeal pointed out in *R v Liddell*[^339] that while the Australian Taxation Office is the ostensible victim, serious tax fraud will inevitably have a flow on effect to the incidence of tax to the honest taxpayer. Most judicial comments identified in the research treat tax evasion as a crime against many victims – the community – as opposed to a single victim. This approach was echoed in *Director of Public Prosecutions (Commonwealth) v Goldberg* (‘Goldberg’), where Vincent JA of the Victorian Supreme Court (with whom Winneke P and Batt JA agreed) referred with apparent approval to the following observation by the sentencing judge in that case:

> Tax evasion is not a game, or a victimless crime. It is a form of corruption and is, therefore, insidious. In the face of brazen tax evasion, honest citizens begin to doubt their own values and are tempted to do what they see others do with apparent impunity. At the very least, they are left with a legitimate sense of grievance, which is itself divisive. Tax evasion is not simply a matter of failing to pay one’s debt to the government. It is theft and tax evaders are thieves...[^340]

The sentiments expressed in *Goldberg* reflect a generally endorsed view that the harm caused to an institutional victim is of equivalent severity to the harm caused to an individual victim.[^341] There was no identifiable increase in punishment severity for offences against individuals compared to institutions evident in the research. In the *Rational Approach Article*, we contend that individual victims are less able to withstand the effects of white-collar crime (there is no diffusion or spreading of loss) and that measuring the harm suffered by institutional victims is almost impossible (even large frauds do not account for statistically significant loss of overall revenue), and therefore it is more cogent to punish crimes against individuals more harshly. Indeed, the empirical evidence reveals that the public perceive white-collar crime as less serious than violent crimes (which is necessarily committed on individuals).[^342]

[^342]: Bastian, Denson and Haslan, above n 84.
can be argued by analogy that the public perceive harm on individuals as more serious than any other type of harm, in particular, physical harm, but also presumably, financial harm. If this constitutes an accurate rendition of current public perceptions, it is not reflected in the current extra-curial judicial or governmental attitude to white-collar offenders.\textsuperscript{343} There is currently no meaningful distinction in sentencing outcomes where the victim is an institution as opposed to an individual, despite the obvious additional burdens suffered by the individual victim.

**H Restitution not given enough weight**

In respect to the mitigatory impact of restitution, it has been said that placing too much emphasis on restitution risks permitting, or the perception of permitting, offenders to ‘buy their way out of prison.’\textsuperscript{344} However, from the 64 cases analysed in the research, it is difficult to determine the effect of this theory in practice. Restitution was not commonly cited, being raised in less than 35\% of cases. Because of the instinctive synthesis approach adopted by sentencing judges, it was virtually impossible to determine the mitigating impact of restitution on the overall sentence. However, an impressionistic view of the sentencing decisions suggest that even where an offender made voluntary restitution, he or she was not automatically afforded a discount. No clear reason can be discerned from the judgements why no substantial discount was given.

**I Previous good character is sometimes disregarded**

In 8\% of the cases analysed in the research, previous good character lost its mitigatory impact because it was perceived to have facilitated the offending behaviour. As I argued in the *Rational Approach Article*, this reasoning is flawed.\textsuperscript{345} In order to maintain doctrinal coherency, all first-time offenders should receive the benefit of their prior good character, regardless of whether they are white-collar criminals or common criminals. It is only repeat offenders who should, to the extent of the progressive loss of mitigation theory, not receive the prior good character discount by virtue of their recidivism.\textsuperscript{346}

**J Extra-curial punishments don't always mitigate**

In *McDonald v The Queen* (1994) 48 FCR, it was said that ‘the most serious consequences of a white-collar offender must be the loss of his own self-respect and the humiliation that accompanies’. However, this view has not resulted in lighter sentences. Australian courts must be satisfied that extra-curial punishment is either exceptional or extreme before allowing it to mitigate a sentence.\textsuperscript{347} In the research, I found that reduction of employment or career prospects to be more prevalent than public opprobrium as a mitigating factor in relation to white-collar offenders. This


\textsuperscript{344} The validity of this argument has been subject to some academic criticism: see Buell, Samuel W, ‘Is the White Collar Offender Privilegged?’ (2014) 63(4) *Duke Law Journal* 823.

\textsuperscript{345} Bagaric and Alexander, above 13, 343.

\textsuperscript{346} *Veen v The Queen [No 2]* (1998) 164 CLR 465.

may indicate the prevalent view that public shaming is futile as an alternative or ancillary form of punishment.\(^\text{348}\) However, where raised, both factors were treated as mitigatory approximately 70% of the time. The courts have not attempted to state what amounts to exceptional or extreme extra-curial punishment, but rather seem to assess this on a case-by-case basis.

**K Strong but Misplaced Emphasis on General Deterrence**

In seeking to ensure that proportionate sentences are imposed the courts have consistently emphasised that general deterrence is a particularly significant sentencing consideration in white-collar crime.\(^\text{349}\) This approach is not unique to Australia.\(^\text{350}\) In *DPP v Gregory*,\(^\text{351}\) the Victorian Court of Appeal set out the reason for this approach explicitly (citations omitted):

> Moreover, general deterrence is likely to have a more profound effect in the case of white collar criminals. White collar criminals are likely to be rational, profit seeking individuals who can weigh the benefits of committing a crime against the costs of being caught and punished. Further, white collar criminals are also more likely to be first time offenders who fear the prospect of incarceration.

The strong endorsement of general deterrence as a particularly important consideration in relation to white-collar offences follows from two judicial assumptions: comparatively, such crimes are hard to detect and prosecute successfully;\(^\text{352}\) and, white-collar offenders see the prospect of imprisonment as particularly distasteful as they carefully weigh up the costs and benefits of crime before committing an offence. The first assumption remains open to further research, whereas the second assumption is demonstrably false given the discussion set out in Chapter IV.

The primacy given to this flawed objective is clear in *Australian Securities & Investments Commission v Soust [No 2]* the Court said that:

> If one accepts, as I do, that general deterrence is the most important element of sentencing antitrust offenders, ‘the character of the offence, rather than that of the offender [is] the central determinant in the sentencing decision … the individual offender’s characteristics are irrelevant, they should be relegated in importance in light of the goal to be achieved, that goal being to deter future contraventions …\(^\text{353}\)


\(^{351}\) *DPP (Cth) v Gregory* [2011] VSCA 145 [53].


Recently, Henning considered the role of deterrence in white-collar sentencing and noted the following:

It is certainly questionable whether a punishment imposed on one white-collar criminal has an impact on others because the violations are usually the product of a unique set of circumstances that allowed the crime to occur … general deterrence is about sending out a message, but it is one that may not be heard by its intended audience.354

According to Henning, the relevance of deterrence remains valid if it:

… has value in the process of imposing punishment because it works to keep judges from succumbing to the impulse to see white-collar defendants in the warm light of a contrite individual who engaged in aberrational conduct but is unlikely to offend again.355

Whatever light may properly be cast around white-collar offenders as opposed to other offenders is a matter of conjecture. The results of research conducted as long ago as 1995 by Weisburd et al clearly showed that prison does not have a strong deterrent effect on white-collar recidivism.356 Henning’s concern about the ‘warm light’ may or may not be apt, but it does not alter the conclusions from the data.

By contrast, the Australian Law Reform Commission (‘ALRC’) carefully considered arguments underlying general deterrence when reviewing the sentencing objectives in the federal jurisdiction. In a report which underpinned Part 1B of the Crimes Act 1914 (Cth), the ALRC expressly disapproved of general deterrence as a sentencing consideration because it is unfair to impose a heavier sanction on a particular accused because of the effect it might have on the behaviour of others.357 The Report, relevantly, states at:

Nor should general deterrence be invoked as a goal or objective by sentencers. To impose a punishment on one person by reference to a hypothetical crimes of another runs completely counter to the overriding principle that a punishment imposed on a person must be linked to the crime that he or she has committed.358

However, this overt recognition of the moral and empirical failure of the objective has not deterred either the courts or the legislature from persisting with it. In DPP (Cth) v Said Khodor El Karhani (1990) 21 NSWLR 370, 377 (Kirby P, Campbell and Newman JJ), it was stated that its absence from the Crimes Act 1914 (Cth) was a ‘legislative slip’ rather than an act of Parliament, and therefore continued to apply it anyway in sentencing federal offenders. In the same year as an appeal was heard in the Victorian Supreme Court challenging the application of El Karhani in Victoria,359 Federal Parliament amended s 16A(2) of the Crimes Act 1914 (Cth) to expressly include as an objective ‘the deterrent effect that any sentence or order

355 Ibid, 32.
357 ALRC, Sentencing, above n 120.
358 Ibid 18.
under consideration may have on other persons.’ The explanatory memorandum to the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015* addressed neither the moral acceptability nor the relative effectiveness of general deterrence nor the earlier ALRC report. Rather, the reason cited for the amendment was that while it did not appear in the *Crimes Act 1914* (Cth), it was included in State and Territory legislation, and this lacuna was a cause for ‘judicial concern.’ In Victoria, sentencing courts have in fact tended towards imposing terms of imprisonment and longer sentences in the past two decades. 360

**L. Conclusion**

As a particular type of criminal subset, the sentencing of white-collar offenders also suffers from a particular set of problems. These problems largely emanate from a type of criminological mythology that has developed around the white-collar offender and offence; a mythology which suggests that this subset engage in crime or respond to punishment in ways markedly differently from other subsets. This mythology persists even in the face of coherent argument and compelling evidence to the contrary. It is used to justify the differential treatment of white-collar offenders where no such justification exists. The evidence that demonstrates the existence of differential treatment is examined in Chapters VII, VIII and IX.

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360 See *R v Nguyen & Phan* [1997] 1 VR 386, 389 (Brooking JA with whom Winneke P and Callaway JA agreed). In that case, Brooking JA said: ‘The seriousness of the offence of defrauding the Commonwealth of a large sum of money by not declaring assessable income has in the past, perhaps, not always been sufficiently reflected in the sentence passed. Those who systematically defraud the Revenue of a large sum over a substantial period must in general expect a substantial custodial sentence. The deterrent and punitive effects of that sentence should not be unduly diminished by allowing release from custody at an unduly early stage’.
CHAPTER VII
RESEARCH: METHODOLOGY AND LIMITATIONS

“If we knew what it was we were doing, it would not be called research, would it?”

Albert Einstein, physicist, 1879 - 1955

A Introduction

In the five co-authored articles, two critical themes emerged. First, there is no standardised or consistent treatment of a number of aggravating and mitigating factors that inform the severity of a sentence for white-collar offenders. We hypothesized that because of a lack of jurisprudential certainty regarding these factors, that sentencing outcomes are unfair because those factors are applied inconsistently. If that hypothesis is correct, we suggested that it is indicative of the irrational state of sentencing law within the white-collar offender subset. Second, even if consistent treatment of certain aggravating and mitigating factors can be observed within the white-collar offender subset, any unjustifiably different treatment of the same sentencing factors between the white-collar offender subset and non-white-collar offender demonstrates inconsistency, and hence unfairness. We hypothesized that unjustifiable inconsistency in treatment of the same sentencing factors between subsets also indicates the irrational state of sentencing law.

The second theme is considered in detail in the previous chapter; that is, I examined how and why certain sentencing factors have been, but should not be, treated differently when the offender falls within the identifiable class of white-collar offender. To some extent, the argument regarding different treatment proceeded on the assumption that improper differentiation does occur, and relied on the analysis of case law across the five articles to justify that assumption. The problem underlying this second theme is principally a problem of theory: assuming that such different treatment occurs, is the different treatment justifiable? This problem is not susceptible to empirics, but is a fundamentally normative claim reliant on the inherent differences between white-collar offenders and non-white-collar offenders. Hence, I did not research this second theme.

The first theme however, could not be adequately considered except by reference to actual sentencing outcomes. The hypothesis emerging from the first theme is that there is no standardised or consistent treatment of certain aggravating and mitigating factors because of a state of jurisprudential uncertainty. There are two premises within that hypothesis: that there is inconsistent treatment of sentencing factors and this inconsistency results from uncertainty. The uncertainty relates to some key assumptions that appear to underpin sentencing practices in relation to white-collar offenders. The first premise was capable of being examined empirically, by statistical analysis – a form of quantitative research. The second premise required a more nuanced form of empirical research assessing judicial attitudes to the key assumptions – a form of qualitative research. Thus, the research was best characterised as both quantitative and qualitative empirical research based on documentary analysis of the selected cases. Having identified the nature of the
research, an appropriate methodological framework was developed in accordance with prevailing social science research theory.

This chapter examines the methodology and limitations of the research designed to test the hypothesis that there is no standardised or consistent treatment of certain aggravating and mitigating factors because of jurisprudential uncertainty.

**B Research theory in the social sciences**

The research was designed to conform to the basic requirements of good scientific research: replicability, precision, falsifiability, and parsimony. Because the research was intended to test the theories that had emerged from the five articles, the research is in essence deductive – it “works from the ‘top down’, from a theory to hypotheses to data to add to or contradict the theory”.

The approach to developing and undertaking the research broadly conformed to the steps suggested by Simion:

1. Identify a research topic and problem
2. Formulate the research question and hypothesis
3. Choose a research methodology
4. Define the significance of the research
5. Find and use a theory
6. Carry out a literature review

In relation to these steps, step 3 (choice of research methodology) was of particular importance. It was noted in the literature regarding the choice of research methodology that some apparent discord exists between the choice of quantitative and qualitative methods of deductive research. The literature indicated that:

The debate over the relative value of each research methodology has been ongoing since the start of the 20th century (Onwuegbuzie & Leech, 2005). The gap between the two methodologies may not be as great as we think. While quantitative research typically uses “numbers” to display data and qualitative methods use “words” to show data, the values could be expressed in other ways (Trochim, 2006). Trochim asserts that all qualitative data can be coded quantitatively. He believes “that anything that is qualitative can be assigned meaningful numerical values. These values can then be manipulated to help us achieve greater insight into the meaning of the data and to help us examine specific hypotheses.”

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365 Ibid 19.
These observations were taken into account in determining the methodological processes I employed. In particular, given that I intended to assess both the level of consistency in the application of the sentencing variables (a quantitative exercise) and the certainty with which a number of key assumptions were manifested in the sentencing reasons for the selected cases (a qualitative exercise), it appeared sensible to employ both methodologies. As Trochim suggests, in order to perform good research, researchers need to make use of both qualitative and quantitative methods.\textsuperscript{366} The desirability of this approach was confirmed in the literature.\textsuperscript{367}

It appears that choosing one methodology over another severely limits the scope of any study. As Creswell and Plano Clark (2007) observe, one method alone cannot answer all the questions that will emerge in the course of researching a topic. In order to facilitate a more comprehensive study of a topic, researchers should have access to all available research tools. The dichotomy therefore should be reconsidered and researchers should become proficient in both methodologies.

Despite the resolution of the appropriate research methodology, research theory in the area of legal research revealed its own set of epistemological problems. Chynoweth identifies a divergence between legal research (or scholarship) which most often employs an ‘interpretive, qualitative analysis required by doctrinal research’, and scientific research, in both the natural and social sciences, which ‘relies on the collection of empirical data, either as a basis for its theories, or as a means of testing them.’\textsuperscript{368} As a result of this distinction, Chynoweth argues that ‘…the process is one of analysis rather than data collection, no purpose would be served by including a methodology section within a doctrinal research publication and one is never likely to find one.’\textsuperscript{369} Somewhat uniquely then, this research does include a methodology section, because the research draws on the scientific tradition of quantitative assessment, as well as the legal scholarship tradition of qualitative doctrinal analysis. The qualitative analysis was performed in accordance with techniques set out by Lisa Webley, Professor of Empirical Legal Studies at the University of Westminster, recognising that ‘[w]ell-compiled qualitative research enhances comprehensibility of social phenomenon.’\textsuperscript{370}

C Application of the research theory

As an anterior step to developing the research methodology, I distilled two preliminary questions that the research would embrace:

(a) Who is the white-collar offender?

(b) How is consistency or inconsistency in relation to the sentencing variables to be tested?

\textsuperscript{367} Soiferman, above n 364, 21.  
\textsuperscript{368} Paul Chynoweth, ‘Legal Research’ in Andrew Knight and Les Ruddock (eds), \textit{Advanced Research Methods in the Built Environment} (Wiley, 2008) 30.  
\textsuperscript{369} Ibid 37.  
\textsuperscript{370} Lisa Webley, ‘Qualitative Approaches to Empirical Legal Research’, in Peter Cane and Herbert Kritzer (eds), \textit{The Oxford Handbook to Empirical Legal Research} (Oxford University Press, 2010).
These preliminary questions informed my approach to the research methodology and conformed to the overall approach taken in the five articles.

We discussed the inadequacies of the current definitions of ‘white-collar offender’ in the *Rational Approach Article*, and proposed a working definition that better captured the unique features of the white-collar offender. For the purposes of this thesis, I adopted that definition. The definitional difficulties associated with the term ‘white-collar crime’ are discussed in Chapter VI. I further consider the definition, which informs the case selection, below.

As set out in the Introduction to this chapter, I quantitatively assessed the treatment of eight selected sentencing variables that I argue are unique to white-collar offenders. Some of these sentencing variables are discussed in the *Rational Approach Article*. During the process of analysis, I also performed a qualitative assessment – by attempting to identify the reasons for the particular treatment of the sentencing variables in each case. In this way, the data served to inform the question of (in)consistency, but also illuminate some of the conceptual reasoning behind the particular treatment of the variables in each case. As far as I can discover, it is the first of its kind in Australia on the subject of white-collar crime.

**D Who is the White-collar offender?**

As discussed at length in Chapter VI, several definitions of white-collar crime have been proposed over the years. However, each of these definitions has proven inadequate on the basis that they fail to acknowledge the broad scope of the term and often are too dependent on occupational transgressions. The approach I have taken surmounts that difficulty by adopting the combined or blended definition set out in Chapter VI.

So, in the research, a white-collar offender is a person who:

- commits a nonviolent criminal act or omission;
- without legal justification;
- in the course of an occupation;
- whilst in a position of significant power, trust or influence;
- for the pursuit of financial gain to the individual to the loss of another/others.

However, in order to search for cases that meet the overarching definition of white-collar crime, it was necessary to once again unpack the constituent parts of the definition in order to search the case law for white-collar criminals amongst the general offender population who commit general crimes. Specifically, the research approached the identification of relevant cases by looking at offence type and offender characteristics.

1 **Offence type**

These are offences which involve the taking of money or property (such as shares) or the avoidance of a legal obligation (such as tax liability) without legal justification by an individual who is in a position of substantial influence in relation to the relevant
transaction. These offences are classically considered to be white-collar offences because the actus reus of these offences occur in a white-collar setting.

Therefore, white-collar offences can potentially include:

- theft of company assets by company directors and employees (such as bankers);
- theft of client money by lawyers and accountants;
- insider trading and other market manipulation by people employed in industries associated with the financial markets;
- complex tax fraud;
- corruption; and
- money laundering.

The statutory prohibitions on this type of conduct are found in a number of contexts: Criminal Code (Cth), Crimes Act 1958 (Vic), Australian Securities and Investments Act 2001 (Cth) etc.

2 Offender characteristics

A white-collar crime occurs even though a crime is charged as a generic offence, but is committed by a white-collar offender or occurs in a specifically white-collar context. In this instance, the charge itself is not indicative of the nature of the offending, but rather the characteristics of the offender. For example, the offence of obtaining property by deception (Crimes Act 1958 (Vic) s 81) may be committed in various contexts, including in migration371 and burglary372 matters. However, where the offender commits such a crime during the course of their employment or by virtue of their employment, and relies on a high degree of deception and breach of trust, it falls within the overarching definition of white-collar crime.373 Other examples of general offences that may be committed by a white-collar offender or in a white-collar context include:

- theft;
- obtaining property belonging to a Commonwealth entity by deception;
- obtaining financial advantage from a Commonwealth entity by deception;
- conspiracy to defraud the Commonwealth;
- false accounting; and,
- obtaining financial advantage by deception.

E How is (in)consistency in relation to the sentencing variables to be tested?

Along with certainty of outcomes in sentencing, consistency across outcomes has been specifically identified by Australian courts as an important goal.374 The pursuit of consistency is justified by the dangers of inconsistency. Such dangers include the violation of the rule of law or the principle of legality, the devaluation of the right to

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371 Frugniet v Migration Agents Registration Authority [2015] AATA 554.
373 R v Linacre [2014] VSC 615.
374 R v Griffis (1977) 137 CLR 293, 327.
equality amongst offenders, the loss of public confidence in the justice system and 
‘costly resource implications.’

However, as discussed in Chapter V, current sentencing orthodoxy involves Australian sentencing courts employing an instinctive synthesis approach – a doctrine described as highly complex and one that cannot yield a ‘single correct sentence.’ Nevertheless, consistency in sentencing is not novel and is observed, with (almost) mathematical accuracy, in the consistently mitigatory treatment of guilty pleas and assistance to authorities, which carry discounts of up to 25 per cent and 50 per cent respectively. This type of consistency is justified on account of its administrative benefits – reducing the expense to the criminal justice system, reducing court delays, avoiding inconvenience to witnesses and preventing the misallocation of monetary resources.

Consistency in sentencing conceptually connotes that ‘similar offenders who commit similar offences in similar circumstances would be expected to receive similar sentencing outcomes.’ Therefore, the imposition of varied sentences can be rightly justified by factual dissimilarity. However, distinguishing facts do not necessarily justify inconsistent treatment of relevant sentencing variables. This is discussed further in Chapter III.

Finally, it is arguable that truly consistent treatment of the variables requires the same treatment across cases 100% of the time. However, given the nature of the sentencing discretion, I allowed a margin of tolerance to account for human error and exceptional factual circumstances. Thus, consistent means 90% of the time. Where treatment is the same between 80-89% of the time, I consider this means that it remained fairly consistent. Treatment that is the same less than 80% of the time I consider to be inconsistent. These descriptors are used in the analysis in Chapter VIII.

**F Two types of cases: Type A and Type B**

It follows from the approach to the definition of white-collar crime set out above – that there are both archetypal white-collar offences as well as general crimes committed by white-collar offenders – that the research was divided into two categories: Type A and Type B.

Cases sorted by reference to offence type are identified as Type A cases.

Cases sorted by reference to offender characteristics are identified as Type B cases.

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376 Wong v The Queen (2001) 207 CLR 584, 612 [77].
377 Freeman v The Queen [2011] VSCA 214 [6].
Cases that fit both the Type A and B categories were recorded under Type A cases.381

G Description of relevant sentencing variables

In general, a sentencing court will consider factors such as age, mental health, general health, assistance to authorities, guilty pleas, addiction, remorse, delay in prosecution and potential to reoffend. These sentencing variables are universal to all criminal offenders and are not unique to white-collar offenders.

The unique factors which distinguish white-collar offenders from other offenders (set out in Chapter VI) form the basis for the eight sentencing variables I assessed.

They are:

(i) good character;
(ii) public opprobrium;
(iii) reduction of employment or career prospects;
(iv) large amount of money involved;
(v) high level of planning and sophistication;
(vi) high level of harm to victims;
(vii) restitution;
(viii) ancillary orders.

The meaning of these variables is explained in Table 3 below.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Explanation</th>
</tr>
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<tbody>
<tr>
<td>1 Good character</td>
<td>This variable is concerned with the ‘character’ of the offender. Character is defined in s 6 of the Sentencing Act 1991 (Vic) to include: the number, seriousness, date, relevance and nature of any previous findings of guilty or convictions of the offender; the general reputation of the offender; and any significant contributions made by the offender to the community. In assessing character, the sentencing court may consider support by family, friends and professional colleagues (which may be evidenced through testimonials).</td>
</tr>
<tr>
<td>2 Public opprobrium</td>
<td>This variable deals with shame or embarrassment in a professional or social context which may arise as a result of the offending. The law is not settled on whether this variable should carry any weight in the sentencing calculus.382</td>
</tr>
<tr>
<td>3 Reduction of employment or career prospects</td>
<td>This variable is particularly important to white-collar offenders as often they are able to commit such offences because of their influential careers. An example is automatic disqualification of offenders as company directors in accordance with s 206B of the Corporations Act 2001 (Cth).</td>
</tr>
</tbody>
</table>

---

381 Cases that satisfied the criteria for both Type A and Type B were included under Type A as a matter of expedience. No principled reason exists for including these cases in either Type A or Type B in particular.

Large amount of money involved

This is particularly important in white-collar offences as they are largely motivated by financial gain. Where the amount of money is high and identifiable, it is usually treated as aggravating. I do not define ‘high’ using monetary parameters but rather look to the remarks of the sentencing judge or where it is very clear that this is so.

High level of planning or sophistication

Generally this attracts a higher penalty.385 This is because offenders who commit well-planned crimes are treated as rational and calculating agents who deliberately engage in criminal behaviour for significant illicit benefits.384 This does not include knowledge of wrongdoing, given that many of these offences are committed by educated people and in specific contravention to policies which they were aware of (such as company share trading policies).

High level of harm to victim

This includes hardship to third parties. These are generally evidenced by victim impact statements.385 This is highly dependent on the facts of the case in question. In respect to property offences, the harm considered by the court may be in two forms – financial loss to the victim and/or damage to institutional integrity and investor confidence.386 This does not include hardship to family members.

Restitution

This is the voluntary return of property or money illegally taken from the victim. Where what was taken cannot be returned, the return of the value of the property or sale proceeds sufficed. Central to this variable is the voluntariness and degree of sacrifice made by the offender.387 Contentiously it has been argued that treating this particular variable as mitigating results in offenders having the option to buy their way out of deserved sentences.388 It may impact upon moral culpability or remorse.

Ancillary orders

These are mandatory orders to restore or disgorge funds which may be made in addition to (or in substitution for) the sentence imposed by the court. By way of example, in Victoria389 ancillary orders include compensation orders, forfeiture and confiscation orders,390 restitution orders,391 unexplained wealth orders,392 literary proceeds orders393 and reparation orders.394 No impact on moral culpability or remorse applies.

Note: Proceeds of Crime Act 2002 (Cth) s 320 which provides that a pecuniary penalty order is not to be taken into account by the sentencing judge except in so far as it indicates an intention to facilitate the course of justice (which is accepted to have a mitigating effect).

383 R v Yildiz (2006); DPP v Bulfin.
384 See Ritchie, above n 236.
385 See Sentencing Act 1991 (Vic) ss 95A–H.
386 Bagaric and Alexander, ‘Capacity of Criminal Sanctions’ above n 8, 337.
387 Subramanian v The Queen [2013] NSWCCA 159.
390 Confiscation Act 1997 (Vic).
391 Sentencing Act 1991 (Vic) s 84.
392 Justice Legislation Amendment (Confiscation and Other Matters) Act 2014 (Vic).
393 Proceeds of Crime Act 2002 (Cth) ss 151-179.
394 Crimes Act 1914 (Cth) s 21B.
H Assessing the aggravating or mitigating effect of variables for consistency

In order to achieve consistency, each variable should be treated in the same way regardless of the context of offending. For example: previous good character, restitution, and the imposition of ancillary orders should always be treated as mitigating factors because they represent a meaningful burden resulting from punishment. Likewise, public opprobrium and reduced employment or career prospects should always be regarded mitigating, because they are a form of extracurial punishment. By contrast, where there is a large amount of money involved, a high level of planning and sophistication, or a high level of harm to the victim(s), there should be an aggravating effect on the overall sentence. Where these variables are present but observed at low levels, they should either be mitigating, or perhaps treated as being neutral. In the research, I only included the variables of money, planning and harm if the amounts or levels were significant, such that the expected result would be an aggravating effect on the overall sentence only in those circumstances. The expected mitigating or aggravating effect of each specific variable to indicate consistency is set out in in Table 4 below.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Expected Result if Consistent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Good character</td>
<td>Should <em>mitigate</em> 90% of the time</td>
</tr>
<tr>
<td>Public opprobrium</td>
<td>Should <em>mitigate</em> 90% of the time</td>
</tr>
<tr>
<td>Reduction of employment/career prospects</td>
<td>Should <em>mitigate</em> 90% of the time</td>
</tr>
<tr>
<td>Large amount of money involved</td>
<td>Should <em>aggravate</em> 90% of the time</td>
</tr>
<tr>
<td>High level of planning and sophistication</td>
<td>Should <em>aggravate</em> 90% of the time</td>
</tr>
<tr>
<td>High level of harm to victim</td>
<td>Should <em>aggravate</em> 90% of the time</td>
</tr>
<tr>
<td>Restitution</td>
<td>Should <em>mitigate</em> 90% of the time</td>
</tr>
<tr>
<td>Ancillary orders</td>
<td>Should <em>mitigate</em> 90% of the time</td>
</tr>
</tbody>
</table>

F Process

I now explain the process by which the relevant sentencing decisions were identified from the existing case law for analysis. In essence, the process was:

**Identification of all possible cases.** I identified a list of offences or breaches (prohibited by a specific statutory provision) I considered qualified as either archetypally white-collar (Type A) or possibly committed by white-collar offenders (Type B) from six Victorian or Federal Acts. This was a subjective process. The list of offences is set out in Table 5 below:

<table>
<thead>
<tr>
<th>Act</th>
<th>Provision</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Corporations Act 2001 (Cth)</em></td>
<td>Director using position dishonestly to gain advantage (s 184)</td>
</tr>
<tr>
<td></td>
<td>Privy to fraudulent altering of books of the company (s 590)</td>
</tr>
<tr>
<td></td>
<td>Inducement to be appointed liquidator etc. of company (s 595)</td>
</tr>
<tr>
<td></td>
<td>Frauds by officers (s 596)</td>
</tr>
<tr>
<td></td>
<td>Anti-avoidance (s 601VCC)</td>
</tr>
<tr>
<td></td>
<td>Prohibition on certain acquisitions of relevant interests in voting shares (s 606)</td>
</tr>
<tr>
<td></td>
<td>Bidder not to dispose of securities during the bid period (s 654A)</td>
</tr>
<tr>
<td></td>
<td>Offence to contravene panel order (s 657F)</td>
</tr>
<tr>
<td></td>
<td>Offence of giving a disclosure document or statement knowing it to be</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Act</th>
<th>Provision</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><strong>TYPE A OFFENCES</strong></td>
</tr>
<tr>
<td></td>
<td>Director using position dishonestly to gain advantage (s 184)</td>
</tr>
<tr>
<td></td>
<td>Privy to fraudulent altering of books of the company (s 590)</td>
</tr>
<tr>
<td></td>
<td>Inducement to be appointed liquidator etc. of company (s 595)</td>
</tr>
<tr>
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</tr>
<tr>
<td></td>
<td>Offence to contravene panel order (s 657F)</td>
</tr>
<tr>
<td></td>
<td>Offence of giving a disclosure document or statement knowing it to be</td>
</tr>
<tr>
<td>Code</td>
<td>Description</td>
</tr>
<tr>
<td>------</td>
<td>-------------</td>
</tr>
<tr>
<td>s 952D, F</td>
<td>Defective (s 952D, F)</td>
</tr>
<tr>
<td>s 988A</td>
<td>Obligation to keep financial records (s 988A)</td>
</tr>
<tr>
<td>s 992A</td>
<td>Prohibition on hawking of certain financial products (s 992A)</td>
</tr>
<tr>
<td>s 992AA</td>
<td>Prohibition on hawking of managed investment products (s 992AA)</td>
</tr>
<tr>
<td>s 993B, C, D</td>
<td>Failing to pay client money into an account as required (s 993B, C, D)</td>
</tr>
<tr>
<td>s 1012E (s 1018B)</td>
<td>Prohibition on advertising personal offers covered by s 1012E (s 1018B)</td>
</tr>
<tr>
<td>s 1041A</td>
<td>Market manipulation (s 1041A)</td>
</tr>
<tr>
<td>s 1041B</td>
<td>False trading (s 1041B)</td>
</tr>
<tr>
<td>s 1041C</td>
<td>Market rigging (s 1041C)</td>
</tr>
<tr>
<td>s 1041D</td>
<td>Dissemination of information about illegal transactions (s 1041D)</td>
</tr>
<tr>
<td>s 1041E</td>
<td>Dissemin ate false information likely to induce persons to dispose of financial products (s 1041E)</td>
</tr>
<tr>
<td>s 1041F</td>
<td>Inducing persons to deal in financial products (s 1041F)</td>
</tr>
<tr>
<td>s 1041G</td>
<td>Dishonest conduct (s 1041G)</td>
</tr>
<tr>
<td>s 1043A</td>
<td>Insider trading (s 1043A)</td>
</tr>
<tr>
<td>s 1101F</td>
<td>Falsification of records (s 1101F)</td>
</tr>
<tr>
<td>s 1307</td>
<td>Falsification of books (s 1307)</td>
</tr>
<tr>
<td>s 1308</td>
<td>False or misleading statements (s 1308); and</td>
</tr>
<tr>
<td>s 1309</td>
<td>False information (s 1309)</td>
</tr>
<tr>
<td>Competition and Consumer Act 2010 (Cth)</td>
<td>Making a contract containing a cartel provision (s 44ZZRF)</td>
</tr>
<tr>
<td></td>
<td>Giving effect to a cartel provision (s 44ZZRH)</td>
</tr>
<tr>
<td>Criminal Code 1995 (Cth):</td>
<td>Abuse of public office (s 142.2)</td>
</tr>
<tr>
<td></td>
<td>Money laundering (s 400.3(1))</td>
</tr>
<tr>
<td></td>
<td>Bribery of foreign public officials (s 70.2)</td>
</tr>
<tr>
<td></td>
<td>Bribery a commonwealth public official (s 141.1)</td>
</tr>
<tr>
<td></td>
<td>Corrupting benefits given to, or received by a Commonwealth public official (s 142.1)</td>
</tr>
<tr>
<td></td>
<td>Abuse of public office (s 142.2)</td>
</tr>
<tr>
<td>Crimes Act 1958 (Vic)</td>
<td>False statements made by company directors (s 85)</td>
</tr>
<tr>
<td></td>
<td>Fraudulently inducing persons to invest money (s 191)</td>
</tr>
<tr>
<td></td>
<td>Making false statements concerning contamination of goods with intent to cause, or being reckless as to whether It would cause economic loss (s 251)</td>
</tr>
<tr>
<td>Legal Practice Act 1996 (Cth) &amp; Legal Profession Act 2004 (Vic)</td>
<td>Trust account deficiency (s 188 and s 3.3.21 respectively)</td>
</tr>
</tbody>
</table>

**TYPE B OFFENCES**

<table>
<thead>
<tr>
<th>Code</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal Code 1995 (Cth)</td>
<td>Theft (s 131.1)</td>
</tr>
<tr>
<td></td>
<td>Dishonest taking or retention of property (s 132.8)</td>
</tr>
<tr>
<td></td>
<td>Obtaining property belonging to a Commonwealth entity by deception (s 134.1)</td>
</tr>
<tr>
<td></td>
<td>Obtaining financial advantage from a Commonwealth entity by deception (s 134.2)</td>
</tr>
<tr>
<td></td>
<td>General dishonesty (s 135.1)</td>
</tr>
<tr>
<td></td>
<td>Obtaining financial advantage (s 135.2)</td>
</tr>
<tr>
<td></td>
<td>Conspiracy to defraud the Commonwealth (s 135.4)</td>
</tr>
<tr>
<td></td>
<td>False or misleading information (s 137.1) or documents (s 137.2)</td>
</tr>
<tr>
<td>Crimes Act</td>
<td>Theft (s 74)</td>
</tr>
</tbody>
</table>
Refinement of cases. Each statutory provision was then typed into the search box of a legal database: Westlaw (http://westlawinternational.com). The search included the following search parameters:

- offender must be an individual, not a corporation;
- must be in one of the nine Australian jurisdictions;
- must be decided in the previous 10 years (2005-2015);
- can be either a reported or unreported decision;
- must be either a sentencing decision, or where applicable, an appeal decision;
- in relation to Type B cases an individual must fit within the definition of white-collar offender set out above.

The selection of these parameters was subjective, but I provide an explanation for choosing these below.

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Offender must not be a corporation</td>
<td>Cases (either Type A or Type B) involving offending corporations were excluded from the research. Although corporations are capable of committing white-collar crimes, they are merely legal entities as opposed to people. Therefore, sentencing considerations such as good character and reduction of employment prospects will be irrelevant. In addition, corporations cannot be sentenced in the same way as people, that is, they cannot not be subjected to punishment in the form of imprisonment. Accordingly, corporations were not considered in this research.</td>
</tr>
<tr>
<td>Offender must be recorded individually (even if co-offender)</td>
<td>Multiple defendants were analysed separately, even if sentenced by the same judge, because this research intended to test the sentencing of individuals. Accordingly, the sentencing of each individual is illustrated in a separate table.</td>
</tr>
<tr>
<td>Must be in one of the nine Australian jurisdictions.</td>
<td>Commonwealth decisions are included alongside State and Territory decisions because there are few State and Territory white-collar offences in Australia. In addition, the similarities between State and Commonwealth offences are significant.</td>
</tr>
<tr>
<td>Must be decided in the last 10 years (2005-2015)</td>
<td>This time restriction was chosen because the majority of the state and territory specific sentencing legislation came into effect in the late 1990s with the latest coming into effect in 2005 (ACT). Excluding cases before 2005 allows for patterns in the approach taken by sentencing courts to be more easily identified. In addition, sentencing trends change over time. The last 10 years can show a meaningful trend for the purposes of this research whereas earlier cases are arguably from a different social/sentencing era and would therefore be unlikely to produce meaningful results.</td>
</tr>
</tbody>
</table>
Both types of decision were included because there was no meaningful distinction between the two types of decision for the purposes of the research.

Decisions and appeals on procedural matters and questions of law were not included. Whether or not an appeal decision was considered in this research was dependent on the subject of the appeal. If the appeal was allowed on account of a finding of error with respect to the treatment of one or more sentencing variable, it was included in the research. Such appeals effectively amend the decision at first instance. By considering an appeal decision on this basis, the treatment of each of the eight variables is analysed only once, hence avoiding any overlap. Where the appeal was dismissed, or was allowed on alternative grounds, it was excluded from the research on the basis of irrelevance.

Decisions which only involved a pecuniary penalty and no sentence were excluded.

The offender type criteria in the definition of white-collar crime were used to identify Type B cases, specifically:
- the offender’s crime must involve the taking of money or property or the avoidance of a legal obligation; and
- the offender must be a person in a position of substantial influence.

<table>
<thead>
<tr>
<th>Table 6: This table lists the research criteria and explains the reasons for its inclusion in this research.</th>
</tr>
</thead>
</table>

Collection and analysis of cases. The cases that were remaining after this search, were then printed, tabularised and analysed in accordance with an analysis rubric. There were 36 Type A cases and 28 Type B cases making 64 cases overall. The analysis rubric is set out below.

<table>
<thead>
<tr>
<th>Step</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>Short form identification of case for easy reference</td>
<td>All the cases have been labelled by number and type, so that type A cases are labelled 1A, 2A, 3A and type B cases are labelled 1B, 2B, 3B.</td>
</tr>
</tbody>
</table>
| Recording of basic case details | Each of the cases was read and the following information was tabulated:  
- case name;  
- sentence;  
- whether the sentence was appealed;  
- major offences;  
- offender status;  
- offence description; and  
- treatment of the sentencing variables including relevant judicial remarks.  
In relation to type B cases the following information was additionally tabulated:  
- whether the crime involved the taking of money, property or avoiding a legal obligation; and  
- whether the offender was in a position of substantial influence. |
Selection of type of treatment: aggravating, mitigating or neutral

A sentencing variable is said to be **mitigating** if the court makes statements such as ‘it is mitigating’ or other statements to that effect. Treatment will be mitigating if it carries weight in the sentencing calculus and ultimately reduces the overall sentence.

A sentencing variable is said to be **aggravating** if the court makes statements such as ‘it is negative’ or ‘I find it detrimental’ or other statements to that effect. Treatment will be aggravating if it carries weight in the sentencing calculus and ultimately increases the overall sentence.

A sentencing variable is said to be **neutral** in one of three situations:

1. It was treated neither positively nor negatively;
2. Its treatment was not discernible and thus could not accurately be said to have carried any significant weight in the sentencing calculus;
3. The absence of it has been discussed by the sentencing court (for example, where a court considers the lack of restitution by the offender).

Where a sentencing variable was not raised by counsel or the sentencing judge, it is simply listed as ‘not raised.’

Importantly, criteria did not assess the weight such considerations hold in the sentencing calculus as this could not be accurately determined.

Table 7: This table lists the research criteria and explains the reasons for its inclusion in this research.

**Recording of results.** After each case was analysed, the results for each variable was then translated into a pie chart, with a brief description of discussion of the result and any anomalies. The results are set out below.

**G Not all variables identifiable in every case**

It must be noted that some of the variables were not raised, or at least not referred to, in every sentencing decision. Therefore, not every case yielded sufficient data to permit analysis of the treatment of all variables. It may be that this absence itself illuminates the view taken by the sentencing court as to the importance or relevance of the variable. However, because it is not possible to compare the matters that were put by counsel at the plea (because transcripts are unavailable) with those that appeared in the sentencing decision (reflected in the case report), it is not possible to determine with certainty whether the variable was not referred to in the sentencing decision or not raised in the sentencing hearing. For economy, I use the term ‘not raised’ to denote both these concepts in the results. I set out the percentages when this occurred across the cases below.
**Graph 1:** The above bar graph compares the percentage of cases in which each variable was or was not raised.

**I Limitations**

**Subjective analysis.** The major limitation with this research was the subjectivity of the analysis required to discern the treatment of the specific variables. Even though this was a quantitative exercise, there was, as the research literature suggested, an inevitable element of qualitative subjectivity to the assessment required to perform the task of categorisation into aggravating, mitigating or neutral.

Often judges do not expressly state whether they have taken a particular sentencing variable to have a mitigating or aggravating effect in the sentencing calculus. Rather, a common phrase in the majority of the judgments is ‘I take this into account.’ On its own, this statement is highly ambiguous. However, when read in context, the treatment often became clearer. For example, the following statement, although not afforded significant weight, still has a mitigating flavour:

>[p]ublic humiliation which no doubt will reach its peak in tomorrow morning's press. Whilst this is a factor I am entitled to take into account as a punishment already suffered, I do not consider it ought be accorded significant weight.395

On the other hand, the following statement such would be considered neutral because it is clear that it has not been treated in a mitigating or aggravating fashion:

>Whilst I take into account in a general sense the media attention in relation to the Hanlong Mining offences (including photographs) and that the Offender has greatly suffered from the public disgrace, shame and humiliation as a result, adverse publicity may only be considered to amount to extra-curial punishment in what may

be classed as exceptional or extreme cases. I have concluded that the evidence does not establish that this case rises to that level.  

The subjectivity of the analysis is especially demonstrated in relation to the treatment of ancillary orders, which are often ordered without a specific sentencing remark indicating treatment. Although it could be argued that any hardship imposed on an offender (other than those excluded by operation of the State or Federal sentencing Acts) would be treated in a mitigating manner, in the absence of a specific remark, the imposition of an ancillary order has been treated as neutral in this research, unless specifically stated otherwise.

**Search limitations.** A further limitation resulted from the search tools and the fact that several cases located were appeal cases. The first instance decisions could not be located without added expense and therefore were not considered in this research. I do not consider that this alters the significance of the research because the manner of treatment of the relevant variables was always indicated in the appeal decision, which was all that was required for the purposes of the quantitative aspect of the research.

**Multiple offenders.** Finally, in some instances, where the sentencing judge was required to sentence multiple offenders for the same offending, these sentences have been analysed as separate instances of sentencing. While it is correct to assume that the sentencer would treat the same variables consistently (because it is the same person sentencing), this potential repetition or results bias only occurred in 7 of 64 cases (or 10.9%) of the case samples. The effect of such a bias may be to improperly increase the consistency or inconsistency of treatment result, however, that in turn depends on any similarities or differences which exist in relation to the variables as between co-offenders. This minor limitation must be taken into account when considering the results for the individual variables.

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396 R v Bo Shi Zhu [2013] NSWSC 127 [218].
397 See Table 6, namely the criteria ‘Offender must be recorded individually (even if co-offender)’.
CHAPTER VIII
RESEARCH: RESULTS

“Research is formalized curiosity. It is poking and prying with a purpose.”

Zora Neale Hurston, African-American novelist and anthropologist, 1891 - 1960

A Introduction

In this chapter, I set out the results of the empirical research. As discussed above, the research focussed on eight sentencing variables, and the quantitative results of the analysis were tabulated under the heading of each variable. Within each table, I recorded some notes. These notes record judicial remarks about – and hence provide qualitative explanation for – the treatment of each variable. This is included in the results specifically for use in the discussion set out in the next chapter. Within each table is a statistical summary of the major findings.
Results

1 Good character

Chart 1: Treatment of good character in 64 recent white-collar cases

- Good character was raised in 62 out of 64 cases.
- In 50 out of 64 cases it was treated as mitigating.
- In 12 out of 64 cases it was treated as neutral.

The reasons for the neutral treatment of good character included:

- That it was the offender’s good character which enabled them to engage in criminal conduct (See 10A & 11A, 4B, 18B, 19B and 20B).
- That previous civil proceedings (although not aggravating because not relevant to sentencing) were part of the offender’s character and antecedents (See 20A).
- That previous good character meant the offender ought to have known that the conduct was entirely wrong (see 33A).
- That prior unrelated offences demonstrated that the offender was a dishonest person (See 6B).
- That good character should be given little weight in the context of breach of trust by a solicitor (See 17B).
- Acknowledged but no discernible effect (See 22A and 13B).
Public opprobrium

Chart 2: Treatment of public opprobrium in 64 recent white-collar cases

- Public opprobrium was raised in 30 out of 64 cases.
- In 21 out of 30 cases it was treated as mitigating.
- In 9 out of 30 cases it was treated as neutral.

The reasons for the neutral treatment of public opprobrium included:
- That it did not amount to an exceptional or extreme case and therefore did not constitute extra-curial punishment (See 8A, 9A, 16A, and 21A).
- That it was essentially offset by the judge sentencing the offender as a thief (See 5B).
- Acknowledged but no discernible effect (See 6A, 1B, 13B, and 15B).
3 Reduction of Employment or Career Prospects

Chart 3: Analysis of reduction in employment/career prospects in 64 recent white-collar cases

- Reduction of employment or career prospects was raised in 48 out of 64 cases.
- In 33 out of 48 cases it was treated as mitigating.
- In 15 out of 48 cases it was treated as neutral.

The reasons for the neutral treatment of public opprobrium included:

- That it did not amount to an exceptional or extreme case and therefore did not constitute extra-curial punishment (See 16A and 21A)
- Acknowledged but no discernible effect (See 6A, 19A, 20A, 22A, 25A, 30A, 31A and 35A)
- That it was essentially offset by the judge sentencing the offender as a thief (See 5B)
- Raised but the offender ultimately had quite good job prospects (See 9B)
- That the offender did not intend to practice as a lawyer after offending (See 21B)
- Acknowledged but regarded as of very little importance to sentencing (See 28B).
4 Large Amount of Money Involved

The involvement of a large amount of money was raised in 56 out of 64 cases.
In 33 out of 56 cases it was treated as aggravating.
In 23 out of 56 cases it was treated as neutral.

In the following cases the amount of money involved was specifically identified as being substantial, large or significant and was therefore treated as aggravating by the sentencing court:

The reasons for which the amount of money involved was treated as neutral included:
- That the profit derived was a modest sum but could not be interpreted as mitigating (See 2A, 19A, and 22A)
- That there was no personal financial gain (See 21A, 30A, and 32A)
- That it was acknowledged as being less in comparison to that of the co-offender but no clear overall effect (See 10A and 31A)
- Acknowledged but no discernible effect. See the following cases:
  - 4A (involved $1.9m profit);
  - 9A (involved approximately $800,000);
  - 12A (involved $30,000);
  - 13A (involved approximately $180,000);
  - 14A (involved over $95,000);
  - 15A;
  - 17A (involved $1.4m);
  - 35A (involved over $1m);
  - 36A (involved over $1m);
  - 2B (involved over $2m);
  - 3B (involved over $2m); and
  - 7B.
• That the offender did not profit from the offending and therefore no pecuniary penalty was imposed (See 16A)
• That the offender did not receive any personal financial gain and therefore was released on recognisance (See 24A)
• That the offender did not profit from the offending (See 34A)

4 out of 64 of the cases analysed were labelled as not raised because the amount of money involved was specifically identified by the court as being low:
• 3A (the amount was a modest sum and fell into the bottom range of offences of that sort);
• 23A (it was identified by the judge as being one of the least serious cases (although the amount of involved was over $180,000));
• 1B (considerably less in comparison to that of the co-offender); and
• 17B (that the amount ($327,700) falls short in comparison to other cases involving solicitors).
High level of planning/sophistication

Chart 5: Analysis of involvement of high levels of planning/sophistication in 64 recent white-collar cases

- The involvement of a high level of planning or sophistication was raised in 42 out of 64 cases.
- In 39 out of 42 cases it was treated as aggravating.
- In 3 out of 42 cases it was treated as neutral.

The reasons for which a high level of planning and sophistication was treated as being aggravating included:
- That it was protracted and prolonged (See 1A, 35A, 6B, and 15B).
- That it was systematic (See 4A and 28A).
- That it involving the deliberate procurement of others to offend (See 8A).
- That it was deliberate although the offender knew well that he should not (See 20A).
- That it was difficult to detect (despite low level sophistication) (See 17A).
- That it was of a high level on some counts and more spontaneous on other counts (See 21B).
- That the lack of sophistication of meticulous bookkeeping was offset by the deceit and period of offending (See 23B).

The reasons for which a high level of planning and sophistication was treated as being neutral included:
- Acknowledged as being deliberate but was out of character (See 3A and 32A).
- No discernible effect (See 16A).

In one case it was not raised because the level of planning and sophistication was low:
- That because of a lack of subterfuge and sophistication it was easier to detect but the overall effect could not be said to be mitigating (See 19A).
High Level of Harm to Victim

Chart 6: Analysis of the involvement of high level of harm to victim in 64 recent white-collar cases

- The involvement of a high level of harm to the victim(s) was raised in 49 out of 64 cases.
- In 36 out of 49 cases it was treated as aggravating.
- In 13 out of 49 cases it was treated as neutral.

The reasons for which a high level of harm to the victim was treated as being aggravating included:
- That the offending was not victimless and/or to the public and/or market was high (especially where the victims were unidentifiable) (See 2A, 4A, 7A, 8A, 33A, 34A, 2B, and 3B).
- That there were multiple victim companies (See 6A).
- That the level of harm was increased because it involved a breach of trust (See 12A).
- That there was a high cost to the community and public at large (See 9B).
- That although the victims were unidentifiable, the offending is likely to have affected many (See 10B).
- That there were flow-on effects to the community related to the people who had obtained loans from the offender being marijuana cultivators (See 14B).

The reasons for which a high level of harm to the victim was treated as being neutral included:
- Acknowledged the victim was the community at large but no clear overall effect (See 5A).
- Raised by counsel but not discernible effect by judge (See 16A, 17A, and 19A).
- Unidentifiable victims and/or effect (See 21A).
In one case the court explicitly stated that the level of harm to the victim was low. This was labelled as not raised, since the variable we are looking at is specifically high level of harm to the victim (See 13A).

Overall the recognition of the public being a victim (in addition to an individual in some cases) was observed in the following cases: 2A, 4A, 5A, 7A, 8A, 11A, 14A, 15A, 17A, 19A, 33A, 34A, 2B, 3B, 9B, 10B, 16B, 24B, 25B.

7 Restitution

Chart 7: Analysis of whether restitution was raised in 64 recent white-collar cases

- Restitution was raised in 22 out of 64 cases.
- In 14 out of 22 cases it was treated as mitigating.
- In 8 out of 22 cases it was treated as neutral.

The reasons for which a restitution was treated as being neutral included:

- That despite the offender’s willingness to make reparation, it would be too difficult to draft a reparation order because the victims were unidentifiable (See 3A).
- That there was no evidence to show that reparation had been made in relation to these offences (acknowledged that reparation made in relation to civil proceedings with ASIC) (See 32A).
- That some measure of restitution made to victims but not regarded as a mitigating factor (See 17B).
- Acknowledged but no discernible effect (See 33A, 1B, 5B, 9B and 21B)
8 Ancillary Orders

Ancillary orders

Chart 8: Analysis of whether ancillary orders were raised in 64 recent white-collar cases

- Ancillary orders were raised in 18 out of 64 cases.
- In 11 out of 18 cases it was treated as mitigating.
- In 7 out of 18 cases it was treated as neutral.

The reasons for the mitigating treatment in type B cases included:
- That it evidenced remorse and/or contrition (See 1A, 5A, 6A, 7A, 8A, 13A, 31A and 1B);
- Offender forfeited not only profit but also initial stake (See 2A);
- Forfeiting of personal assets (11A).

The reasons for the neutral treatment in type B cases included:
- That a lower compensation order was imposed so as not to hamper rehabilitation by a harsh order, however the overall effect could not be said to be mitigating (See 27B);
- Acknowledged but no discernible effect (See 3A, 9A, 19A, 34A, 5B, 10B).
The above research seeks to answer the overarching question: are white-collar offenders sentenced consistently or consistently in relation to eight sentencing variables? The research further enables consideration of some of the qualitative assertions made in the five articles, and facilitates a closer consideration of the veracity of those assertions, at least to the extent of the results revealed by the 64 analysed cases. Despite the relatively small number of cases (considering the time parameter spanned ten years), the sample size is sufficient to obtain a relatively objective view of sentencing trends and to facilitate discussion of the current approach to sentencing white-collar offenders across the eight sentencing variables.
CHAPTER IX

RESEARCH: DISCUSSION

‘There is nothing more deceptive than an obvious fact.’


A Introduction

In this chapter I discuss the results of the empirical research. The primary purpose of the research was to examine one aspect relating to rationality: the question of consistency or inconsistency of the judicial treatment of the variables. This was the quantitative aspect of the research. However, it was also possible to engage in some qualitative assessment given that each of the 64 cases was read and considered in depth. Specifically, I examined whether white-collar offending does in fact possess a unique set of features and whether the assertions which underpinned the arguments advanced in the articles were valid.

B Preliminary Observations

Within the definition of white-collar crime set out in Chapter VI (and applied in the research methodology), I identified in total 64 cases over the 10-year sample period. Accordingly, the results indicate that white-collar crime is, at present, either not prevalent, not detected or not prosecuted in Australia as often as expected. This is in comparison to the United States, which saw over 400 white-collar crime prosecutions in November 2015 alone. In terms of offender make-up, of the 64 cases analysed, 58 involved male offenders and 6 involved female offenders (that is, approximately 90% and 10% respectively).

C Quantitative Assessment: Consistency of Treatment of the Sentencing Variables

As set out in Chapter VII, the main purpose of the research was to test whether courts in Australia are treating the sentencing variables relevant to white-collar offenders consistently or inconsistently.

From Table 8 below, the sentencing remarks suggest that the there is inconsistent treatment of the majority of sentencing variables in the context of white-collar offending, with the exception of the treatment of good character and high level of planning and sophistication.

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Table 8: This table compares the expected and observed treatment of each of the sentencing variables.

The percentages suggest that the levels of consistency that are achieved across the variables are relatively proportionate to the judicial certainty regarding the role of the individual variable in the sentencing calculus.

- In relation to planning or sophistication, the high level of consistency (93%) was unsurprising, given that the greater the level of planning, the higher the criminality involved in the commission of the offence.

- In relation to good character, given the prevailing view that good character should not mitigate because it usually facilitates the commission of white-collar offences, the fairly consistent treatment (82%) was unexpected.

- In relation to harm to victim, a higher degree of consistency (73%) was expected because the aggravating aspect of this variable seems uncontroversial.

- In relation to public opprobrium (70%) and reduction of career prospects (71%), the judicial uncertainty surrounding the sentencing value of these variables makes the inconsistent results expected.

- In relation to restitution (64%) and ancillary orders (67%), the low consistency rate was unexpected because the prevailing orthodoxy is that neither restitution nor ancillary orders should mitigate very much at all, and so I expected there to be an even lower consistency rate. This suggests that judges do take restitution into account in some cases.

<table>
<thead>
<tr>
<th>Sentencing Variable</th>
<th>Expected Result</th>
<th>Observed result</th>
<th>Determination as to consistency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Good character</td>
<td>Should be mitigating 90% of the time</td>
<td>Mitigating 82% of the time</td>
<td>Fairly consistent</td>
</tr>
<tr>
<td>Public opprobrium</td>
<td>Should be mitigating 90% of the time</td>
<td>Mitigating 70% of the time</td>
<td>Inconsistent</td>
</tr>
<tr>
<td>Reduction of employment or career prospects</td>
<td>Should be mitigating 90% of the time</td>
<td>Mitigating 71% of the time</td>
<td>Inconsistent</td>
</tr>
<tr>
<td>Large amount of money involved</td>
<td>Should be aggravating 90% of the time</td>
<td>Aggravating 59% of the time</td>
<td>Inconsistent</td>
</tr>
<tr>
<td>High level of planning or sophistication</td>
<td>Should be aggravating 90% of the time</td>
<td>Aggravating 93% of the time</td>
<td>Consistent</td>
</tr>
<tr>
<td>High level of harm to victim</td>
<td>Should be aggravating 90% of the time</td>
<td>Aggravating 73% of the time</td>
<td>Inconsistent</td>
</tr>
<tr>
<td>Restitution</td>
<td>Should be mitigating 90% of the time</td>
<td>Mitigating 64% of the time</td>
<td>Inconsistent</td>
</tr>
<tr>
<td>Ancillary orders</td>
<td>Should be mitigating 90% of the time</td>
<td>Mitigating 67% of the time</td>
<td>Inconsistent</td>
</tr>
</tbody>
</table>
• In relation to amount of money involved, the very low consistency rate (59%) was very unexpected, because there is little doubt that the larger the amount of money, the more serious the offending.

Thus, the results were a combination of expected and very unexpected variables.

**D Qualitative Assessment: Distinctive Features of White-collar Offenders**

In the *Rational Approach Article*, we identified certain features which we argued distinguished white-collar offenders from other offenders.

The features we identified were:

• white-collar offenders are not normally from socially-deprived backgrounds;

• white-collar offenders often do not have prior convictions;

• white-collar offences often involve a breach of trust or violation of some other moral virtue, such as loyalty;

• the offences are normally well planned or may continue over a long period of time;

• it is often possible to fully remedy the resulting tangible harm through monetary restitution;

• there is no limit to the maximum benefit derived from the crime;

• the harm caused by the offence often goes beyond that inflicted on individuals and is assumed to extend to financial institutions and markets;

• there are often non-criminal sequels to the conduct in question; and

• there is often a range of incidental sanctions which are suffered by white-collar offenders, including loss of reputation, reduction of future career prospects and public opprobrium.

The research revealed that these features apply in many, but not all, instances of white-collar offending. The assumptions made about background, good character and a high level of planning were borne out by the research. However, the incidence of extra-curial punishment was not as common as expected, especially with respect to public opprobrium, which was raised in less than half the cases analysed. Restitution was raised in just over 30% of the cases analysed, which may suggest that either many offenders were unable to make restitution, or the curial attitude toward restitution resulted in a reluctance to make it or to raise it. Table 9 below summarises the results.
**Table 9:** This table lists the factors which distinguish white-collar criminals from common criminals and examines whether they can be evidenced by the research.

<table>
<thead>
<tr>
<th>Distinguishing factor</th>
<th>Observations</th>
</tr>
</thead>
<tbody>
<tr>
<td>White-collar offenders are not normally from socially-deprived backgrounds</td>
<td>This is true and was observed in 91% of cases. All the type A cases involved offenders who had a tertiary education and/or good careers. Only 9% of all cases analysed involved offenders who are not necessarily highly educated and/or have good careers.</td>
</tr>
<tr>
<td>White-collar offenders often do not have prior convictions</td>
<td>This is correct and was observed in almost 97% of cases analysed.</td>
</tr>
<tr>
<td>White-collar offences often involve a breach of trust or violation of some other moral virtue, such as loyalty</td>
<td>This was true in the following cases: 8A, 12A, 5B, 10B, 13B, 15B, 17B, 18B, 19B, 20B, 21B, 27B, 28B – that is, 20.3% of all cases analysed.</td>
</tr>
<tr>
<td>The offences are normally well planned or may continue over a long period of time</td>
<td>This was true in 65.6% of cases analysed.</td>
</tr>
<tr>
<td>It is often possible to fully remedy the resulting tangible harm through monetary restitution</td>
<td>This was raised in 34.4% of the cases analysed. In others it was presumably not raised because the offender did not have the means to make full restitution. Hence, this premise seems to be at least partially validated. In one case the victims were unidentifiable and therefore although the offender was willing to make reparation, it was impossible (3A).</td>
</tr>
<tr>
<td>There is no limit to the maximum benefit derived from the crime</td>
<td>Not measureable in this research however the varying sums obtained tend to suggest this is accurate.</td>
</tr>
<tr>
<td>The harm caused by the offence often goes beyond that inflicted on individuals and extends to financial institutions and markets</td>
<td>This statement was made in 38.8% of the cases in which high level of harm was raised (and 29.7% of all cases analysed).</td>
</tr>
<tr>
<td>There are often non-criminal sequels to the conduct in question</td>
<td>Not observable in this research.</td>
</tr>
<tr>
<td>There is often a range of incidental sanctions which are suffered by white-collar offenders, including loss of reputation and reduction of future career prospects</td>
<td>Public opprobrium was only raised in 46.9% of cases and reduction in employment or career prospects was raised in 75% of cases. Therefore, on average, there is approximately a 60% chance that incidental sanctions will be suffered by white-collar offenders.</td>
</tr>
</tbody>
</table>

**E Qualitative Assessment: Assertions About Sentencing Variables as Applied to White-collar Offenders**

Several specific assertions were made in relation to the eight sentencing variables in the *Rational Approach Article*. These assertions are examined in Table 10 below.
<table>
<thead>
<tr>
<th>Sentencing Variable</th>
<th>Assertion</th>
<th>Observation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Good character</td>
<td>Recognised but regarded as facilitative and therefore given little mitigating weight due to the importance of general deterrence.</td>
<td>Raised in over 96% of cases so it is characteristic of white-collar offenders. It may not have been raised in other cases because it was self-evident or assumed not to be relevant to sentence. Generally mitigating, but often qualified by the fact that it was not of high importance (82%). Although research did not assess weight given to this factor, where it was treated as being neutral, it was largely due to the belief that the good character facilitated the offending (45% of neutral cases and 8% of total cases where good character was raised).</td>
</tr>
<tr>
<td>Public opprobrium</td>
<td>Common non-curial hardship stemming from white-collar offending.</td>
<td>Raised in almost 47% of cases. Therefore, this is a reasonably common occurrence in white-collar crime cases. Mitigating in 70% of those cases. In 44% of the cases where it received neutral treatment (and 13% of all cases where it was raised) the reason was that it did not amount to an exceptional or extreme case and therefore did not constitute extra-curial punishment.</td>
</tr>
<tr>
<td>Reduction of employment or career prospects</td>
<td>No generally agreed approach as to relevance to sentence. Strongest argument against employment deprivations being mitigating is that it creates a separation of classes.</td>
<td>Raised in 75% of cases. Mitigating in 71% of those cases. In 14% of the cases where it received neutral treatment (and 4% of all cases where it was raised) the reason was that it did not amount to an exceptional or extreme case and therefore did not constitute extra-curial punishment. In 57% of cases where it received neutral treatment (and 16% of all cases where it was raised) it was acknowledged but there was no discernible effect as to treatment. This establishes that courts have not adopted a consistent approach as to treatment of this variable.</td>
</tr>
<tr>
<td>Large amount of money involved</td>
<td>Key consideration in determining offence severity for white-collar crimes is amount of money or value of property involved.</td>
<td>Raised in 87.5% of cases. Aggravating in 59% of those cases (where the amount was substantial). In at least 39% of the cases where it received neutral treatment no discernible treatment could be determined from the court’s judgement</td>
</tr>
</tbody>
</table>
Despite the fact that the majority of those cases concerned amounts of more than $1m (that is 16% of the cases where a large amount of money was raised).

In the remaining cases neutral treatment was given where there was little or no profit from the offending (39% of neutral cases; 16% of all cases where large amount of money was raised).

<table>
<thead>
<tr>
<th>High level of planning or sophistication</th>
<th>Crimes that are well-planned and committed over a long period of time are often punished more heavily.</th>
<th>Raised in 65.6% of cases.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Aggravating in 93% of those cases.</td>
</tr>
<tr>
<td></td>
<td>The main reason for neutral treatment was that although the conduct was deliberate it was out of character (66% of neutral cases; 4.8% of all cases where raised).</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Harshness of penalty both generally and in comparison between high level and low level planning was not assessed in this research. Notably, only one case involved low level planning (See 19A).</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>High level of harm to victim</th>
<th>Crimes committed against individuals, especially those who are financially vulnerable or fragile, cause more direct and much greater harm than crimes committed against the revenue or large corporations.</th>
<th>Raised in 76.6% of cases.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Aggravating in 73% of those cases.</td>
</tr>
<tr>
<td></td>
<td>In 30.6% of the cases which received aggravating treatment, the harm was in relation to the public and/or market at large (that is 22.4% of all the cases where high level of harm was raised).</td>
<td></td>
</tr>
<tr>
<td></td>
<td>This research did not compare the level of harm between crimes committed against the revenue and crimes committed against individuals. The level of harm was deemed high based on assessment by the court.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Restitution</th>
<th>Voluntary restitution by offender is consistently regarded as important but does not automatically result in a significant discount because of the perception that an offender is buying his or her way out of prison. Restitution in context of property offences is a mitigating consideration but is</th>
<th>Raised in 34.4% of cases indicating that it is not necessarily common.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mitigating in 64% of those cases.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>In 62.5% of cases where it received neutral treatment (and 22.7% of all cases where it was raised) it was acknowledged but there was no discernible effect as to treatment. This indicates that mitigation is in fact not automatic.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>No evidence that courts are actually applying the idea that treating restitution as mitigating would enable offenders to buy their way out of prison thereby causing class separation.</td>
<td></td>
</tr>
</tbody>
</table>
not necessarily a weighty factor. Only in circumstances where restitution constitutes a demonstrable hardship to offender will it provide a significant mitigation of penalty. Although this research did not assess the weight of mitigation (this could not be done given the instinctive synthesis approach to sentencing), asserting that more mitigation is afforded to the offender where restitution caused demonstrable hardship may be incorrect as this was not one of the reasons for neutral treatment in any of the cases.

### Ancillary orders

Confiscation orders which reclaim property do not mitigate but orders which further strip offender of assets do mitigate. Commonwealth legislation does not allow such orders to be mitigating per se but it does allow it to inform the level of remorse and contrition.

Only raised in 28.1% of cases indicated courts are not making very much use of these orders in relation to white-collar offenders. Mitigating in 61% of those cases.

In 44.4% of the cases in which this variable was raised, the reason for mitigatory treatment was that it informed remorse and/or contrition.

In only one of the cases analysed had the offender been stripped of personal assets as well as assets derived from the offending, and in that case the treatment was mitigating (See 11A).

In 85.7% of cases where it received neutral treatment (and 33.3% of all cases where it was raised) it was acknowledged but there was no discernible effect as to treatment.

| Table 10: This table tests the accuracy of the assertions made in A Rational Approach to Sentencing White-collar Offenders in Australia with respect to each of the sentencing variables based on the research results. Disregarding the assertions made in relation to weight of mitigation and penalty harshness, which were not assessed in this research, the assertions made in relation to good character, reduction of employment and/or career prospects, large amount of money involved, and ancillary orders were generally correct. The assertions made in relation to public opprobrium and restitution may need clarification and elaboration. The assertions made in relation to high level of planning and high level of harm could not be assessed because this research did not specifically test the harshness of penalty or compare in detail the level of harm between individuals and the public. Notably, despite the emphasis on matching harm to victim with harshness of sanction (proportionality), the level of harm caused to the victim was identified in only 78% of cases (including the case where the level of harm was identified to be of a low level). This finding suggests that, in 22% of white-collar sentences, judges are not adequately articulating the principal basis by which the nature and severity of the sanctions for an offence is to be determined. While there may be other explanations, (including the opaqueness of the instinctive synthesis method), failure to identify and assess the level of harm in 22% of cases may indicate that in at least 1 in every 5 cases, the sentence is not properly informed by the proportionality principle. |
F Conclusion

In Chapter IV, I identified the four integers of a rational approach to sentencing law. The data above illuminates at least two of those integers, namely, whether sentencing law as currently applied is capable of clear and consistent application, and whether the outcomes of individual cases are relatively predictable. The ineluctable conclusion from the data is that in neither instance is the law able to claim to be rational. Further, to the extent that the five articles rely on assumptions about the features of sentencing law, these assumptions are borne out by the research. Finally, the Rational Approach Article made a series of assertions regarding the treatment of variables by courts – effectively criticisms about the way we understood the courts to be applying the eight variables. The qualitative assessment of the 64 cases tended to support these assertions, and thus, the critiques that followed. Given those conclusions, two important questions remain before turning to consider the reform proposals in detail: does sentencing law accord with known human behaviour and is the law responsive to change if required? I commence Chapter IX with those questions in mind.
CHAPTER X

TOWARDS A RATIONAL APPROACH: PROPOSALS FOR REFORM

Social reform is not to be secured by noise and shouting; by complaints and denunciation; by the formation of parties, or the making of revolutions; but by the awakening of thought and the progress of ideas. Until there be correct thought, there cannot be right action; and when there is correct thought, right action will follow.

Henry George, *Social Problems*, 1946

**A Introduction**

As I explained in Chapter I, the purpose of this thesis is to identify the major weaknesses of the present sentencing model, which I refer to as ‘failure mode’, and to create a platform for change through reform. The failure mode has been examined and elucidated in Chapters V, VI, VII and VIII. In Chapter V, such problems inherent in the sentencing calculus as the opacity of the instinctive synthesis method and the failure of some of the objectives of sentencing were demonstrated. As became evident when considering the problems specific to white-collar crime in Chapter VI – commencing with the semantic challenge of establishing a fixed or at least circumscribed meaning for white-collar crime – a meaningful jurisprudence can only be developed by identifying the base causes of the currently irrational approach to sentencing. Identifying and responding to these causes is essential to the process of reform.

There are two key assumptions underlying a rational approach to sentencing. The first is that criminal actors respond rationally to punishment, in other words, that the law accords with known human behaviour. The second is that courts, by imposing punishment, can modify the behaviour of criminal actors and where it does not, the law will adapt and respond in order to achieve that result. But neither of those key assumptions is reflected in the current approach to sentencing white-collar offenders. The problem that we identify in the articles is that there is no empirical evidence to support the relationship between the impact of sentencing and modifying criminal behaviour, whether as a general or specific deterrent, or to rehabilitate. Much work needs to be done by legal scholars and by experts outside of the law, to ascertain the cause and effect relationships that sentencing law requires to act as an effective instrument of social change. Further, where it is evident that the law is not achieving the purpose which justifies its existence, it must change. In Chapter VI, I demonstrated the obstinate commitment by the judiciary to failed paradigms and manifestly false premises; reform of the law will be impossible as long as the evidence is ignored.

Paradoxically, the same judiciary which clings on to the fuzzy logic,\(^{399}\) clearly understand what is at stake in this area of the law:

\(^{399}\) In the mathematical sciences, ‘fuzzy logic’ is employed to deal with a concept of a partial truth where a value might be any value between 0 and 1 and is thus considered to be ‘fuzzy’ whereas in Boolean truth may only be ‘crisp’ values of 0 or 1. Fuzzy logic is therefore a system of logic in which a statement can be true or false or on a continuum. I use this term to describe the feature of judges which permit them to apply assumptions to sentencing law, which are not necessarily true or false.
It is difficult to overstate the importance of sentencing in the administration of any system of criminal justice. In a very real sense it is where the ‘the rubber meets the road’. The exercise of the power to administer punishment is one of the two critical components of any system for the administration of criminal justice - the other being the determination of guilt or innocence. The manner in which the power to impose punishment is exercised is one of the two critical determinants of the quality and calibre of justice provided in any jurisdiction. Any system which imposes punishments which are cruel, harsh or arbitrary cannot be described as a just system. The extent to which ‘the punishment fits the crime’, and the offender, provides a tangible measure of justice.  

In order to better provide a tangible measure of justice, and thereby to achieve a more rational approach to sentencing white-collar offenders, below I make some proposals for the reform of the law in this area.

At the highest level of abstraction, the High Court has relatively recently sought to justify the current approach to sentencing in *Munda v Western Australia*:

... there are three points to be made in response. First, the proper role of the criminal law is not limited to the utilitarian value of general deterrence. The criminal law is more than a mode of social engineering which operates by providing disincentives directed to reducing unacceptably deviant behaviour within the community. To view the criminal law exclusively, or even principally, as a mechanism for the regulation of the risks of deviant behaviour is to fail to recognise the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community’s disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence ...  

The criminal law is principally about crime reduction and failing to acknowledge that objective will only perpetuate useless, expensive and misguided action; punishment clearly has a part to play in crime reduction. The objectives identified by the Victorian and Federal legislatures – deterrence, denunciation, community protection, rehabilitation – are important objectives; and sentencers would be assisted by the legislature listing and ranking them. In this way, sentences will no longer reflect the unobtainable but will give proper weight to the desirable. If research reveals that there are other objectives that can or should be achieved, then the list should be revisited.

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401 87 ALJR 1035 [54].
B Proposals for reform: conclusions from the thesis

Proposal 1:

Legislative reform of the Crimes Act 1914 (Cth) and the Sentencing Act 1991 (Vic) to rank the general sentencing objectives. The recommended order (in descending priority) is:

1. Just punishment
2. Community protection
3. Rehabilitation
4. Absolute general deterrence

The current legislative sentencing objectives have not been prioritised. The rationale behind prioritising the objectives is that it distinguishes the objectives from the more general factors which must be taken into account in the sentencing process, such as, good character, remorse, age, and restitution. In addition, it reiterates the importance of fairness by emphasising equality amongst the larger category of criminal offenders, thus diminishing the stereotypical class bias criticism that arises when categorising offenders.

By prioritising just and proportional punishment the courts satisfy the retributive element of punishment and minimise the opportunity for private acts of vengeance. Of almost equal importance is community protection which would justify the harsh and lengthy punishment of dangerous offenders, particularly violent offenders and sex offenders. The third objective of punishment should be rehabilitation thus satisfying the utilitarian aspect of punishment and minimising costs associated with recidivism and reimprisonment. The final objective for punishment should be absolute general deterrence given that there is minimal research to prove that this objective is either achievable or attainable.

Proposal 2:

More empirical research (preferably specific to Australian offenders) is required to assess the efficacy of pursuing the sentencing objectives.

The justification for the above recommendations is the pursuit of a more rational and more efficient sentencing process. The most logical and cost effective way of achieving this goal is by looking to existing (and conducting further) empirical research. Importantly, the objectives of punishment should be the same for all offenders irrespective of categorisation and should be supported by evidence where possible.

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402 Crimes Act 1914 s 16A(2): the goals of punishment are combined with all the general factors to be considered by the sentence and are unprioritised. Cf s 5(1) of the Sentencing Act 1991 (Vic) where the goals are separated in an individual provision but are also unprioritised.
403 Bagaric, Alexander and Pathinayake, above n 28; Bagaric and Alexander, above n 8.
Proposal 3:

Legislative amendment of provisions which require the consideration of general deterrence to be the consideration of absolute general deterrence only. This is relevant to white-collar crime as well as other types of crime.

The rationale behind this recommendation is that the objectives of imposing punishment should be supported by empirical research in order to be rational. Where such objectives have been expressly disproved by empirical research, there remains no logical or moral justification for attempting to achieve them.

Proposal 4:

Insert provision in the Crimes Act 1914 (Cth) and Sentencing Act 1991 (Vic) requiring judges to clearly state how they treat each of the sentencing factors they consider and how the sentence imposed satisfies the objectives for punishment.

The rationale behind this recommendation is that by requiring judges to provide specific reasons and general methodology about how they consider each sentencing factor, whether mitigating, aggravating or neutral, courts will promote clarity and consistency. I do not propose that judges ought to provide numerical figures as to the weight each factor plays in the sentencing exercise as this would defeat the purpose of instinctive synthesis and would be impossible to achieve. The only way to implement this recommendation is by legislative action. Unless this recommendation is implemented, inconsistency will remain and continue to jeopardise the rule of law, the right to equality amongst offenders, public confidence in the justice system, while increasing the price of justice.

Proposal 5:

Imprisonment (particularly lengthy terms) should not be the preferred penalty for white-collar criminals. It should be a penalty of last resort. Instead, re-allocate funding to increase investigation, detection, compliance and policing.

The rationale for this recommendation is that although white-collar crime is ‘serious’ it is not in the same category of seriousness as arson, violent, sex and drug offences. The white-collar criminal as an individual does not physically harm another person and therefore need not be physically incapacitated.

Further, the expense to the community does not justify imprisonment for economic crimes. There are other punishments that better respond to such crimes, such as economic sanctions (life-time economic bans on earning or ownership of property), professional disqualification, and systematic tracing and confiscation of assets. Moreover, despite the public perception that white-collar offenders are treated more leniently because of their perceived social status, this has not been proven – the reason for the perception more likely being the highly individualised nature of the

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404 Except where there is a statutory discount e.g. guilty pleas: see, eg, Sentencing Act 1991 (Vic) s 6AAA.


406 For an expansion of this justification, see: Bagaric, Alexander and Pathinayake, above n 1.
sentencing process. Appropriate outcomes should not be dictated by misperceptions.

Proposal 6:

Legislative amendment requiring judges to provide reasons as to why an ancillary order was not imposed (where it could have been) before considering imprisonment.

The rationale behind this recommendation is two-fold: first, the reinforcement of existing legislative provisions which require sentencers to first consider other forms of punishment; second, to promote the imposition of ancillary orders which effectively provide a primary punishment in the form of disgorgement, compensation, or occupational disablement. Legislative provisions already exist in Victorian and Commonwealth sentencing law which could be better utilised by requiring reasons for not imposing such punishments.

Proposal 7:

Legal and/or criminological should academics should reconsider the role of rational choice theory as it applies to sentencing decision making to develop a new empirically valid paradigm for legislatures and sentencing courts.

This recommendation is potentially only aspirational. However, this recommendation could find pragmatic application if either State or Federal legislatures convene a commission of inquiry into the theoretical and practical difficulties in achieving sentencing outcomes and means for reform. This would entail an examination of the flaws with rational choice theory and utility of behavioural economic theories being applied to sentencing.

C Proposals for Reform: review of previous recommendations

The proposals for reform set out above resulted from the research and discussion undertaken as part of the preparation of this thesis. However, prior to these reform proposals, throughout the five articles, a series of recommendations were made which considered how sentencing law may respond to the critiques of the various facets. Given the extent of the further research and more detailed consideration of the subject matter of the articles, it is timely to reconsider whether those earlier recommendations should be maintained or amended.

<table>
<thead>
<tr>
<th>#</th>
<th>Article</th>
<th>Recommendation</th>
<th>Comments</th>
<th>Conclusion</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>(Marginal) General Deterrence Doesn’t Work – and What It Means for</td>
<td>Courts should no longer increase sentences to pursue the objective of marginal general deterrence</td>
<td>The empirical research contained in ‘General Deterrence’ demonstrated that marginal general deterrence does not work, as did the Victorian Sentencing</td>
<td>Maintain</td>
</tr>
</tbody>
</table>


408 Bagaric and Alexander, ‘General Deterrence’, above n 201, 270.
<table>
<thead>
<tr>
<th>Sentencing</th>
<th>Advisory Council. 409 Bearing in mind the discussion about the requirement for rationality in law (see Chapter 4) the recommendation contained in the article remains sound because it is, as we argued, unjustifiable to pursue a sentencing objective which demonstrably does not work.</th>
</tr>
</thead>
<tbody>
<tr>
<td>There should follow a general reduction of penalty severity to the extent that marginal general deterrence currently drives sentencing outcomes (i.e., a reduction in tariff for revenue and drug offences) 410</td>
<td>This recommendation is a corollary of the conclusion that marginal general deterrence does not work. It would thus be necessary to reduce penalty severity which is otherwise increased due to this reason. This does not mean that sentences must necessarily be reduced overall but rather a different basis for maintaining sentence severity must be identified.</td>
</tr>
<tr>
<td>These reforms can be achieved by judicial reassessment of the meaning and role of general deterrence in the sentencing process. General deterrence should be confined to absolute general deterrence. 411</td>
<td>As absolute general deterrence does work, it should be retained. However, as the research reveals, methods of reform which require judicial intervention are undesirable for their inconsistency and possible lack of basis in principle. Enacting systemic change is the province of parliament and rather than a shift in judicial approach, a change in the law, including amendments to the Sentencing Act, will be preferable. I note however the experience of DPP v Walters 412 where the court held that parliament’s intended median sentence could not be achieved because the legislation lacked any mechanism with which to do it.</td>
</tr>
</tbody>
</table>

409 Ritchie, above n 236, 2.
410 Bagaric and Alexander, ‘General Deterrence’, above n 201, 283.
411 Ibid.
<table>
<thead>
<tr>
<th>Section</th>
<th>Topic</th>
<th>Statement</th>
<th>Recommendations</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>Rehabilitating Totality in Sentencing: From Obscurity to Principle</td>
<td>The principles of mercy should not underpin the application of totality.(^{413})</td>
<td>Maintain</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Mercy is too vague both conceptually and in practice to support the use of totality in sentencing. To continue to use this as the basis of the doctrine would be irrational because it cannot be an effective foundation of totality (see Chapter V). Mercy introduces subjectivity, inconsistency and irrationality to the sentencing process.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Totality should be applied but be based the objective of rehabilitation and possibly proportionality.(^ {414})</td>
<td>Maintain</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Totality may still be useful in sentencing if it can be supported on a rational basis. As was argued in the article, it is logically sound to afford some discount to an offender who has not yet had the benefit of rehabilitation for earlier offences and so totality should be maintained in sentencing. This is particularly relevant for white-collar offenders who, so the research reveals, often commit a number of offences over a period of time. Further, more extensive research into the nature of proportionalism could potentially provide some support for the concept.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Totality should be given only modest weight in the sentencing decision.(^ {415})</td>
<td>Maintain</td>
</tr>
<tr>
<td></td>
<td></td>
<td>As was outlined in the article, given that the effect of rehabilitation is speculative and difficult to support with clarity based on the empirical evidence it should only be afforded modest weight.</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn’t Work,</td>
<td>Legislature should abolish specific deterrence as a sentencing objective on the basis of studies which have found no link between increased legal</td>
<td>Maintain</td>
</tr>
<tr>
<td></td>
<td></td>
<td>This recommendation is sound. In fact, the empirical evidence supports a conclusion that recidivism rates are high despite more punitive punishments. Instead, it is more effective to pursue specific rehabilitative programs</td>
<td></td>
</tr>
</tbody>
</table>

\(^ {413}\) Bagaric and Alexander, ‘Totality’, above n 101, 139, 167.
\(^ {414}\) Ibid 167.
\(^ {415}\) Ibid.
<table>
<thead>
<tr>
<th><strong>Rehabilitation Might and the Implications for Sentencing</strong></th>
<th>compliance and experience in jail and the length of the jail term.416</th>
<th>directed specifically towards prisoners and offending reduction, such as the Defy Ventures program.417</th>
<th>Where judges would have increased a sentence where specific deterrence would have been a weighty consideration in the sentencing determination (i.e. considerable criminal history) judges should impose more lenient sentences because they no longer should pursue specific deterrence.418</th>
<th>This recommendation is consistent with the approach taken in this thesis, that is, a demonstrably unattainable objective cannot be pursued.</th>
<th>Maintain</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>A Rational Approach to Sentencing White-collar Offenders in Australia</strong></td>
<td>Provide a numerical and large discount for restitution.420</td>
<td>The empirical research reveals that restitution is underutilised (raised in only 34.4% of cases), and therefore it should be encouraged in order to do justice to victims. The argument that restitution</td>
<td>Given that at this point in time, there is no firm evidence the rehabilitative measures imposed by sentencing courts, especially, in relation to white collar offences are generally effective, the objective of rehabilitation should not play a meaningful role in the sentencing calculus.419</td>
<td>As per the recommendation.</td>
<td>Maintain</td>
</tr>
</tbody>
</table>

416 Bagaric and Alexander, Capacity of Criminal Sanctions’, above n 8, 172.
419 Ibid.
allows offenders to buy their way out of gaol is outweighed by the good that comes from restoration for victims. Furthermore, like the discount for an early guilty plea, recognising the utilitarian benefit of restitution and offering an incentive for its use is sound.

| Abolish the pursuit of general deterrence and the increase in sentences which follow. | As in ‘(Marginal) General Deterrence Doesn’t Work – and What It Means for Sentencing’, above, it is clear that general deterrence is ineffective and it is therefore irrational to increase penalties on this basis. | Maintain |
| Provide a greater discount for previous good character, consistent with other areas of sentencing. | Although good character was found to be generally mitigating in the empirical research, its unique treatment in the case of white-collar offenders, where it is usually afforded less weight, has a questionable logical basis and, in any case, should be abandoned in order to achieve consistency in sentencing principles. | Maintain |
| Provide a greater discount for non-curial harm in the form of employment deprivations. | The empirical research reveals that this factor is not treated consistently and so it is desirable to adopt a uniform approach. Employment deprivation should be mitigating as this better reflects the true effect of the sentence and finding of guilt, and it does not meaningfully create a separation between the treatment of offenders from different classes. | Maintain |
| Place more emphasis on the harm caused by the offence to guide the sentence: crimes against individuals | Focussing on harm better reflects the proportionality principle and, as outlined in the article, greater harm is done to individuals than to government or institutional | Maintain |

421 DPP (Cth) v Thomas [2016] VSCA 237.  
423 Ibid.  
424 Ibid.
should be treated more seriously than those against the revenue or large corporations.\(^{425}\)

victims in terms of the offence’s impact on the victim. Contrary to the popular assumptions, there is little evidence that white-collar crime undermines confidence in institutions or markets.

<table>
<thead>
<tr>
<th>5</th>
<th><strong>First-time Offender, Productive Offender, Offender with Dependents: Why the Profile of Offenders (Sometimes) Matters in Sentencing</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Good criminal history should have a considerable impact on sentencing</strong> – first time offenders reoffend at lower rates than repeat offenders, and hence, are less of a danger to the community. Sentencing discount of 25% for first time offenders is appropriate.(^{426})</td>
<td><strong>This recommendation is sound. The mitigating nature of good criminal history is supported by the research but its weight cannot be assessed. To give a defined discount is possible(^{427}) and appropriate to serve utilitarian ends,(^{428}) given there is less need for community protection.</strong></td>
</tr>
<tr>
<td><strong>Past good acts should not receive a discount beyond that associated with a good criminal history (assuming that, in fact, they have not previously committed an offence).(^ {429})</strong></td>
<td><strong>Although the research reveals that past good character such as contribution to community, etc is often recognised, realistically, it is almost impossible to assess with accuracy and therefore it does not form a rational basis for mitigation of sentence.</strong></td>
</tr>
<tr>
<td><strong>Offenders who have physical or financial dependents should have a penalty reduction of 25%.(^ {430})</strong></td>
<td><strong>This recommendation recognizes the specific hardship to offenders who are carers of others. The recommendation does not provide license to people in that position to commit offences, but recognizes the relationship between the offender and the requirement for care by another person. This is in accordance with</strong></td>
</tr>
</tbody>
</table>

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\(^{425}\) Ibid.


\(^{428}\) See, eg, *DPP (Cth) v Thomas* [2016] VSCA 237 regarding the discount for a guilty plea.


\(^{430}\) Ibid 446.
Table 11: This table summarises the recommendations in each of the articles which form the basis for this thesis and whether they should be kept, amended or discarded.

D Conclusion

Sentencing and the imposition of penalties on white-collar offenders is largely without evidence-based justification or rational explanation. The corollary is that scarce community resources are wasted or misdirected and the high order purpose of sentencing law – the reduction of crime – is not achieved. What is required is to align sentencing practice with evidence-based reality. Penological and criminological studies should guide sentencing outcomes – not intuitive hunches and demonstrably false propositions.

The research quantitatively demonstrates that there are two identifiable failures in the sentencing of white-collar offenders.

First, there is inconsistency within the treatment of at least six of eight sentencing variables (and further research may reveal yet others) when sentencing courts are required to determine the aggravating or mitigating effect of those variables. This is indicative of judicial uncertainty regarding their proper treatment. This failure is a breach of an integer of a rational system of sentencing law as set out in Chapter IV: the outcomes of individual cases are relatively predictable.

Second, there is inconsistency in the treatment of the sentencing variables between white-collar offenders and non-white-collar offenders. This disparate treatment – particularly in relation to prior good character and restitution – is unjustifiable where the underlying reasons for such treatment in relation to an offender remain constant, whether or not the offender is part of the white-collar subset. This failure is a breach of another integer of a rational system of sentencing law: that the law is capable of clear and consistent application.

Further, the research qualitatively demonstrates that white-collar sentencing is irrational in so far as it pursues sentencing objectives – such as general deterrence – which are demonstrably unachievable and which are based on a demonstrably unsatisfactory paradigm: the rational choice theory. These failures breach another integer of a rational system of sentencing law: that the law is designed to accord with known human behaviour.

The results of the research conform, in the main, to the contentions set out in the five co-authored articles.

Despite the failures, there is still a way forward – but only if the causes and effects of these failure modes are translated into action. The reform proposals set out above provide a model agenda for what might be done to correct the small but many systemic errors which are responsible for the irrational state of the law. The law

must be responsive to change when obviously required. The courts will serve the interests of the community, of the victim and of the offender by replacing rhetoric with rationality.

**D Postscript**

I note with some optimism, that during the latter part of the preparation of this thesis, on 25 November 2015, the Australian Senate referred an inquiry into the inconsistencies and inadequacies of current criminal, civil and administrative penalties for corporate and financial misconduct or white-collar crime to the Senate Economics References Committee for inquiry and report by 27 July 2016. The closing date for submissions was 30 March 2016 and evidence was called before the Committee in the latter part of 2016.

I, along with Professor Bagaric and Ms Jenny Awad, made a submission to, and appeared before, the Committee. We gave evidence in accordance with the broad proposals for reform that have been set out in this thesis. A number of other academics, institutional bodies and individuals also made submissions and gave evidence.

At the time of submission of this thesis, the Committee had not yet made a final report to the Senate.

It is hoped that the sentencing of white-collar offenders, and perhaps all offenders, will benefit from the modest contribution made by this thesis, and the work of the Committee.
# APPENDIX A: RESEARCH

## A Type A Case Analysis

<table>
<thead>
<tr>
<th>Case 1A</th>
<th><em>R v McKay</em> [2007] NSWSC 275</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Sentence</strong></td>
<td>Three fixed terms amounting in all to 15 months periodic detention</td>
</tr>
<tr>
<td><strong>Sentence Appealed?</strong></td>
<td>No</td>
</tr>
<tr>
<td><strong>Major offence/s</strong></td>
<td><em>Corporations Act 2001</em> (Cth) ss 1043A(1) and 1311(1)(a)</td>
</tr>
</tbody>
</table>
| **Offence description** | – Procuring mother to acquire 8,000 shares  
– Procuring son to acquire 8,000 shares  
– Procuring mother, son and a friend to acquire 7,650 shares |
| **Offender status** | 56 year old female, educated and member of associations [8]  
Worked as a consultant – held several roles [9] established a business providing consulting services to victim company [11] |
| **Sentencing Variables** | **Treatment** | **Remarks** |
| 1. Good character | Mitigating | ‘All these testimonials paint a picture of a person of the highest integrity. All assert that her actions in breaching the insider-trading provisions of the *Corporations Act 2001* were totally out of character. They also confirm the fact that she has expressed, on numerous occasions, deep regret and genuine heartfelt remorse for her lapse of judgment.’ [43]  
‘As to the fact that the offender has no prior convictions and has led an unblemished life both professionally and personally, it has been said that good character is not as significant a mitigating factor in sentencing for white-collar crimes as it is for other offences (*R v El Rashid* unreported Court of Criminal Appeal 7 April 1995). Although this is undoubtedly the case, it does not mean that the Court should lose sight of the good character of an offender, which nevertheless, remains a relevant factor in the sentencing process.’ [64]  
‘There is no need to impose a fine in the present matter. Indeed, the Crown does not suggest that a fine be imposed. In view of the offender’s good record and her undoubted rehabilitation, there is no need to make a Recognisance Release Order.’ [70] |
<p>| 2. Public opprobrium | Mitigating | ‘At a personal level, as might be expected, she has experienced considerable shame and loss of face…considerable stress and uncertainty as to her future.’ [45] |
| 3. Reduction of employment/career prospects | Mitigating | ‘It is clear that the disgrace and adverse publicity associated with the public revelation of the offences has had a very substantial effect on the offender both professionally and personally. It has really meant the end of her career as a company consultant, at least for the time being.’ [45] ‘There are a number of other matters to be briefly noted… the exposure and adverse publicity have had a very substantial effect on her financial position, her ability to resume her work in the business world and on her health.’ [52] |
| 4. Large amount of money involved | Aggravating | ‘…three points do not however, significantly mitigate the objective seriousness of the offences. First, the amount ventured in the transactions was approximately $150,000. This could hardly be described as an insignificant investment.’ [55] |
| 5. High level of planning/sophistication | Aggravating | ‘The three offences must be regarded as serious… The offending took place over a period of two and a half months, involving three offences and the procuring of five share purchases… must be accepted, in these circumstances, that the offender acted with deliberation knowing, in each case, that the information was not generally available and was material.’ [56] |
| 6. High level of harm to victim | Not raised | |
| 7. Restitution | Not raised | |
| 8. Ancillary orders | Mitigating | ‘I have also made reference to the fact that the offender has paid $77,428 following an order made pursuant to the Proceeds of Crimes Act 2002. This is an appropriate case to find that the making of the consent order and the payment of the penalty show a further willingness to facilitate the course of justice in a matter connected to the offence. In addition, the payment may be seen to be further evidence of contrition and co-operation.’ [67] |</p>
<table>
<thead>
<tr>
<th>Case 2A</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Sentence</strong></td>
<td></td>
</tr>
</tbody>
</table>
| | 1. 10 months imprisonment, immediate recognisance order in the sum of $500 requiring good behaviour for 18 months.  
2. Fine - $30,000 |
| **Appealed?** | No |
| **Major offence/s** | *Corporations Act 2001 (Cth) s 1043A(1)* |
| **Offence description** | Insider trading with information which could materially effect the market price of shares in Indophil Resources, of which he was a director. |
| **Offender status** | 65 year old male; metallurgist; worked in international mining industry for 40 years; great career. |
| **Sentencing Variables** | **Treatment** | **Remarks** |
| 1. Good character | Mitigating | ‘I accept that you are devoted to your family…numerous testimonials have been tendered on your behalf and oral character evidence has been called. All speak of your drive, your competence and your integrity… I do accept, however, that your misconduct was an aberration and that you almost certainly will not re-offend in this or any other way.’ |
| 2. Public opprobrium | Mitigating | ‘Public humiliation which no doubt will reach its peak in tomorrow morning’s press. Whilst this is a factor I am entitled to take into account as a punishment already suffered, I do not consider it ought be accorded significant weight.’ |
| 3. Reduction of employment/career prospects | Mitigating | ‘You will be disqualified from holding corporate office, which is a penalty in itself, see *Rich v ASIC* (2004) 220 CLR 129, and at the age of 65 this is effectively a disqualification for life.’ |
| 4. Large amount of money involved | Neutral | ‘I do not regard the nature of the trade, the amount invested or the anticipated profit as falling into a particularly grave or serious category…your actual profit derived from the average of sales of all your Indophil shares in June and July 2008 was $29,045, a figure whilst larger, I still regard as modest.’ |
| 5. High level of planning/sophistication | Not raised |  |
6. **High level of harm to victim**

| Aggravating | ‘In insider trading cases I consider there are at least two victims; the seller or sellers of the stock at the lower price and the public, whose confidence in the integrity of the market must be diminished. The impact upon public confidence in the market is an important factor. The securities markets could not survive and flourish without the confidence of those who elect to invest in it.’ |

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7. **Restitution**

| Not raised |

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8. **Ancillary orders**

| Mitigating | ‘You have consented to the payment of a pecuniary penalty order, thus forfeiting not only your profit but also your initial stake…These are all matters that operate significantly to mitigate the sentence that I must pass.’ |

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**Case 3A**  
*R v Stephenson* [2010] NSWSC 779

| **Sentence** | Release without passing sentence on your own recognisance and without security, on the following conditions:  
1. good behaviour (12 months); and  
2. pecuniary penalty of $20,000 |

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| **Sentence Appealed?** | No |

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| **Major offence/s** | *Corporations Act 2001* (Cth) s 1043A |

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| **Offence description** | - Disposing of 4514 shares;  
- Awareness of insider trading conduct in conversation with broker; [41] and  
- Share trading (information passed to him from a friend who was a company executive) |

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| **Offender status** | 57 year old male; career spanning 41 years, generally in the wholesale food distribution industry, worked as a managing director and a consultant. |

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<table>
<thead>
<tr>
<th><strong>Sentencing Variables</strong></th>
<th><strong>Treatment</strong></th>
<th><strong>Remarks</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Good character</td>
<td>Mitigating</td>
<td>‘I am satisfied that in the circumstances of this case that Mr Stephenson’s good character should be afforded weight.’ [61]</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>3. Reduction of employment/</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>career prospects</td>
<td>Not raised</td>
<td>‘I accept it is an offence towards the bottom of the range of offences of its kind when his lack of knowledge is taken into consideration, coupled with the relatively modest sum involved.’ [67]</td>
</tr>
<tr>
<td>---</td>
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</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Neutral</td>
<td>‘For sentencing purposes, I accept the offending constituted by his deliberate use of price sensitive information was out of character.’ [61]</td>
</tr>
<tr>
<td>5. High level of planning/ sophistication</td>
<td>Not raised</td>
<td>‘In fixing the penalty, I take into account that the funds generated from the trade have since been released from the broker’s suspense account, and that while Mr Stephenson remains willing to make reparation to sellers who were financially disadvantaged by his conduct, it would be difficult, if not impossible, to craft a reparation order under s 20(1)(a) to give effect to his intention, given that over five years have passed since committing the offence and when many, if not most sellers, are likely to be difficult to identify or locate.’ [68]</td>
</tr>
<tr>
<td>6. High level of harm to victim</td>
<td>Neutral</td>
<td>Pecuniary penalty of $20,000 Acknowledged but no discernible effect.</td>
</tr>
<tr>
<td>7. Restitution</td>
<td>Neutral</td>
<td>Pecuniary penalty of $20,000 Acknowledged but no discernible effect.</td>
</tr>
<tr>
<td>8. Ancillary orders</td>
<td>Neutral</td>
<td>Pecuniary penalty of $20,000 Acknowledged but no discernible effect.</td>
</tr>
<tr>
<td>Case 4A</td>
<td>R v Hartman [2010] NSWSC 1422</td>
<td></td>
</tr>
<tr>
<td>Sentence</td>
<td>Original total sentence: 4.5 years (non-parole 3 years) Sentence quashed on appeal: New sentence (2.5 years, 2 years + 18 months and 16 months) with a single pre-release period of 15 months. Upon expiry of 15 months imprisonment, to be released upon recognisance in the sum of $1,000 (conditions apply).</td>
<td></td>
</tr>
<tr>
<td>Sentence Appealed?</td>
<td>Yes – Hartman v R [2011] NSWCCA 261 (appeal concerned the weight given to assistance to authorities, psychiatric condition and gambling)</td>
<td></td>
</tr>
<tr>
<td>Major offence/s</td>
<td>Corporations Act 2001 (Cth)</td>
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<tr>
<td></td>
<td>- s 1043A(1) - 19 counts</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- s 1043A(2) - 6 counts</td>
<td></td>
</tr>
<tr>
<td>Offence description</td>
<td>Front running – 25 counts</td>
<td></td>
</tr>
<tr>
<td>Offender status</td>
<td>25 year old male; tertiary education, worked at Orion as an equities dealer.</td>
<td></td>
</tr>
<tr>
<td>Sentencing Variables</td>
<td>Treatment</td>
<td>Remarks</td>
</tr>
<tr>
<td>----------------------</td>
<td>-----------</td>
<td>---------</td>
</tr>
<tr>
<td>1. Good character</td>
<td>Mitigating</td>
<td>‘The offender has not previously come to the notice of the authorities and he is entitled to the benefit of his good character.’ [52]</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Neutral</td>
<td>‘The evidence which I accept indicates that the insider trading charges alone made him a total profit in excess of $1.9 million.’ [45]</td>
</tr>
<tr>
<td>5. High level of planning/sophistication</td>
<td>Aggravating</td>
<td>‘The offender set about systematically trading in breach of the law for the sole purpose of enhancing his personal wealth at the expense of others.’ [45]</td>
</tr>
<tr>
<td>6. High level of harm to victim</td>
<td>Aggravating</td>
<td>‘It must be remembered that his crimes were not victimless. Each illegal transaction was likely to have a cost to someone, who either traded or held their position, without the benefit of the knowledge available to the offender.’ [45]</td>
</tr>
<tr>
<td>7. Restitution</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>8. Ancillary orders</td>
<td>Not raised</td>
<td></td>
</tr>
</tbody>
</table>

Case 5A  
*R v O’Brien* [2011] NSWSCS 1553

**Sentence**  
2 years imprisonment served by way of intensive correction order

**Sentence Appealed?**  
No

**Major offence/s**  
*Corporations Act 2001* (Cth) ss 1043A(1) and 1311(1)(a)

**Offence description**  
4 counts of insider trading in a senior position of director in company over 6.5 months.

**Offender status**  
41 year old male, tertiary education, worked in financial services industry [5]. Senior position of director until terminated for serious and wilful misconduct.

**Sentencing Variables**  
<table>
<thead>
<tr>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>
| **Mitigating** | **1. Good character** | ‘The offender has no prior convictions. As already indicated, however, in 'white collar offences' good character is not as significant a mitigating factor in sentencing as it is for other offences.’ [58]  

‘The offender has a very strong subjective case. He is a man of previous good character and this is his first occasion of offending. His co-operation with the authorities was immediate and substantial and is indicative of genuine contrition and remorse. I am satisfied that he will not offend in this way again and that his prospects of rehabilitation are excellent.’ [73]  

Note: Appears mitigating, even if only slightly |
| **2. Public opprobrium** | ‘The charges against him have attracted substantial media publicity… While these matters do not constitute 'exceptional circumstances' for sentencing purposes and are a natural consequence of this kind of offending, they remain relevant and important considerations in the sentencing process.’ [75]  

Acknowledged but no discernible effect. |
| **3. Reduction of employment/career prospects** | ‘As a result of being convicted for these offences, the offender will be automatically disqualified from managing a corporation for a period of five years. In Rich v ASIC [2004] HCA 42, (2004) 220 CLR 129 the plurality held that disqualification from holding such office was a penalty.’ [63]  

‘Even without the intervention of this Court, he has already been punished for his offending. He has lost his job, he is most unlikely to ever again be employed in the financial industry and his prospects of obtaining employment generally must be regarded as problematic.’ [74]  

‘It is clear that this offending has resulted in the offender suffering irreparable damage to his professional reputation and to his professional relationships. While these matters do not constitute 'exceptional circumstances' for sentencing purposes |
and are a natural consequence of this kind of offending, they remain relevant and important considerations in the sentencing process.’ [75]

<table>
<thead>
<tr>
<th>4. Large amount of money involved</th>
<th>Aggravating</th>
<th>‘Yielding a gross profit of $54,748.68… While the offender did not personally benefit from the transactions, they still involved serious criminality.’</th>
</tr>
</thead>
<tbody>
<tr>
<td>5. High level of planning/ sophistication</td>
<td>Aggravating</td>
<td>‘The offender was part of the Georgeson coverage team dealing with Project Delorean and was a contact point for WDC and was intimately involved in the planning, preparation and provision of services to facilitate this transaction.’ [22]</td>
</tr>
<tr>
<td>6. High level of harm to victim</td>
<td>Neutral</td>
<td>‘The 'victim' in such offences is the investing community at large.’ [52]</td>
</tr>
<tr>
<td>7. Restitution</td>
<td>Not raised</td>
<td></td>
</tr>
</tbody>
</table>
| 8. Ancillary orders | Mitigating | ‘On 8 September 2011 the CDPP provided the offender with a proposed pecuniary penalty order requiring him to pay the amount of $54,748.68 (the PPO). On 22 September 2011 the PPO was made by the Supreme Court of NSW by consent. On 20 October 2011 the offender sent a cheque in the amount of $54,748.68 to the CDPP for payment of the PPO in full.’ [37]

‘Pursuant to s320(b) of the POC Act, the Court in passing sentence must not have regard to any pecuniary penalty order that relates to the offences. However, pursuant to s320(a), the Court 'may have regard to any co-operation by the [offender] in resolving any action taken against' him under the Act. As previously indicated, the extent of the co-operation by the offender was significant and demonstrated a willingness to facilitate the course of justice in relation to the offences.’ [65]

**Case 6A**  
**R v Glynatsis [2012] NSWSC 1551**

**Sentence**  
Original sentence: Concurrent 2 year sentence, served by way of intensive community correction order  
Quashed on appeal: 15 months and 12 months imprisonment, to be released on recognisance after 12 months and payment of $1000.

**Sentence Appealed?**  
Yes – **R v Glynatsis [2003] NSWCCA 131**  
Court noted ‘the criminality of insider trading offences is best
indicated by the amount of money invested as opposed to the profit that was made. Although the sentencing judge erred by placing more importance on the profit, that error did not significantly influence the exercise of the sentencing discretion.’

Appeal allowed on the basis that ‘…that the mode of serving those sentences by way of an ICO does not adequately meet the principle of general deterrence, given the nature of the criminality and its seriousness in this case.

<table>
<thead>
<tr>
<th>Major offence/s</th>
<th>Corporations Act 2001 (Cth) ss 1043(a) and 1311(1)(a)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Offence description</td>
<td>9 counts insider trading between November 2009 to November 2010. Placing orders over the internet through account in his own name or trading accounts of his relatives (with their permission – but received no benefits from relative’s trading accounts) [16], [25].</td>
</tr>
<tr>
<td>Offender status</td>
<td>27-8 year old at time of offending – now 29 year old, male, tertiary education, graduate consultant at PwC in the tax &amp; legal department; senior consultant at PwC (resigned in June 2001) [19]</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Sentencing Variables</th>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Good character</td>
<td>Mitigating</td>
<td>‘The Offender is entitled to appropriate credit for his prior good character.’ [150]</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Neutral</td>
<td>Acknowledged but no discernible effect</td>
</tr>
<tr>
<td>3. Reduction of employment/ career prospects</td>
<td>Neutral</td>
<td>Acknowledged but no discernible effect</td>
</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Aggravating</td>
<td>‘In each instance, the securities were sold yielding total gross profits of $50,826.00 or an overall gross benefit of $45,706.00. Of that amount, the Offender derived, on his own account, a gross profit of $23,840.00, and his relatives derived a profit of $26,386.00.’ [158]</td>
</tr>
<tr>
<td></td>
<td></td>
<td>‘It is necessary to keep in mind that the total amount invested was $371,507.00. This is an important indication of the gravity of the offences: R v Doff at [31] (NSWSC).’ [159]</td>
</tr>
<tr>
<td></td>
<td></td>
<td>‘I have concluded that no sentence other than a term of imprisonment is appropriate in the circumstances</td>
</tr>
</tbody>
</table>

| | | |
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| | | |
| | | |
of the case. To impose a lesser sentence would not reflect the seriousness of the Offender's crimes, or give proper effect to applicable sentencing principles to which I have made reference.’ [184]

On appeal it was decided that it was more important to consider the amount invested to indicate criminality – but no apparent influence on error in decision. [55]

<table>
<thead>
<tr>
<th>5. High level of planning/sophistication</th>
<th>Not raised</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>6. High level of harm to victim</th>
<th>Aggravating</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>7. Restitution</th>
<th>Not raised</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>8. Ancillary orders</th>
<th>Mitigating</th>
</tr>
</thead>
</table>

‘On 15 May 2012, with the consent of the Offender, the Commonwealth Director of Public Prosecutions obtained a pecuniary penalty order under s.116 Proceeds of Crime Act 2002 (Cth) in the sum of $50,826.00, representing the total gross profits derived from the offences committed by the Offender. This amount was paid on 4 June 2012.’
‘I have regard to the Offender's payment of the pecuniary penalty order as evidencing his co-operation in resolving action taken against him: s.320(a) *Proceeds of Crime Act 2002 (Cth).*’ [147]

<table>
<thead>
<tr>
<th>Case 7A</th>
<th><em>R v Fysh (No 4)</em> [2012] NSWSC 1587</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Sentence</strong></td>
<td>2 years aggregate [82] Concurrent sentence, minimum of 12 months on recognisance of good behaviour and $1,000 surety [83]-[85]</td>
</tr>
<tr>
<td><strong>Sentence Appealed?</strong></td>
<td>No</td>
</tr>
<tr>
<td><strong>Major offence/s</strong></td>
<td><em>Corporations Act 2001</em> (Cth) ss 1043A(1)(c) and 1311(1)(a)</td>
</tr>
<tr>
<td><strong>Offence description</strong></td>
<td>2 counts of insider trading committed over 2 days. Purchase of 250,000 shares whilst in possession of inside information [3]</td>
</tr>
<tr>
<td><strong>Offender status</strong></td>
<td>51 year old male, held a very senior position at a large international company which conducts business in the energy sector.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Sentencing Variables</strong></th>
<th><strong>Treatment</strong></th>
<th><strong>Remarks</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Good character</td>
<td>Mitigating</td>
<td>‘The prior good character of the offender cannot be doubted. Apart from his having no prior convictions, he tendered a very large number of what can only be described as glowing character references from work colleagues, family members and friends…All of the referees state that his convictions for insider trading are completely out of character with his professional and personal morals. I am satisfied, on the strength of that material, that apart from the present offences, the offender is otherwise a person of good character and strong morals.’ [62]</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Mitigating</td>
<td>‘The offender's evidence established that there has been considerable media attention to this case. I accept that the attendant impact upon his professional reputation will affect him professionally, economically and personally. He has lost highly remunerative employment, having earned in excess of $1.3 million per annum before his employment with BG came to an end.’ [72]</td>
</tr>
</tbody>
</table>
| 3. Reduction of employment/career prospects | Mitigating | ‘I accept that the attendant impact upon his professional reputation will affect him professionally, economically and personally. He has lost highly remunerative employment, having earned in excess of $1.3 million per annum before his employment with BG came to an end.’ [72]  
‘It was submitted that the offender is now unemployable. I doubt whether that is so, having regard to his evident intelligence and range of abilities. Nonetheless I accept that his perception to that effect is a burden for him.’ [73] |
| 4. Large amount of money involved | Aggravating | ‘…the amount invested was substantial. That is an important indicator of criminality. With respect to the first parcel of 240,000 shares, the offender paid $764,142.82 (an average of $3.18 per share) plus brokerage of $7641.36. With respect to the second parcel of 10,000 shares, the offender paid $32500.00 (an average of $3.25 a share) plus brokerage of $32,5.00. The total amount paid was $804,609.18.’ [44]  
‘It is also relevant to consider the benefit derived from the offences. Upon sale of the shares, the offender received $1,437,500.00 less brokerage of $7,187.50 attributable to those shares, amounting to a total of $1,430,312.40, giving a net profit of $626,703.32.’ [45] |
| 5. High level of planning/sophistication | Aggravating | ‘Accordingly, the seriousness of the offences must be considered on the basis that their planning was well considered.’ [50] |
| 6. High level of harm to victim | Aggravating | ‘It is well-established that insider trading is not to be viewed as a victimless crime. As stated by the Court of Criminal Appeal in *R v Rivkin* [2004] 184 FLR 365 at [412], the victim of such an offence is the investing community at large; the injury, the loss of confidence in the efficacy and integrity of the market in financial products. It is to be regarded as a form of cheating, or fraud: *Hartman v R* [2011] NSWCCA 261; (2011) 87 ACSR 52 at [94].’ [51] |
| 7. Restitution | Not raised |
| 8. Ancillary orders | Mitigating | ‘It is relevant in that context to consider the offender's response to the Commissioner' s
application for a pecuniary penalty order under the *Proceeds of Crime Act.*' [52]

‘In accordance with that provision, the offender's cooperation in resolving the Commissioner's claim may properly be taken into account as a mitigating factor.’ [53]

<table>
<thead>
<tr>
<th>Case 8A</th>
<th><em>R v Bo Shi Zhu</em> [2013] NSWSC 127</th>
</tr>
</thead>
</table>
| Sentence | 6 months, 3 months and 2 years imprisonment  
Total effective sentence: 15 months prison pre-release  
Recognisance: good behaviour and surety of $1,000) |
| Sentence Appealed? | No |
| Major offence/s | *Corporations Act 2001* (Cth) ss 1043A(1)(d) and 1311(1)(a) |
| Offence description | 3 rolled up counts of insider trading (re: takeovers) – over 3 separate periods of employment with 3 different employers over 4.5 years – offending occurred in breach of company policies [44][89][131]  
Trading in leveraged products since 2004 then used CFDs for all securities trading since 2006 |
<p>| Offender status | 35 year old male [69], intelligent young man who was educated in Australia [80]. Held 3 positions at 3 corporations, as an executive [5], associate [5], and Vice president [5] |
| Sentencing Variables | Treatment | Remarks |
| 1. Good character | Mitigating | ‘Also to be weighed in his favour is the evidence concerning his prior good character at the time of the commission of the relevant offences.’ [204] |
| 2. Public opprobrium | Neutral | ‘Whilst I take into account in a general sense the media attention in relation to the Hanlong Mining offences (including photographs) and that the Offender has greatly suffered from the public disgrace, shame and humiliation as a result, adverse publicity may only be considered to amount to extra-curial punishment in what may be classed as exceptional or extreme cases. I have concluded that the evidence does not establish that this case rises to that level.’ [218] |</p>
<table>
<thead>
<tr>
<th>Section</th>
<th>Type</th>
<th>Mitigating/Aggravating</th>
</tr>
</thead>
<tbody>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Mitigating</td>
<td>‘I also take into account the fact that his guilty pleas to these offences may well effectively mean that he has no re-employment prospects in the finance industry and may otherwise impact adversely on his future employment prospects.’ [219]</td>
</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Aggravating</td>
<td>‘The total profit derived from the Caliburn offending was $81,483.60 (less costs) of which the Offender's share was $55,814.50.’ [58]</td>
</tr>
<tr>
<td></td>
<td></td>
<td>‘I consider that the objective gravity of the offending conduct in relation to the Caliburn matters to be significant, although, not at the high end of the range for offences of this kind.’ [84]</td>
</tr>
<tr>
<td></td>
<td></td>
<td>‘In relation to the Funtastic shares, the offending involved, as I have indicated, the avoidance of loss of $6,900 and a profit of $3559.50.’ [108]</td>
</tr>
<tr>
<td>5. High level of planning/sophistication</td>
<td>Aggravating</td>
<td>‘However, accepting that the Offender did not appreciate the criminality of his trading, there is no doubt that he was fully aware of the fact that he was breaching company policy and was acting dishonestly. In utilising Ms Chen's First IG Markets Account, he consistently took steps to disguise or conceal his trading. In this respect, I rely upon the Statement of Facts and the candid admissions made by the Offender both in his affidavit and in the course of his oral evidence.’ [81]</td>
</tr>
<tr>
<td></td>
<td></td>
<td>‘The seriousness of his activities was increased by his procuring others to trade for their own profit.’ [82]</td>
</tr>
<tr>
<td>6. High level of harm to victim</td>
<td>Aggravating</td>
<td>‘In relation to the Caliburn, Credit Suisse and Hanlong Mining offences, I accept the Crown's submission that in this case there were at least three classes of victim, namely: (i) The market, including in particular the investing community at large; (ii) The employers, by reason of the breach of trust that had been bestowed by each of the Offender's three employers. In addition, in the case of the Caliburn and Credit Suisse counts, the Offender...’</td>
</tr>
</tbody>
</table>
misappropriated client's price sensitive information;

(iii) Individuals being the class of persons who trade with an Offender without having access to that inside information. In particular, in this case the Offender procured transactions prior to market announcements with counter-parties ignorant of the insider information about to be released to the public. As the Crown observed, while the Offender sought to maximise profit through the use of CFDs, those on the other side of the transactions faced the potential for increased losses.’ [203]

<table>
<thead>
<tr>
<th>7. Restitution</th>
<th>Not raised</th>
</tr>
</thead>
<tbody>
<tr>
<td>8. Ancillary orders</td>
<td>Mitigating</td>
</tr>
<tr>
<td></td>
<td>‘I take into account, as evidence of co-operation, the fact that the Offender, in relation to an application made under the Proceeds of Crime Act, consented to an order under that Act in the sum of $371,348.20 and has paid that amount under the order.’ [232]</td>
</tr>
</tbody>
</table>

**Case 9A**  
*R v John Gay* (unreported, Tas Sup Ct, Porter J, 30 August 2013)

**Sentence**  
Convicted of 1 count of insider trading and fined $50,000

**Sentence Appealed?** Yes  
- *Re Gay* [2014] TASSC 22: application for leave to manage a corporation following automatic disqualification (granted) [40] and confirmed good character in favour of appeal [28], and  
- *CDPP v Gay* [2015] TASSC 15: questions of law not sentencing

**Major offence/s**  
*Corporations Act 2001* (Cth) ss 1043A(1)(d) and 1311(1)(a)

**Offence description**  
Selling shares – insider trading by a true insider (Chairman) but sale of shares was not prompted by inside information (conduct contrary to public policy) [14]

**Offender status**  
70 year old male; no formal education qualification, chairman of Gunns Ltd (previously a top 100 ASX company)

**Sentencing Variables**  

<table>
<thead>
<tr>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Good character</td>
<td>‘I am satisfied that the offender is of exemplary character, a man respected and admired by many, with a reputation of honesty and integrity’</td>
</tr>
</tbody>
</table>
2. Public opprobrium | Neutral | ‘No doubt that has been intrusive at times. However there is nothing before me to suggest that these proceedings themselves have been responsible for such a level of derision or humiliation, so as to amount to an extra-curial punishment.’

3. Reduction of employment/career prospects | Mitigating | ‘Upon conviction, s 206B(1)(b)of the Corporations Act will operate to disqualify the offender from managing corporations. This in itself is a penalty: Rich v ASIC (2004) 220 CLR 129 at [37].’

4. Large amount of money involved | Neutral | No discernible effect
- The total of the suggested avoided loss is $798,798.54.

5. High level of planning/sophistication | Not raised |

6. High level of harm to victim | Neutral | No discernible effect

7. Restitution | Not raised |

8. Ancillary orders | Neutral | $50,000 fine
- Acknowledged but no discernible effect.

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**Case 10A** | **CDPP v Hill** [2015] VSC 86
---

**Sentence** | 3 years and 3 months imprisonment (2 years non-parole) [99]

**Sentence Appealed?** | No

**Major offence/s** | Abuse of public office – 4 counts
- Insider trading (analysed here) – 1 count
- Identity theft – 1 count

**Offence description** | Use of MEIs provided by Hill to make gross profit of more than $8 million and a net profit of more than $7 million – less than $200,000 obtained in accordance with Hill & Kamay agreement. Hill received less than $20,000 from these trading activities.

**Offender status** | Analyst at ABS [11], commonwealth public official [12]

**Sentencing Variables** | Treatment | Remarks
---

1. Good | Neutral | ‘Neither of you has ever been in trouble with the
character

police before. That is not uncommon in the case of white collar offenders; indeed, it is often their previous good character that enables the white collar offender to be in a trusted position in the first place.’ [82]

‘You have both provided references from a range of former teachers, employers, family and friends. Your referees all speak very highly of you, and have expressed their shock and disbelief at discovering that you had committed these offences. They all regard these offences as being totally out of character for you.’ [83]

2. Public opprobrium Mitigating

‘I have no doubt that your actions have brought considerable shame and embarrassment to yourselves and your families.’ [83]

3. Reduction of employment/career prospects Mitigating

‘You both did well at university, and went on to obtain good jobs after graduation You were hard-working, focused, driven, and eager to succeed. You have both been involved in voluntary activities in the community. You both had promising professional careers ahead of you, which you have almost certainly thrown away by your own actions.’ [78]

4. Large amount of money involved Neutral

‘Mr Hill, the insider trading offence in which you engaged with Mr Kamay was less serious than the three offences engaged in by Mr Kamay on his own. Less than $200,000 of the $8 million gross profit made by Mr Kamay was attributable to your agreement, which was always intended to be limited in size and duration.’ [58]

5. High level of planning/sophistication Not raised

6. High level of harm to victim Aggravating

‘The ABS has provided a victim impact statement, which sets out in some detail the effect your actions have had on the ABS and its staff. Confidentiality of the information provided to, and held by, the ABS is critical to its proper functioning. Conduct such as yours can be very damaging to an agency like the ABS, particularly to its public reputation. Your actions have caused the ABS to spend considerable time and money reviewing the
integrity of its computer systems, and undertaking further staff training. The ABS also arranged counselling for those members of staff who were having trouble dealing with the nature and seriousness of your betrayal of trust.’ [40]

‘I would not describe any of the offences as less serious, on the basis that they were simply opportunistic.’ [41]

<table>
<thead>
<tr>
<th>7. Restitution</th>
<th>Not raised</th>
</tr>
</thead>
<tbody>
<tr>
<td>8. Ancillary orders</td>
<td>Not raised</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Case 11A</th>
<th>CDPP v Kamay [2015] VSC 86</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence</td>
<td>7 years and 3 months (4 years and 6 months non-parole) [109]</td>
</tr>
<tr>
<td>Sentence Appealed?</td>
<td>No</td>
</tr>
<tr>
<td>Major offence/s</td>
<td>Insider trading – 4 counts</td>
</tr>
<tr>
<td></td>
<td>Money laundering – 1 count</td>
</tr>
<tr>
<td></td>
<td>Identity theft – 2 counts</td>
</tr>
<tr>
<td>Offence description</td>
<td>Use of MEIs provided by Hill to make gross profit of more than $8 m and a net profit of more than $7 m – less than $200,000 obtained in accordance with agreement with Hill &amp; Kamay</td>
</tr>
<tr>
<td>Offender status</td>
<td>Associate director at NAB [10]</td>
</tr>
<tr>
<td>Sentencing Variables</td>
<td>Treatment</td>
</tr>
<tr>
<td>1. Good character</td>
<td>Neutral</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Mitigating</td>
</tr>
<tr>
<td>Description</td>
<td>Type</td>
</tr>
<tr>
<td>------------------------------------------------</td>
<td>--------</td>
</tr>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Mitigating</td>
</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Aggravating</td>
</tr>
<tr>
<td>5. High level of planning/sophistication</td>
<td>Aggravating</td>
</tr>
<tr>
<td>6. High level of harm to victim</td>
<td>Aggravating</td>
</tr>
</tbody>
</table>


counselling for those members of staff who were having trouble dealing with the nature and seriousness of your betrayal of trust.' [40]

'While it may not be possible to point to any particular loss made by an identifiable victim, insider trading is not a victimless crime. Apart from harm to the market and public confidence, in this case there were counter-parties to each of your trades; they themselves had to enter into other transactions to try to cover their own positions.' [47]

<table>
<thead>
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<tr>
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</tr>
</tbody>
</table>

'By virtue of the operation of the federal confiscation laws, you were liable to pay a pecuniary penalty of around $8 million, representing the gross profits of your offending. Because you had only retained the net profits, that would have left you owing almost $1 million. You reached a settlement with the Commonwealth in which you agreed to forfeit all of your assets, including your equity (of about $160,000) in some property that was not tainted by your offending. In sentencing you, I have had regard to the fact that you have forfeited that non-tainted property, and that you have co-operated in the resolution of this forfeiture issue. The latter is further evidence of contrition.' [89]

**Case 12A**  
*R v Joffe [2015] NSWSC 741*

**Sentence**

Convicted:
- Count 1: 1 year, 3 months imprisonment from 12 June 2015.
- Count 2 (accounting for the offence on the s 16BA Form): 1 year 9 months imprisonment from 12 December 2015.

Recognisance upon giving security without surety of $1000, requiring good behaviour for 2 years and 3 months from 12 June 2015 [128].

**Sentence Appealed?** No

**Major offence/s**  
*Corporations Act 2001 (Cth) ss 1043A(1)(d) and 1311(1)*
| Offence description | - 2 counts of procuring Stromer to acquire relevant securities whilst in possession of inside information. [1]  
- Joffé procuring Stromer in August 2006 to acquire 29,580 shares in Auckland International Airport Limited whilst in possession of inside information. [5]  
- Procurement by Joffé of Stromer in November 2006 to acquire 962,000 Contracts for Difference ('CFDs') in Alinta Infrastructure Holdings whilst in possession of inside information. [6]  
- Offending contrary to corporation securities trading policy [10] |
|---|---|
| Offender status | Associate analyst at Moody’s Investor Service Pty Ltd [10]  
Joffé is aged 38, male, tertiary education (law & commerce) [77] - [78] |
| Sentencing Variables | Treatment | Remarks |
| 1. Good character | Mitigating | 'There are a number of mitigating factors to be taken into account and most of them are common to each offender…Aside from their offending behaviour, they are persons of good character (which is not uncommon in a matter such as this).’ [114]-[115] |
| 2. Public opprobrium | Not raised | |
| 3. Reduction of employment/career prospects | Mitigating | 'There are a number of mitigating factors to be taken into account and most of them are common to each offender… Joffé has not been employed for quite some years …They are unlikely to find employment in the commercial or legal world for the foreseeable future.' [114]-[118] |
| 4. Large amount of money involved | Neutral | 'Although Joffé did not make any investment himself and did not stand to make any profit, I have earlier mentioned my acceptance of the Crown's contention that he intended to contribute $30,000 to the amount invested by Stromer in the Alinta Infrastructure matter.’ [104]  
No discernible effect |
<p>| 5. High level of planning/sophistication | Not raised | |
| 6. High level of harm to | Aggravating | 'Joffé's offences are more serious than Stromer's because of the breach of trust factor.' [113] |</p>
<table>
<thead>
<tr>
<th>Victim</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>7. Restitution</td>
<td>Not raised</td>
</tr>
<tr>
<td>8. Ancillary orders</td>
<td>Not raised</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Case 13A</th>
<th><em>R v Stromer</em> [2015] NSWSC 741</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence</td>
<td>Convicted:</td>
</tr>
<tr>
<td></td>
<td>- Count 3: 1 year, 3 months imprisonment from 12 June 2015, and</td>
</tr>
<tr>
<td></td>
<td>- Count 4: 1 year, 6 months imprisonment from 12 December 2015.</td>
</tr>
<tr>
<td></td>
<td>Recognisance upon giving security without surety of $1000, requiring good behaviour for 2 years from 12 June 2015 [129].</td>
</tr>
<tr>
<td>Sentence Appealed?</td>
<td>No</td>
</tr>
<tr>
<td>Major offence/s</td>
<td><em>Corporations Act 2001</em> (Cth) ss 1043A(1)(c) &amp; 1311(1) – 2 counts</td>
</tr>
<tr>
<td>Offence description</td>
<td>Stromer pleaded guilty to two counts of acquiring the relevant securities whilst in possession of inside information.</td>
</tr>
<tr>
<td>Offender status</td>
<td>36 year old male, first class education (including tertiary in commerce and law), worked in a major law firm then as a consultant and then employed in his father's business which was involved with property development and aged care - Investing and trading in securities was an interest he shared with his father.[58]</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Sentencing Variables</th>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Good character</td>
<td>Mitigating</td>
<td>'There are a number of mitigating factors to be taken into account and most of them are common to each offender…Aside from their offending behaviour, they are persons of good character (which is not uncommon in a matter such as this).’ [114] [115]</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Not raised</td>
<td></td>
</tr>
</tbody>
</table>
| 3. Reduction of employment/career prospects | Mitigating | 'He has struggled to obtain employment since being charged.’ [59]  
‘There are a number of mitigating factors to be taken into account and most of them are common to each offender… Stromer had only managed to find work in recent years as a call centre salesperson. …They are unlikely to find employment in the commercial or legal world for the foreseeable
4. Large amount of money involved | Neutral |
---|---|
| 'In the case of Alinta Infrastructure, Stromer invested $94,757 and was required to deposit a margin requirement equal to 10 per cent of the total exposure. According to the agreed facts, his likely maximum exposure was $179,457.' [103] |
| No discernible effect |

5. High level of planning/sophistication | Not raised |
---|---|
|  |

6. High level of harm to victim | Not raised |
---|---|
| 'The circumstances in which offences of this nature can be committed vary widely and there are a number of matters to be considered in an assessment of their objective seriousness… They are not offences that are anywhere near the upper range of seriousness for these types of matters; the Auckland Airport offences are below the midrange of seriousness and the Alinta Infrastructure offences are just within that range. Joffe's offences are more serious than Stromer's because of the breach of trust factor.' [113] |
| This case involved a low level of harm. |

7. Restitution | Not raised |
---|---|
|  |

8. Ancillary orders | Mitigating |
---|---|
| 'Another mitigating feature to be taken into account in Stromer's case is that he co-operated in the making of a pecuniary penalty order under the *Proceeds of Crime Act 2002* (Cth) in the sum of $222,349.87: see s 320(a) of that Act.' [119] |

**Case 14A** | *R v Newton Chan* [2010] VSC 312 |
---|---|
Sentence | Total effective sentence of 20 months imprisonment (recognisance: $500 and 20 months) (p. 11) |
Sentence Appealed? | No |
Major offence/s | *Corporations Act 2001* (Cth) s 1041A – 8 counts of market manipulation (and 1 count of providing false & misleading information in an ASIC examination) |
Offence description | Offending occurred over 22 months and involved 344 bids – protracted and persistent |
Offender | 46 year old male, tertiary education, securities trader employed in |
<table>
<thead>
<tr>
<th>Status</th>
<th>the Financial Services Group of Macquarie Equities Limited (then Division Director), high income (&gt; $500,000) (p. 2)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Sentencing Variables</strong></td>
<td><strong>Treatment</strong></td>
</tr>
<tr>
<td>1. Good character</td>
<td>Mitigating</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Not raised</td>
</tr>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Mitigating</td>
</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Neutral</td>
</tr>
<tr>
<td>5. High level of planning/sophistication</td>
<td>Aggravating</td>
</tr>
<tr>
<td>6. High level of harm to victim</td>
<td>Aggravating</td>
</tr>
<tr>
<td>7. Restitution</td>
<td>Not raised</td>
</tr>
<tr>
<td>8. Ancillary orders</td>
<td>Not raised</td>
</tr>
</tbody>
</table>

**Case 15A**  
*R v Mervyn Jacobson* [2014] VSC 592

**Sentence**  
Imprisonment in custody for a period of 12 months. Upon release, good behaviour is required for 20 months. [99]
<table>
<thead>
<tr>
<th>Sentence Appealed?</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Offence description</td>
<td>33 counts of taking part, and 2 counts of conspiracy to take part, while working as CEO and principal shareholder of company (GTG). [1]-[3]</td>
</tr>
<tr>
<td>Offender status</td>
<td>72 year old male, tertiary education, worked as a doctor then an entrepreneur, senior position in company, majority shareholder, made significant contributions to medicine and technology. [48]</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Sentencing Variables</th>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
</table>
| 1. Good character    | Mitigating | 'I have referred to the evidence, relating to your character and to your philanthropic works, in some detail, because, it demonstrates that, apart from your offending in this case, you are a person who comes before the court with an exceptionally good character…' [67]  

'In summary, then, I accept that you are a person who, apart from your offending in this case, has been of exceptionally good character… You have no previous convictions…' [73]  

'… evidence as to your good character and your health, to which I have referred, are relevant and valid mitigating circumstances, which must be given appropriate weight…' [75] |
| 2. Public opprobrium | Mitigating | 'I also accept that, for a person such as yourself, your conviction has involved a dramatic fall from grace for you, as a result of which you suffer from genuine feelings of humiliation and embarrassment. The shame attaching to your offending is a not insignificant penalty to you.' [82] |
| 3. Reduction of employment/career prospects | Mitigating | 'As a result of your convictions in this case, you will be automatically disqualified from managing a corporation for a period of five years. You have spent the better part of four decades of your working life as the driving force of a number of different enterprises involved in the commercialisation of medical and genetic technologies. Your disqualification from managing any corporation will be a significant penalty to you.' |
It will disable you from pursuing work, to which you have been dedicated, and which you have been particularly passionate about. By the time that the period of disqualification is completed, you will be more than 77 years of age. It will be most unlikely that, at that stage, you would be able to regenerate your working career.' [81]

'… I am satisfied that there are substantial mitigating circumstances in your case … In addition, your automatic disqualification from managing a corporation for a period of five years will be a significant penalty on you, as it will be particularly difficult for you to resurrect your career, in a meaningful way, at the completion of that term of disqualification…' [89]

<table>
<thead>
<tr>
<th>4. Large amount of money involved</th>
<th>Neutral</th>
<th>No discernible effect.</th>
</tr>
</thead>
<tbody>
<tr>
<td>5. High level of planning/sophistication</td>
<td>Aggravating</td>
<td>'Your offending involved a number of serious features. It extended over a period of more than five months. Your conduct was deliberate and calculated, designed to serve your own financial purposes, and, in particular, to avoid or limit your exposure to further margin calls, and to protect the value of your principal investment. Through your involvement in national and international commerce, you had gained a sophisticated understanding of the commercial world, and you had significant experience in business affairs. Your offending could not be excused on the basis that you were in any way naïve or unwitting.' [42]</td>
</tr>
<tr>
<td>6. High level of harm to victim</td>
<td>Aggravating</td>
<td>'The offences, for which you have been convicted, are serious. The express objective of s 1041A of the Corporations Act is to promote a fair, orderly and transparent market for registered securities. As part of that objective, s1041A is directed to ensuring that the market price for registered securities truly reflects the genuine interaction of the forces of supply and demand for those securities on a free market. The conduct, in which you indulged, and to which you were a party, was calculated to</td>
</tr>
</tbody>
</table>
undermine that objective. In that way, your conduct had the capacity to erode the integrity of, and public confidence in, the securities market, and thereby to cause damage to members of the community, who have invested their savings in that market.'  

'Your offending involved a number of serious features. …Those offences involved the purchase of a substantial number of GTG shares, which had a significant effect on the market for those shares in the manner described by Mr Dent…'  

'It is possible that investors, or potential investors, made decisions about purchasing, or retaining, GTG shares, based on the market price of the shares which you had artificially inflated. However, during the period covered by the charges of which you have been found guilty, the GTG shares were not heavily traded. Thus, the risk of any such potential loss to investors, or potential investors, was quite limited.'

<table>
<thead>
<tr>
<th>7. Restitution</th>
<th>Not raised</th>
</tr>
</thead>
<tbody>
<tr>
<td>8. Ancillary orders</td>
<td>Not raised</td>
</tr>
</tbody>
</table>

**Case 16A**  
*R v Dalzell [2011] NSWSC 454*

<table>
<thead>
<tr>
<th><strong>Sentence</strong></th>
<th>2 years imprisonment served by way of intensive community correction order.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Sentence Appealed?</strong></td>
<td>No</td>
</tr>
<tr>
<td><strong>Major offence/s</strong></td>
<td><em>Corporations Act 2001</em> (Cth) ss 1311(1)(a), 1043A</td>
</tr>
<tr>
<td><strong>Offence description</strong></td>
<td>Used inside information to influence his decision to acquire stocks. Bought stocks in a client which was acquiring another company. The information was found not to be high-grade information.</td>
</tr>
<tr>
<td><strong>Offender status</strong></td>
<td>49 year old; male; Senior manager of KPMG Transaction Services</td>
</tr>
<tr>
<td><strong>Sentencing Variables</strong></td>
<td><strong>Treatment</strong></td>
</tr>
<tr>
<td>1. Good character</td>
<td>Mitigating</td>
</tr>
</tbody>
</table>
were said to be ‘exceptional references in several respects’ in particular as to the offender’s character and demonstrates that his offending was out of character.’ [150]

2. Public opprobrium | Neutral | ‘…the charge brought against him attracted media publicity…I accept the Crown’s submissions to which I have earlier referred that such matters do not, in this case, constitute ‘exceptional circumstances’ for sentencing purposes.’ [139] [141]

3. Reduction of employment/career prospects | Neutral | ‘…has been unemployed since August 2009…recruitment consultants who he has made contact with had not returned his calls in 2010…offence will prevent him working in the financial services industry again…I accept the Crown’s submissions to which I have earlier referred that such matters do not, in this case, constitute ‘exceptional circumstances’ for sentencing purposes.’ [139] [140] [141]

4. Large amount of money involved | Neutral | 'I accept that this case, though involving serious criminality, nonetheless takes its place towards the lower end of the range of insider trading offences.' [154]

‘...offender did not profit by the charged transaction and, in fact, incurred a small loss….I have determined that it is not appropriate in the circumstances of the case to impose an order of that kind.' [156]

Neutral because the focus is on the offender not profiting not the amount of money specifically involved.

5. High level of planning/sophistication | Neutral | Raised by Crown but no discernible effect as to treatment by sentencing judge.

'...deliberate, planned and executed over a period of time, rather than being spur of the moment.' [102]

6. High level of harm to victim | Neutral | Raised by Crown but no discernible effect as to treatment by sentencing judge.

'The Crown referred to a number of authorities that identify the nature of 'victims' of offences of the kind in question. Those authorities identify both the
seller or sellers of the stock at the lower price and as well the public.' [109]

| 7. Restitution | Not raised |
| 8. Ancillary orders | Not raised |

<table>
<thead>
<tr>
<th>Case 17A</th>
<th><em>R v De Silva</em> [2011] NSWSC 243</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence</td>
<td>2 years, 6 months imprisonment, released after 1.5 years with a good behaviour bond for the remainder of the sentence.</td>
</tr>
<tr>
<td>Sentence Appealed?</td>
<td>No</td>
</tr>
<tr>
<td>Major offence/s</td>
<td>Insider trading – 12 separate transactions – front running</td>
</tr>
<tr>
<td>Offence description</td>
<td>Through his position, the offender gained knowledge that Macquarie intended to acquire large volumes of securities on the Singapore stock exchange. Offender acquired securities and CFDs in the same companies. Offender disposed of the securities and CFDs shortly after Macquarie made its acquisitions, and consequently he made a profit.</td>
</tr>
<tr>
<td>Offender status</td>
<td>37 year old, male, tertiary education, portfolio manager with Macquarie Funds Management Group.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Sentencing Variables</th>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Good character</td>
<td>Mitigating</td>
<td>'Also to be weighed in the offender's favour is the evidence concerning his prior good character at the time he committed the present offence.' [63]</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Mitigating</td>
<td>'I have also taken into account the fact that the offender has received adverse publicity as a result of his offending behaviour and that he has had a significant fall from grace…' [65]</td>
</tr>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Not raised</td>
<td></td>
</tr>
</tbody>
</table>
| 4. Large amount of money involved | Neutral | '…gross profit made by the offender …to $1,412,975 Australian dollars (rounded to the nearest dollar). It is common ground that the net profit made by the offender would have been marginally less on account of brokers' fees and interest costs. None of that money has been recovered.' [32]  
No discernible effect. |
|---|---|---|
| 5. High level of planning/ sophistication | Aggravating | Crown submissions:  
'The offence was only detected by reason of international cooperation and assistance, which demonstrates the degree of planning involved in the offender's conduct and the difficulty of detecting it…' [60]  
'I accept the general thrust of those submissions. I accept that although the offender's conduct revealed no great measure of sophistication or subterfuge, it was nonetheless difficult to detect…' [61] |
| 6. High level of harm to victim | Neutral | Referred to sentencing principles from previous cases – that this is not a 'victimless crime.' [52] [56]  
But otherwise no discernible effect. |
| 7. Restitution | Not raised | |
| 8. Ancillary orders | Not raised | |

Case 18A  
*R v Rodney Stephen Adler* [2005] NSWSC 274

<table>
<thead>
<tr>
<th>Sentence</th>
<th>4 years, 6 months imprisonment (non-parole period 2 years, 6 months)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence Appealed?</td>
<td>Yes in <em>Adler v R</em> [2006] NSWCCA 158, however the appeal was dismissed.</td>
</tr>
<tr>
<td>Major offence/s</td>
<td>Disseminating false information to induce the purchase of shares (s 1041E), intentionally dishonest conduct and failing to discharge duties as director in good faith and in the best interests of the company (s 184(1)(b)).</td>
</tr>
<tr>
<td>Offence description</td>
<td>The offender disseminated information that he knew to be false, namely that he had purchased shares in HIH with his own money, when he had actually used money sourced from HIH. The offender intended this to induce people to purchase HIH shares, and thereby raise the share price. The offender also procured HIH to invest $2m into a company in which the offender was interested, BTS, by misleading the HIH board.</td>
</tr>
<tr>
<td>Offender</td>
<td>46 year old male, tertiary education, member of Institute of</td>
</tr>
<tr>
<td>status</td>
<td></td>
</tr>
<tr>
<td>---</td>
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</tr>
<tr>
<td>Chartered Accountants, non-executive director and shareholder of HIH.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Sentencing Variables</th>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
</table>
| 1. Good character | Mitigating | 'Away from his business activities a somewhat different character emerges. He is described in a number of testimonials as a good and committed husband and father, who has given generously to charity and assisted persons in difficult circumstances, both financially and with personal support and encouragement.' [41]  

'At the time of the commission of the offences in counts 1 and 2, the offender had no prior convictions and must be regarded as a person of good character; but at the time of the commission of the BTS offences, he had committed the offences the subject of counts 1 and 2 and also suffered the civil penalty proceedings hereafter referred to, and therefore cannot be regarded as a person of prior good character, at least in the business sense. Furthermore, it has been held that prior good character is of lesser significance in the case of white collar crimes because normally it is that factor which places the offender in a position where he or she is able to commit such crime: *R v Rivkin* [2004] NSWCCA 7 at [410] citing *R v El Rashid* (CCA – 7 April 1995); *Director of Public Prosecutions v Bulfin* above.' [51]  

2. Public opprobrium | Mitigating | 'Since the collapse of HIH … He and his wife and children have also been subjected to an excessive amount of unreasonable and intrusive publicity by the media relating to their private lives, causing him and them additional distress.' [44]  

3. Reduction of employment/ career prospects | Mitigating | '…some regard must be had to the order for disqualification to avoid any element of double punishment, but only to a very minor degree.' [56]  

4. Large amount of money involved | Aggravating | 'In relation to the misrepresentations the subject of the third count, the offender described them 'in a broad sense' as 'stupid errors of judgment' in an effort to cut corners (T 44). They were not stupid errors of judgment but deliberate lies, criminal and in breach of his fiduciary duties to HIH as a director. The amount of money fraudulently
obtained from the company ($2m) was large.’ [40]

<table>
<thead>
<tr>
<th>5. High level of planning/sophistication</th>
<th>Not raised</th>
</tr>
</thead>
<tbody>
<tr>
<td>6. High level of harm to victim</td>
<td>Aggravating</td>
</tr>
<tr>
<td></td>
<td>'The offences are serious…the statement ‘I am putting my money up which shows I believe in the industry’ coming as it did from a director of the company with a reputation for shrewd investment, would have induced people, particularly small investors, to purchase HIH shares. Many, if not all, of such people would have lost their money when the company collapsed.’ [38]</td>
</tr>
<tr>
<td>7. Restitution</td>
<td>Mitigating</td>
</tr>
<tr>
<td></td>
<td>'After the collapse of HIH, the Australian Securities and Investments Commission (ASIC) took civil proceedings against the offender and others in relation to the payment of the $10m to PEE and the subsequent investments by that company with such money: Re HIH Insurance Limited (in prov liq) and anor: Australian Securities and Investments Commission v Adler and Ors [2002] NSWSC 171, 41 ACSR 72. It was held in such proceedings that the offender and others had acted in breach of their duties as directors and orders for a pecuniary penalty and compensation orders totalling $8,886,402 were made against the offender and Adler Corporation. He was also disqualified from managing a corporation for 20 years: [2002] NSWSC 483, 42 ACSR 80.’ [52]-[53]</td>
</tr>
<tr>
<td></td>
<td>'The offender has paid the whole amount of the penalty and compensation by instalments, the last payment being received on 18 December 2002.' [55]</td>
</tr>
<tr>
<td></td>
<td>'It is to his credit that he paid the fine and compensation rather than avoiding it as he probably could have done by transferring assets or declaring himself bankrupt.' [56]</td>
</tr>
<tr>
<td>8. Ancillary orders</td>
<td>Not raised</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Case 19A</th>
<th>R v Bateson [2011] NSWSC 643</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence</td>
<td>2 years’ imprisonment, served by way of intensive correction order, and fined $70,000.</td>
</tr>
<tr>
<td>Appealed?</td>
<td>No</td>
</tr>
<tr>
<td><strong>Major offence/s</strong></td>
<td>Insider trading</td>
</tr>
<tr>
<td>---------------------</td>
<td>-----------------</td>
</tr>
<tr>
<td><strong>Offence description</strong></td>
<td>Offender and his wife were trustees and equal beneficiaries of a super fund. The fund had a share trading account. The fund owned shares in WHL. The offender was privy to information concerning a potential gas project, and attended the board meeting at which it was resolved to conduct due diligence and prepare a letter of intent. WHL also entered into a memorandum of understanding with the other companies involved in the project. The offender instructed the fund’s broker to acquire shares in WHL under a nominee name, expecting the price of the shares to rise after the project was announced to the market.</td>
</tr>
<tr>
<td><strong>Offender status</strong></td>
<td>58 year old, male, tertiary educated, non-executive director of WHL.</td>
</tr>
<tr>
<td><strong>Sentencing Variables</strong></td>
<td><strong>Treatment</strong></td>
</tr>
<tr>
<td>1. Good character</td>
<td>Mitigating</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Mitigating</td>
</tr>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Neutral</td>
</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Neutral</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>5. High level of planning/sophistication</td>
<td>Not raised</td>
</tr>
<tr>
<td>6. High level of harm to victim</td>
<td>Neutral</td>
</tr>
<tr>
<td>7. Restitution</td>
<td>Not raised</td>
</tr>
<tr>
<td>8. Ancillary orders</td>
<td>Neutral</td>
</tr>
</tbody>
</table>

**Case 20A**  
*R v Hall [No 2] [2005] NSWSC 890*

**Sentence**  
2 years, 1 month imprisonment, released after 12 months with a good behaviour bond for the remainder of the sentence, upon a $5000 security without surety.

**Sentence Appealed?**  
No - *R v Hall* [2005] NSWSC 889 concerned an application to withdraw a plea of guilty in relation to count 1 in the indictment.

**Major offence/s**  
*Corporations Act 2001* (Cth) – s 1043A(1) - Insider trading

**Offence description**  
The offender procured a company, Leisuremark, to sell shares in Clifford Corporation while in possession of inside information. The inside information was a letter from Clifford’s auditors. The letter highlighted possible breaches of the Corporations Law, and urged the directors to seek legal advice. It also suggested that Clifford may not be able to continue as a going concern, and that profits had been overstated by $15m. The letter reminded the directors of their obligations in relation to price sensitive information.

**Offender**  
59 years old (offending) & 66 years old (sentencing); tertiary
<table>
<thead>
<tr>
<th>Status</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>education, mature and intelligent, director of Clifford Corporation</td>
<td>(publicly listed company)</td>
</tr>
<tr>
<td>Sentencing Variables</td>
<td><strong>Treatment</strong></td>
</tr>
</tbody>
</table>
| **1. Good character** | Neutral | 'He has no relevant criminal convictions. Ordinarily that would demonstrate good character, which ought to receive some favourable recognition in sentencing. However, ASIC brought civil penalty proceedings against Mr Hall in 2004. The matter proceeded before Bergin J. Her Honour made a number of declarations that Mr Hall had acted dishonestly in the exercise of his powers and the discharge of his duties as a director of companies in the Clifford group. They are not findings made beyond reasonable doubt. They are not criminal convictions. They are not, for the purposes of sentencing, a matter of aggravation (Weininger v The Queen (2003) 212 CLR 629 at 638). They are, nonetheless, an aspect of Mr Hall's character and antecedents which show that the offence now being dealt with is not an aberration (cf s16A(2)(m)). Even were it the case that Mr Hall had good character, that fact would not be a significant mitigating factor in the context of 'white collar' offences such as insider trading (R v El Rashid (unreported, NSW CCA, 7.4.95) per Gleeson CJ).'

[101]                                                                                                                                                                                                 |

<table>
<thead>
<tr>
<th><strong>2. Public opprobrium</strong></th>
<th>Mitigating</th>
<th>'Further, it was suggested that, to some degree, Mr Hall and members of his family had been subjected to the shame and humiliation of publicity arising from these charges, which is a form of extra curial punishment. I accept that … such punishment should be taken into account in the complex synthesis relevant to the ultimate sentence.' [117]</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>3. Reduction of employment/career prospects</strong></td>
<td>Neutral</td>
<td>'I should also refer to … other matters…As a result of the orders made by Bergin J [civil penalty in 2004], he has been banned from managing any corporation for 14 years.' [118]</td>
</tr>
<tr>
<td></td>
<td></td>
<td>No discernible effect.</td>
</tr>
<tr>
<td><strong>4. Large amount of money involved</strong></td>
<td>Aggravating</td>
<td>'Instead, as a consequence of Mr Hall’s actions, the investing public lost more than $200,000.' [99]</td>
</tr>
<tr>
<td></td>
<td></td>
<td>'Some 850,000 shares, yielding over $215,000, were sold…' [124]</td>
</tr>
</tbody>
</table>
| **5. High level**      | Aggravating | 'There was no reason for covert action. Had the company somehow survived, the share dealing by }
<table>
<thead>
<tr>
<th>of planning/ sophistication</th>
<th>Mr Hall may never have become known. The dealings became known because of the collapse.' [91] 'Mr Hall, knowing that he had inside information, that is, information that was not generally available, and knowing that information was price sensitive, deliberately traded shares, when he well knew he should not do so.' [92]</th>
</tr>
</thead>
<tbody>
<tr>
<td>6. High level of harm to victim</td>
<td>Aggravating 'Instead, as a consequence of Mr Hall’s actions, the investing public lost more than $200,000.' [99] 'Here, the Crown submits, and I accept, that the criminality on the part of Mr Hall was very significant. In many cases of insider trading, the offender seeks to profit from information that comes into his possession. Ordinarily, in such cases, the profit is confiscated once the crime has been detected. Such cases involve no monetary loss to an individual. There is, nonetheless, damage to the investing public's confidence in the integrity of the market. Such damage is serious enough. Here, it was worse. Here it can be inferred that, in addition, many people or institutions who bought shares in Clifford from Leisuremark in good faith lost their money (s16A(2)(e)). Some 850,000 shares, yielding over $215,000, were sold on the instructions of Mr Hall, those instructions being given on six separate occasions.' [124]</td>
</tr>
<tr>
<td>7. Restitution</td>
<td>Not raised</td>
</tr>
<tr>
<td>8. Ancillary orders</td>
<td>Not raised</td>
</tr>
</tbody>
</table>

**Case 21A**

| Sentence | State offence – 9 months imprisonment
Commonwealth offence – 12 months imprisonment (released on recognisance after 7 months ($2,500)) |
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence Appealed?</td>
<td>No</td>
</tr>
</tbody>
</table>
| Major offence/s | **Corporations Act 2001** (Cth) s 184(1) – 1 count
**Crimes Act 1990** (NSW) s 178BB(1) – 2 counts |
<p>| Offence description | Recklessly signing documents even though he suspected he had been given the wrong advice – resulted in value of the available assets being overstated by $129 million, effectively turning a deficiency of $111,861,000 into an apparent surplus of |</p>
<table>
<thead>
<tr>
<th>Offender status</th>
<th>Sentencing Variables</th>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>56 year old; male; tertiary education; managing director (Australia) at HIH Insurance Group</td>
<td>1. Good character</td>
<td>Mitigating</td>
<td>‘…no prior convictions.’ [4] [37] 'although good character is not quite as significant as a mitigating factor in relation to white collar crime…it still has a relevance…' [39]</td>
</tr>
<tr>
<td></td>
<td>2. Public opprobrium</td>
<td>Neutral</td>
<td>'Although the imposition of a sentence of imprisonment upon a corporate executive, with an extended history of otherwise blameless conduct is likely to have a severe impact upon him, and also upon his family, it cannot be said that there is, in this case, anything of an exceptional nature that would justify some amelioration of sentence.' [62]</td>
</tr>
<tr>
<td></td>
<td>3. Reduction of employment/career prospects</td>
<td>Neutral</td>
<td>'Although the imposition of a sentence of imprisonment upon a corporate executive, with an extended history of otherwise blameless conduct is likely to have a severe impact upon him, and also upon his family, it cannot be said that there is, in this case, anything of an exceptional nature that would justify some amelioration of sentence.' [62]</td>
</tr>
<tr>
<td></td>
<td>4. Large amount of money involved</td>
<td>Neutral</td>
<td>'…did not personally enrich the offender.' [35]</td>
</tr>
<tr>
<td></td>
<td>5. High level of planning/sophistication</td>
<td>Not raised</td>
<td>'…not involving any form of deliberate deceit.' [19] Therefore there was no planning here However judge acknowledged that conduct re: Cth offence –‘…knowingly signed minutes'</td>
</tr>
<tr>
<td></td>
<td>6. High level of harm to victim</td>
<td>Neutral</td>
<td>‘…precise effect of the offences on individual victims is unascertainable, since the ultimate collapse of the HIH group was multifactorial and related to long standing and serious mismanagement by a wide group of persons.' [47]</td>
</tr>
<tr>
<td></td>
<td>7. Restitution</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td></td>
<td>8. Ancillary orders</td>
<td>Not raised</td>
<td></td>
</tr>
</tbody>
</table>

Case 22A: *R v Huy Anh Le* [2008] VSC 624

$17,139,000
<table>
<thead>
<tr>
<th>Sentence</th>
<th>12 months imprisonment wholly suspended for 2 years</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence Appealed?</td>
<td>No</td>
</tr>
<tr>
<td>Offence description</td>
<td>Solicitor stealing from clients in property settlements and from trust account.</td>
</tr>
<tr>
<td>Offender status</td>
<td>39 year old, male, migrant, tertiary education, solicitor</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Sentencing Variables</th>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Good character</td>
<td>Neutral</td>
<td>'You…have no prior convictions and no subsequent offending.' [25]</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Not raised</td>
<td></td>
</tr>
</tbody>
</table>
| 3. Reduction of employment/career prospects | Neutral | 'You were reprimanded by the tribunal and it was ordered that you be suspended from practice for three years from that date, effectively meaning that you were suspended from practice until at least 31 May 2009.' [19]  
No further reduction from employment raised. No discernible effect. |
| 4. Large amount of money involved | Neutral | 'In terms of your offending, the amounts involved are at the lower end of the scale of offending.' [50]  
No discernible effect |
| 5. High level of planning/sophistication | Not raised | |
| 6. High level of harm to victim | Not raised | |
| 7. Restitution | Mitigating | 'I do take into account that full restitution will be made.' [47] |
| 8. Ancillary orders | Not raised | |

<table>
<thead>
<tr>
<th>Case 23A</th>
<th><em>DPP v Nguyen</em> [2010] VSC 182</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence</td>
<td>36 months imprisonment wholly suspended for 3 years.</td>
</tr>
<tr>
<td>Sentence Appealed?</td>
<td>No</td>
</tr>
<tr>
<td>-------------------</td>
<td>----</td>
</tr>
<tr>
<td>Major offence/s</td>
<td><em>Crimes Act 1958 s 74 - 7 counts of theft, s 83 - 6 counts of false accounting.</em>&lt;br&gt; <em>Legal Practice Act 1996 s 188 - 5 counts of deficiency in trust account.</em></td>
</tr>
<tr>
<td>Offence description</td>
<td>Offence committed in capacity as a solicitor – taking from clients</td>
</tr>
<tr>
<td>Offender status</td>
<td>37 year old, male, tertiary education, migrant, solicitor (sole practitioner)</td>
</tr>
</tbody>
</table>

### Sentencing Variables

<table>
<thead>
<tr>
<th>Variable</th>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Good character</td>
<td>Mitigating</td>
<td>’…you have no prior convictions and have been of good behaviour otherwise…I have taken [this] matter into account on your behalf.’</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Mitigating</td>
<td>’I do take into account the fact that these offences are now relatively old and that you have not practised in the meantime.'&lt;br&gt;’I accept that your career in law is finished. I think that it is unlikely that you will be able to significantly pursue your alternative career as a migration agent.’</td>
</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Not raised</td>
<td>’The total of the deficiencies in your trust account was $180,262.75.'&lt;br&gt;’I do, however, regard this case as one of the least serious of its kind to come before this Court, as is indicated by the net proceeds in your favour.'&lt;br&gt; This involved a low amount of money according the court not a large amount of money.</td>
</tr>
<tr>
<td>5. High level of planning/sophistication</td>
<td>Not raised</td>
<td>Not applicable&lt;br&gt;’…your crimes are largely those of a thoroughly disorganized person, rather than an outright dishonest one.’</td>
</tr>
<tr>
<td>6. High level of harm to victim</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>7. Restitution</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>8. Ancillary orders</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>Case 24A</td>
<td>R v Moylan [2014] NSWSC 944</td>
<td></td>
</tr>
<tr>
<td>------------------</td>
<td>-----------------------------</td>
<td></td>
</tr>
<tr>
<td>Sentence</td>
<td>1 year, 8 months imprisonment (released on recognisance $1000 – good behaviour for 2 years)</td>
<td></td>
</tr>
<tr>
<td>Sentence Appealed?</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Major offence/s</td>
<td>Corporations Act 2001 (Cth) s 1041E - Disseminate false information likely to induce persons to dispose of financial products.</td>
<td></td>
</tr>
<tr>
<td>Offence description</td>
<td>Offender publishes hoax media release purportedly by ANZ Banking Group announcing withdrawal of facility to mining company. Share price in mining company drops &amp; investors lose money</td>
<td></td>
</tr>
<tr>
<td>Offender status</td>
<td>26 year old, male, intelligent, tertiary education</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Sentencing Variables</th>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Good character</td>
<td>Not raised</td>
<td>Offender was not of prior good character in this case. [88] Noted that offender has not previously been convicted of a serious offence [105] however this is not the variable we are testing.</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Neutral</td>
<td>'…present offence did not involve personal financial gain…' [59] Resulted in offender being released on recognisance. (see [105]) Neutral because the focus is on the offender not profiting not the amount of money specifically involved.</td>
</tr>
<tr>
<td>5. High level of planning/sophistication</td>
<td>Aggravating</td>
<td>Detailed - 'Specific planning concerning the offence' [11]-[27] 'I accept here, that after the initial deception there was no attempt to conceal the crime. Indeed, it was always going to be straightforward to ascertain who the perpetrator was. The point of the offence was to</td>
</tr>
</tbody>
</table>
be discovered after a short period of time.' [57]

'The Offender is undoubtedly an intelligent person. The offence was effected by reasonably careful and thorough planning so that at least in the short term the recipients of the false media release would believe the truth of what was contained within it.' [65]

'As I have said, the offending was attended with a considerable degree of planning and pre-meditation, albeit over a fairly short timeframe of a few days. The use of the logo, the examination of previous media releases by the ANZ, the purchase and use of the domain name, as well as the name of an actual employee of the Bank on the media release and in the recorded message on the phone, and the number of recipients of the email, especially the numerous media outlets, all attest to the level of the planning for the offence.' [76]

<table>
<thead>
<tr>
<th>6. High level of harm to victim</th>
<th>Aggravating</th>
</tr>
</thead>
<tbody>
<tr>
<td>'…the actual damage was considerable, as is made clear by the level of trading in Whitehaven's shares and the significant sudden drop in the share price. I note that the share price recovered within a relatively short period of time, although that is not to ignore the damage done to individual investors who lost money by acting on the basis of the false statements.' [75]</td>
<td></td>
</tr>
<tr>
<td>'Here, the market was manipulated, vast amounts of shares were unnecessarily traded and some investors lost money or their investment in Whitehaven entirely. These were not just 'day traders and speculators' as the Offender said to Mr Duffy - superannuation funds and ordinary investors suffered damage. It was intended that ANZ at least be embarrassed and that Whitehaven should be damaged or threatened, even if there was no intention to hurt shareholders and investors as such.' [103]</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>7. Restitution</th>
<th>Not raised</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>8. Ancillary orders</th>
<th>Not raised</th>
</tr>
</thead>
</table>

Case 25A  
*R v Lirim Emini* [2011] VSC 336
<table>
<thead>
<tr>
<th>Sentence</th>
<th>24 months imprisonment, released on recognisance after 12 months ($5,000).</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence Appealed?</td>
<td>No</td>
</tr>
<tr>
<td>Major offence/s</td>
<td>Corporations Act 2001 (Cth) s 184 - 3 counts of using position as a director dishonestly with intention of gaining an advantage.</td>
</tr>
<tr>
<td>Offence description</td>
<td>Transfer of shares and stocks despite position as director.</td>
</tr>
<tr>
<td>Offender status</td>
<td>48 years of age, male, career in finance, CEO.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Sentencing Variables</th>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Good character</td>
<td>Mitigating</td>
<td>‘…previously unblemished record and character. A number of references were tendered on your behalf which spoke to your good character. I have been particularly impressed as to the detail and glowing nature of these references.’ [37] 'You are both entitled to have previous good character taken into account in the sentencing process.' [50]</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Mitigating</td>
<td>‘… your prospects of future employment will undoubtedly be affected by convictions for the offences for which you have pleaded guilty.’ [40]</td>
</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>5. High level of planning/sophistication</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>6. High level of harm to victim</td>
<td>Aggravating</td>
<td>'In sentencing both of you, it is relevant to consider any injury, loss or damage resulting from your offences. The Crown does not allege any specific loss. The Crown notes that the securities transferred by you, Mr Emini, in July 2006 were returned, and then submits that, as a result of the settlement to which I have just referred, it is difficult to quantify any actual loss to OPSL’s creditors as a result of the criminal conduct of each of you.’ [34]</td>
</tr>
</tbody>
</table>
'Whilst the collapse of Opes Prime is part of the background and circumstances to your offending, it must be remembered that each of you falls to be sentenced for the offending to which you have pleaded guilty, rather than for some broad and uncharged allegation that you each engaged in fraudulent conduct which caused Opes Prime to collapse. I turn now to consider your personal circumstances.' [35]

### Case 26A  
*R v Anthony Charles Blumberg* [2011] VSC 336

<table>
<thead>
<tr>
<th>Sentence</th>
<th>12 months imprisonment (released on recognisance after 6 months, $5,000)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appealed?</td>
<td>No</td>
</tr>
<tr>
<td>Major offence/s</td>
<td><em>Corporations Act 2001</em> (Cth) s 184 – 1 count of using position as a director dishonestly with intention of gaining an advantage.</td>
</tr>
<tr>
<td>Offence description</td>
<td>Transfer of shares &amp; stocks despite position as director.</td>
</tr>
<tr>
<td>Offender status</td>
<td>43 years of age, male, director.</td>
</tr>
</tbody>
</table>

### Sentencing Variables

<table>
<thead>
<tr>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
</table>
| **1. Good character** | Mitigating '…person of unblemished character and reputation…I have been impressed by the detail and high regard in which you have been held as described in the references tendered on your behalf.' [43]

'You are both entitled to have previous good character taken into account in the sentencing process.' [50] |
| **2. Public opprobrium** | Not raised |
| **3. Reduction of employment/career prospects** | Mitigating 'Your career in the finance and business sector commenced in 1992. From that time until the collapse of Opes Prime, you were largely engaged full-time in this sector. Since the collapse of Opes Prime, you have engaged in such employment as you could. Recently, and until the plea hearing, you
were working as a forklift driver.’ [42]

‘…your prospects of future employment will undoubtedly be affected by a conviction for the offence for which you have pleaded guilty.’ [46]

<table>
<thead>
<tr>
<th>Factor</th>
<th>Consideration</th>
</tr>
</thead>
<tbody>
<tr>
<td>4. Large amount of money involved</td>
<td>Not raised</td>
</tr>
<tr>
<td>5. High level of planning/sophistication</td>
<td>Not raised</td>
</tr>
<tr>
<td>6. High level of harm to victim</td>
<td>Aggravating</td>
</tr>
</tbody>
</table>

'In sentencing both of you, it is relevant to consider any injury, loss or damage resulting from your offences.' The Crown does not allege any specific loss. The Crown notes that the securities transferred by you, Mr Emini, in July 2006 were returned, and then submits that, as a result of the settlement to which I have just referred, it is difficult to quantify any actual loss to OPSL’s creditors as a result of the criminal conduct of each of you.’ [34]

'Whilst the collapse of Opes Prime is part of the background and circumstances to your offending, it must be remembered that each of you falls to be sentenced for the offending to which you have pleaded guilty, rather than for some broad and uncharged allegation that you each engaged in fraudulent conduct which caused Opes Prime to collapse. I turn now to consider your personal circumstances.' [35]

<table>
<thead>
<tr>
<th>Factor</th>
<th>Consideration</th>
</tr>
</thead>
<tbody>
<tr>
<td>7. Restitution</td>
<td>Not raised</td>
</tr>
<tr>
<td>8. Ancillary orders</td>
<td>Not raised</td>
</tr>
</tbody>
</table>

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**Case 27A**

*R v Lo* [2007] NSWSC 105

**Sentence**

9 months imprisonment

**Sentence Appealed?**

No

**Major offence/s**

*Crimes Act 1958* s 82 - 3 counts of OFAD.

**Offence description**

Gave significant assistance to authorities.

**Offender**

57 year old, male, tertiary education, audit manager and company
<table>
<thead>
<tr>
<th>status</th>
<th>secretary.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Sentencing Variables</strong></td>
<td><strong>Treatment</strong></td>
</tr>
<tr>
<td>1. Good character</td>
<td>Mitigating</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Not raised</td>
</tr>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Not raised</td>
</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Not raised</td>
</tr>
<tr>
<td>5. High level of planning/sophistication</td>
<td>Aggravating</td>
</tr>
<tr>
<td>6. High level of harm to victim</td>
<td>Not raised</td>
</tr>
<tr>
<td>7. Restitution</td>
<td>Not raised</td>
</tr>
<tr>
<td>8. Ancillary orders</td>
<td>Not raised</td>
</tr>
<tr>
<td><strong>Case 28A</strong></td>
<td><strong>R v Shawn Darrell Richard [2011] NSWSC 866</strong></td>
</tr>
</tbody>
</table>
| **Sentence** | - 3 years and 9 months imprisonment (to be released on recognisance after 2 years and 6 months)  
- 2.5 years’ imprisonment, then 15 months’ good behaviour bond after release. |
| **Sentence Appealed?** | No |
| **Major offence/s** | Corporations Act 2001 (Cth) s 1041E - False or misleading statements; s 1041G - dishonest conduct. |
| **Offence description** | Offender dishonestly operating the business in a way that was designed to, and had the effect of, diverting sums invested in |
superannuation funds in Australia, into overseas funds located in tax havens. The overseas funds were of questionable value and were inappropriate superannuation investments. Misleading statements included product disclosure statements, designed to induce Australians to apply for financial products. Offending committed over 4 years.

<p>| Offender status | 36 years old; male; did not complete tertiary education; director of Astarra Asset Management (AAM). |</p>
<table>
<thead>
<tr>
<th>Sentencing Variables</th>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
</table>
| 1. Good character | Mitigating | 'He has not committed any previous criminal offences. The Crown accepts, as do I, that prior to his involvement with the Trio Capital Group, he was a man of good character…[this] does not deserve much weight.' [116] [118]

'The evidence satisfies me, as is often the case in white-collar crimes, that Mr Richard is unlikely to offend again. That is for a number of reasons including, but not limited to… the fact that he was of prior good character…' [94]

| 2. Public approbrium | Not raised | |
| 3. Reduction of employment/career prospects | Mitigating | ‘…he also entered into an Enforceable Undertaking with the Australian Securities and Investments Commission (Ex C) in which he undertook, in accordance with the Australian Securities and Investments Commission Act 2001, not to provide financial services in Australia permanently.’ [4]

'The evidence satisfies me, as is often the case in white-collar crimes, that Mr Richard is unlikely to offend again. That is for a number of reasons including, but not limited to, the enforceable undertaking…' [94]

| 4. Large amount of money involved | Aggravating | 'I am satisfied that the losses involved in the offences amounted to $26.2m. This is a very large sum of money.' [77]

‘…he received over $1m personally, which was a very significant personal benefit.' [122]
### 5. High level of planning/sophistication

| Aggravating | '…engaged in conduct amounting to systematic deception in order to conceal the receipt of funds by him, including using private email accounts and overseas bank accounts to facilitate the concealment of the receipt of his personal benefit.' [65]  

'…carefully considered and planned…' [122] |

### 6. High level of harm to victim

| Aggravating | $26.6m lost. Loss of superannuation funds, which are intended to provide a secure retirement fund. The government announced a financial assistance package to victims of the fallen super fund, however not all investors were covered by the package. Given lack of details of victims, the court was unable to make any findings about the personal circumstances of any victims of the offences. [68]-[76] |

### 7. Restitution

| Not raised | None of the $26.6m has been recovered. No weight expressed to be given to this factor → no restitution |

### 8. Ancillary orders

| Not raised | |

---

**Case 29A**  
*R v Ashraf Kamha* [2008] NSWSC 765

| Sentence | 6 months imprisonment (fully suspended) (recognisance release order – 12 months good behaviour) |

| Sentence Appealed? | No |

| Major offence/s | *Corporations Act 2001* (Cth) s 590(1)(c)(iii) - Being privy to the fraudulent altering of the books of the company ( |

| Offence description | The offender was privy to the fraudulent alteration of FAI General Insurance’s books. Claims estimates in the company’s database were reduced, which then flowed into publication by the company of a proclaimed trading profit of over $3m. Actually, there should have been a loss of just under $8m. The decision to reduce claims was made while the offender was on leave, however he received a phone call from a superior, asking him to ensure that the person responsible for the reductions made the reductions in time for the half yearly accounts. The offender passed on that instruction. |

| Offender status | Male; director of FAI General Insurance. |

<table>
<thead>
<tr>
<th>Sentencing Variables</th>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
</table>
| 1. Good             | Mitigating | 'You have no prior convictions have previously led
<table>
<thead>
<tr>
<th>character</th>
<th>an unblemished life. The testimonials bear witness to this which is beyond the simple observation of an absence of prior conviction.’ [10]</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Public opprobrium</td>
<td>Not raised</td>
</tr>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Not raised</td>
</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Not raised</td>
</tr>
<tr>
<td>5. High level of planning/sophistication</td>
<td>Not raised</td>
</tr>
<tr>
<td>6. High level of harm to victim</td>
<td>Not raised</td>
</tr>
<tr>
<td>7. Restitution</td>
<td>Not raised</td>
</tr>
<tr>
<td>8. Ancillary orders</td>
<td>Not raised</td>
</tr>
</tbody>
</table>

**Case 30A**  
*R v Boulden* [2006] NSWSC 1274

<table>
<thead>
<tr>
<th>Sentence</th>
<th>12 months’ imprisonment, to be served by way of periodic detention.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence Appealed?</td>
<td>No</td>
</tr>
<tr>
<td>Major offence/s</td>
<td><em>Corporations Act 2001</em> (Cth) s 590(1)(c)(iii) - Being privy to fraudulent alteration of accounts.</td>
</tr>
<tr>
<td>Offence description</td>
<td>The offender was privy to the fraudulent alteration of FAI General Insurance’s books. Claims estimates in the company’s database were reduced, which then flowed into publication by the company of a proclaimed trading profit of over $3m. Actually, there should have been a loss of about $8m. The offender requested the improper reductions to be carried out.</td>
</tr>
<tr>
<td>Offender status</td>
<td>42 years old; male; tertiary education; financial controller of FAI General Insurance New Zealand (Financial Controller of the Corporate and Professional Insurance Division at the time of offending).</td>
</tr>
<tr>
<td>Sentencing</td>
<td>Treatment Remarks</td>
</tr>
<tr>
<td>Variables</td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td><strong>1. Good character</strong></td>
<td>Mitigating</td>
</tr>
<tr>
<td><strong>2. Public opprobrium</strong></td>
<td>Mitigating</td>
</tr>
<tr>
<td><strong>3. Reduction of employment/career prospects</strong></td>
<td>Neutral</td>
</tr>
</tbody>
</table>
| **4. Large amount of money involved** | Neutral | ’… it is clear that, apart from 'hanging on' to his own position with its well paid salary, the offender did not stand to gain personally in a financial manner from the creation of the fraudulent document.’ [17] ’The offender knew and intended that the false entry in the ledger that he caused to be made would directly lead to a false reduction of FAIG’s underwriting loss for the year ended 31 December 1997 of about $5.5 million. The offender also knew and intended that, when consolidated with the accounts of FAI Insurance Limited, this would directly lead to a false increase in FAI’s profit of about $5.5 million, thereby converting what would have been an overall loss for that period into a small
| 5. High level of planning/ sophistication | Aggravating | 'Objective criminality… The fraudulent nature of the exercise is illustrated by the fact that on 23 January 1998, he again e-mailed Mr Gross and lied to him about the reason for the alteration to the journals.' Counsel submission - '…[offender] played a role in planning, and a significant role in implementing the alterations.' [19] – no specific comment on this by judge. '…offender knew that the alteration he directed would be likely to be reflected in false profit figures released to the market.' [33] |
| 6. High level of harm to victim | Not raised |
| 7. Restitution | Not raised |
| 8. Ancillary orders | Not raised |

<table>
<thead>
<tr>
<th>Case 31A</th>
<th>R v Robert Bart Doff [2005] NSWSC 50</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence</td>
<td>350 hours’ community service work and a fine of $30,000.</td>
</tr>
<tr>
<td>Major offence/s</td>
<td>Corporations Act 2001 (Cth) s 1043A(1) - Insider trading.</td>
</tr>
<tr>
<td>Offence description</td>
<td>The offender learnt through a meeting with the CEO of Impulse Airlines, that there was a deal for the merging of Impulse’s business with Qantas and that ACCC approval was still outstanding. Within about 3 hours of learning the inside information, the offender instructed his stockbroker to purchase 20,000 Qantas shares, in the name of the offender’s company. Due to the similarity with Rivkin’s case, which was heard before this case, the sentencing judge paid close attention to Rivkin’s sentence. The sentencing was a comparison exercise.</td>
</tr>
<tr>
<td>Offender status</td>
<td>Mature and intelligent man, proprietor of a large and apparently successful real estate agency (Rene Rivkin’s real estate agent, acting on the sale of Rivkin’s property to the CEO of Impulse Airlines).</td>
</tr>
<tr>
<td>Sentencing Variables</td>
<td>Treatment Remarks</td>
</tr>
<tr>
<td>1. Good character</td>
<td>Mitigating</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Not raised</td>
</tr>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Neutral</td>
</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Neutral</td>
</tr>
<tr>
<td>5. High level of planning/sophistication</td>
<td>Not raised</td>
</tr>
<tr>
<td>6. High level of harm to victim</td>
<td>Not raised</td>
</tr>
<tr>
<td>7. Restitution</td>
<td>Not raised</td>
</tr>
<tr>
<td>8. Ancillary orders</td>
<td>Mitigating</td>
</tr>
</tbody>
</table>

**Case 32A**  
*R v Williams* [2005] NSWSC 315
<table>
<thead>
<tr>
<th><strong>Sentence</strong></th>
<th>4 years and 6 months (non-parole period of 2 years and 9 months)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Sentence Appealed?</strong></td>
<td>No</td>
</tr>
<tr>
<td><strong>Major offence/s</strong></td>
<td>False statements or omissions in company documents.</td>
</tr>
<tr>
<td><strong>Offence description</strong></td>
<td>The offender authorised the issue of a prospectus in relation to securities in HIH, from which prospectus there was a material omission. The offender also authorised a statement in the HIH Annual Report which he knew to be misleading. The offender was also reckless and failed to exercise his powers and discharge his duties for a proper purpose, in that he signed a letter to Noteholders which contained a misleading statement.</td>
</tr>
<tr>
<td><strong>Offender status</strong></td>
<td>68 years old; male; CEO of HIH.</td>
</tr>
<tr>
<td><strong>Sentencing Variables</strong></td>
<td><strong>Treatment</strong></td>
</tr>
<tr>
<td>1. Good character</td>
<td>Mitigating</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
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</tr>
</tbody>
</table>
| 2. Public opprobrium | Mitigating | Counsel submitted – ‘the public vilification which has been attracted to him as a result of the collapse of HIH, including the very considerable and somewhat hostile media coverage in which he has been categorised as a 'corporate crook'. It has left him with a permanently damaged reputation and loss of standing in the community, and it has also led to the removal of his name from the title of the ‘Ray Williams Institute of Paediatric Endocrinology, Diabetes and Metabolism' from the Medical Research Unit at the Childrens’ Hospital at Westmead that he had endowed and supported for many years…’ [69]

'It is true that some weight needs to be given to these consequences, in so far as the current convictions carry with them the public opprobrium which attaches to that circumstance…’ [70] |

| 3. Reduction of employment/career prospects | Mitigating | Counsel submitted – ‘…the 10 year disqualification, under s 206C of the Corporations Act, which followed upon the declarations of contravention of ss 180 and 182 of that Act made in the last mentioned proceedings. Together with his present age of 68 years, and the two matters next identified, this has left him unemployed and unemployable without any hope of resuming any form of commercial activity…’ [69]

'It is true that some weight needs to be given to these consequences… in so far as they would of themselves result in a 5 year period of disqualification from corporate governance.' [70]

The offender received a 10 year disqualification.

The offender is unemployed, unemployable and without any hope of resuming any form of commercial activity. |

| 4. Large amount of money involved | Neutral | ‘…it is not contended that the Defendant [committed the three offences] …for the immediate purpose of generating some personal gain for himself.' [41] |

| 5. High level of planning/sophistication | Neutral | ‘…the offences span the last three years of HIH, and I accept the Crown submission that they were likely to have contributed, to some degree, to the prolongation of its life, by facilitating the raising of |
further capital and by misrepresenting the group’s financial position.’ [39] ‘…it is not contended that the Defendant was the architect of, or solely responsible for, any of the three offences…’ [41] ‘the three offences in this case were objectively serious, and they effectively extended over a somewhat lengthy period.’ [43] 

Appears to be low level planning in this case but no discernible effect.

<table>
<thead>
<tr>
<th>6. High level of harm to victim</th>
<th>Not raised</th>
</tr>
</thead>
<tbody>
<tr>
<td>7. Restitution</td>
<td>Neutral</td>
</tr>
<tr>
<td></td>
<td>‘While the Defendant has demonstrated personal remorse and contrition, faces potential civil litigation which may result in orders for the repayment of monies or for the payment of damages, has paid a pecuniary penalty to ASIC and may have to give contribution in relation to the transaction which involved Mr Adler, nothing has been placed before me to show that he has, to this point, made any material reparation in relation to these offences.’ [71]</td>
</tr>
<tr>
<td>8. Ancillary orders</td>
<td>Not raised</td>
</tr>
</tbody>
</table>

### Case 33A: R v Milne [No 6] [2010] NSWSC 1467

<table>
<thead>
<tr>
<th>Sentence</th>
<th>8.5 years’ imprisonment, with a non-parole period of 4 years 9 months.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence Appealed?</td>
<td>No</td>
</tr>
<tr>
<td>Major offence/s</td>
<td>Criminal Code 1995 s 135.1(1) - dishonestly obtaining a gain from the Commonwealth, s 400.3(1) - money laundering.</td>
</tr>
<tr>
<td>Offence description</td>
<td>55 years old, male, successful businessman, sole director and shareholder of Barat Advisory.</td>
</tr>
<tr>
<td>Offender status</td>
<td>The offender caused a company, Barat Advisory, to lodge a tax return that contained false information. Barat Advisory acquired part of a debt owed by Admerex to Clairmont Holdings. Barat Advisory was meant to pay Clairmont Holdings consideration for the partial sale of the debt, but it did not. In repayment of the debt now owed to Barat Advisory, Admerex issued shares to Barat Advisory. The shares were valued at $2,236,459. Barat Advisory transferred the shares to offshore ‘stitching’ companies, but the</td>
</tr>
</tbody>
</table>
offender intended Barat Advisory to retain its beneficial interest in the shares. None of Barat Advisory’s financial documents record any payment by the stitching companies for the transfer of the shares, or any debt owed by the stitching companies. The transfer was of legal title only. There were various sales of the shares through international entities, and money was deposited into Barat Advisory’s Australian accounts. The offender misled his accountants, and caused false tax returns to be lodged.

<table>
<thead>
<tr>
<th>Sentencing Variables</th>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Good character</td>
<td>Mitigating</td>
<td>'He has no prior convictions.' [199]</td>
</tr>
<tr>
<td></td>
<td></td>
<td>'All testimonials refer to the Offender’s successful career in business over many years, in circumstances which are described as being honest and honourable. The evidence reveals the Offender to be a hard-working man who has provided well for his family.' [202]</td>
</tr>
<tr>
<td></td>
<td></td>
<td>'I accept that the offender is a man of good character.' [204]</td>
</tr>
<tr>
<td></td>
<td></td>
<td>'I will give weight to his good character on sentence.' [221]</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Mitigating</td>
<td>'I accept the submission for the Offender that the convictions will make it more difficult for him to operate commercially, to obtain employment and to visit overseas for the purpose of employment and I take this into account on sentence.' [229]</td>
</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Aggravating</td>
<td>'There was a substantial loss to the revenue as a result of the offences, with the Commonwealth being deprived of capital gains tax in a sum of at least $1,964,727.00.' [210]</td>
</tr>
<tr>
<td></td>
<td></td>
<td>'The amount of capital gains tax evaded was very substantial, exceeding $1.9 million.' [249]</td>
</tr>
<tr>
<td></td>
<td></td>
<td>'…necessary to have regard to the total value of the money or property involved. In this case, the 48 Million Admerex shares, which the offender dealt with, intending that they would become an instrument of crime, were valued at between $8.4 million and $9.12 million.' [258]</td>
</tr>
</tbody>
</table>
### 5. High level of planning/sophistication

<table>
<thead>
<tr>
<th>Aggravating</th>
<th>'…serious example of …offence…involving the establishment and misuse of a sophisticated offshore structure for the specific purpose of avoiding the payment by Barat Advisory of a substantial amount of tax.' [208]</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>'..significant degree of planning and deceit.' [260]</td>
</tr>
</tbody>
</table>

### 6. High level of harm to victim

<table>
<thead>
<tr>
<th>Aggravating</th>
<th>'…in the circumstances of this case, that serious tax fraud of this type affects the whole community in a detrimental way.' [251]</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>'In this case, the amount of tax which was not paid, but which ought to have been paid, was no less than $1,964,727.00.' [261]</td>
</tr>
</tbody>
</table>

### 7. Restitution

<table>
<thead>
<tr>
<th>Neutral</th>
<th>'A number of assets of the Offender are subject to a forfeiture application under the <em>Proceeds of Crime Act 2002 (Cth).</em>' [216]</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No further comments on this. No discernible effect.</td>
</tr>
</tbody>
</table>

### 8. Ancillary orders

<table>
<thead>
<tr>
<th>Not raised</th>
<th></th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Case 34A</th>
<th><em>DPP v Peter John Couper</em> [2012] VCC 875</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence</td>
<td>At first instance - 21 months suspended for 3 years, and fined $10,000</td>
</tr>
<tr>
<td></td>
<td>On appeal - 1 year and 10 months imprisonment, fine of $10,000 (recognisance after 60 days imprisonment - $1,000)</td>
</tr>
<tr>
<td>Sentence</td>
<td>Yes – <em>DPP v Couper</em> [2013] VSCA 72 – appeal allowed</td>
</tr>
<tr>
<td>Major offence/s</td>
<td>- <em>Corporations Act 2001 (Cth)</em> s 1307(1) - falsification of books – 2 counts</td>
</tr>
<tr>
<td></td>
<td>- <em>Corporations Act 2001 (Cth)</em> s 1309(1) – false information – 1 count</td>
</tr>
<tr>
<td></td>
<td>- <em>Australian Securities and Investment Commission Act 2001</em> s 64 – False information - 1 count</td>
</tr>
<tr>
<td>Offence description</td>
<td>'In very short compass, in 2007, as Chief Financial Officer of the On Q Group, the parent company of Bill Express (BXP), you arranged for the false documentation in BXP company books of a non existent purchase of stock, and then its sale for considerable profits to two other entities, when in fact, that sale never took place.' [4]</td>
</tr>
<tr>
<td>Offender status</td>
<td>58 years old; male; certificate of business studies; chief financial officer of large, public, high-tech company with a staff of over</td>
</tr>
<tr>
<td>Sentencing Variables</td>
<td>Treatment</td>
</tr>
<tr>
<td>------------------------------</td>
<td>-----------</td>
</tr>
</tbody>
</table>
| 1. Good character            | Neutral   | ‘…no prior convictions.’ [10]  
|                              |           | ‘…engaged in a great deal of community service over the years.’ [15]  
|                              |           | 'I am satisfied, demonstrated a genuine commitment to community welfare, as evidenced by your involvement in the various organisations, to which I have referred, on a voluntary basis.' [38]  
|                              |           | 'My concern is that you have been presented to me as a man of otherwise impeccable morals who under a particular situation of pressure abandoned those principles and engaged in behaviour which had the potential to deceive large numbers of persons in the community, that is actual or potential investors in a public company, that is BXP. In one sense your previous honest and good character tells against you insofar as this offending is concerned. You would have known very well that what you did was entirely wrong.' [41]  
| 2. Public opprobrium         | Not raised| FIRST INSTANCE – Not raised                                                                                                                                                                          |
| 3. Reduction of employment/  | Not raised| FIRST INSTANCE – Not raised (’The directors at APN are apparently aware of your legal situation, are supportive of you and wish you to continue employment with them.' [20] → Therefore not applicable.) |
|   career prospects           |           |                                                                                                                                                                                                    |
| 4. Large amount of money     | Neutral   | ’Most significantly, as I have said, you received no gain from your activities which, in my view, from the authorities that I was referred to, has particular weight in the sentencing exercise.' [45]  
|   involved                  |           |                                                                                                                                                                                                    |

Also mentioned in the prosecution opening but not referred to by the judge in the sentencing decision.  
’On 29 February 2008, the financial statements of BXP for the half-year ended 31 December 2007 were approved. The financial statements showed a net loss before tax (’NLBT’) for the half-year of $3.041 million for the BXP consolidated entities. Without the recorded profit on the sale of Simix stock of $3.525 million, the loss for the half-year would have been more than double than that recorded for the BXP consolidated entities for the
period, amounting to a loss of $6,566,000' (p. 33)  
*Neutral because the focus is on the offender not profiting not the amount of money specifically involved.*

<table>
<thead>
<tr>
<th>5. High level of planning/sophistication</th>
<th>Aggravating</th>
<th>FIRST INSTANCE – Not raised</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>ON APPEAL – 'To my mind, the moral culpability exhibited by the respondent’s offending and the need for general deterrence justify the imposition of an immediate custodial sentence. I base that conclusion, in particular, upon the fact that the respondent’s conduct involved repeated instances of dishonesty over a protracted period of time. It is significant that the respondent had to instruct innocent employees of BXP to record transactions that the respondent knew had not taken place because the transactions related to non-existent stock. Those employees were placed in a position of carrying out what they took to be their responsibilities in good faith and, while believing in the respondent’s honesty, followed his instructions and thereby, indirectly and unintentionally misled the market.' [110]</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>6. High level of harm to victim</th>
<th>Aggravating</th>
<th>First Instance – Not raised</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>ON APPEAL – 'While the particular individuals who were harmed in this case from the respondent’s recording of false entries in company journals and the resulting artificial increase in the price of BXP shares may not be identifiable, there is a harm that lies in the erosion of confidence in the market as a whole. The offending had the potential to impair the efficacy and integrity of the market in public securities.' [108]</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>7. Restitution</th>
<th>Not raised</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>8. Ancillary orders</th>
<th>Neutral</th>
<th>Fined $10,000. Acknowledged but no discernible effect.</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Case 35A</th>
<th><em>DPP v Kenneth Edward Hampson [2006] VSC 229</em></th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence</td>
<td>5 years imprisonment (2 years and 6 months non-parole).</td>
</tr>
<tr>
<td>Sentence Appealed?</td>
<td>No</td>
</tr>
<tr>
<td>Major offence/s</td>
<td><em>Legal Practice Act 1996 (Cth) s 188 – deficiency in a trust account of over $600,000</em></td>
</tr>
<tr>
<td><strong>Offence description</strong></td>
<td>The offender stole money from 18 clients’ trust accounts. Sometimes the stolen monies were applied to the offender’s own benefit, and other times to the benefit of other clients.</td>
</tr>
<tr>
<td>------------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Offender status</strong></td>
<td>61 year old (at time of sentence); male; tertiary education; solicitor and principal of a sole practice.</td>
</tr>
<tr>
<td><strong>Sentencing Variables</strong></td>
<td><strong>Treatment</strong></td>
</tr>
<tr>
<td>1. Good character</td>
<td>Mitigating</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Mitigating</td>
</tr>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Neutral</td>
</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Neutral</td>
</tr>
<tr>
<td>5. High level of planning/sophistication</td>
<td>Aggravating</td>
</tr>
</tbody>
</table>
| 6. High level of harm to victim | Neutral | '…testator prepared a victim impact statement. It refers to her perception of you as a man whom her father trusted, in whom he felt safe and secure, as well as being a friend of the family, and in whom she too felt safe. She spoke of the hurt and anger she felt about having to lodge a Fidelity Fund claim…'

Reference made to victim impact statements but no discernible effect as to treatment. |
| 7. Restitution | Not raised | |
| 8. Ancillary orders | Not raised | |

**Case 36A**  
*DPP v Gabriel Werden [2006] VSC 397*

**Sentence**  
5 years and 10 months imprisonment (3 years and 4 months non-parole)
<table>
<thead>
<tr>
<th>Appealed?</th>
<th></th>
</tr>
</thead>
</table>
| **Major offence/s**| *Legal Practice Act 1996 (Cth) s 188 – deficiency in a trust account*  
*Crimes Act 1958 (Vic) s 74 - 9 counts of theft, s82 – 3 counts of OFAD.* |
| **Offence description** | The offender stole money from 9 clients’ trust accounts, and applied the money to his own benefit, including for gambling purposes. |
| **Offender status**  | 40 year old, male, tertiary education, solicitor and principal of a sole practice. |

### Sentencing Variables

<table>
<thead>
<tr>
<th>Variables</th>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Good character</td>
<td>Not raised</td>
<td>Not applicable – in this case the offender was not of good character.</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Not raised</td>
<td></td>
</tr>
</tbody>
</table>
| 4. Large amount of money involved  | Neutral   | The deficiency in the trust account was $1,104,729.11.  
Raised but no discernible effect as to the treatment of this variable. |
| 5. High level of planning/sophistication | Not raised|         |
| 6. High level of harm to victim    | Neutral   | '…victims whom you misled and deceived.'  
No further mention of this. |
| 7. Restitution                     | Not raised|         |
| 8. Ancillary orders                | Not raised|         |
### B Type B Case Analysis

<table>
<thead>
<tr>
<th>Case 1B</th>
<th>R v Gregory [2010] VSC 121</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Sentence</strong></td>
<td>2 years imprisonment to be released on recognisance after 12 months ($5,000) [56]</td>
</tr>
<tr>
<td><strong>Sentence Appealed?</strong></td>
<td>Yes – DPP (Cth) v Gregory [2011] VSCA 145 – appeal dismissed</td>
</tr>
<tr>
<td><strong>Major offence/s</strong></td>
<td>Criminal Code 1995 s 135.4(5) - Conspiring to dishonestly cause a risk of loss to the Cth.</td>
</tr>
<tr>
<td><strong>Offence description</strong></td>
<td>Assisted Wheatley in an attempt to evade Australian income tax by remitting funds overseas to a company based in Switzerland</td>
</tr>
<tr>
<td><strong>Offender status</strong></td>
<td>61 year old male, highly successful, solicitor. [33]</td>
</tr>
<tr>
<td><strong>Crime involving taking money/property/avoiding a legal obligation</strong></td>
<td>Yes – avoiding legal obligation [27]</td>
</tr>
<tr>
<td><strong>Position of substantial influence?</strong></td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>'…your position and role as a solicitor is itself an aggravating feature of the offence.' [34]</td>
</tr>
<tr>
<td></td>
<td>'Your conduct involved blatant dishonesty and the exploitation of your position as a solicitor…' [43]</td>
</tr>
<tr>
<td><strong>Sentencing Variables</strong></td>
<td><strong>Treatment</strong></td>
</tr>
<tr>
<td>1. Good character</td>
<td>Mitigating</td>
</tr>
</tbody>
</table>
'I have already referred to the testimonials tendered on your plea concerning your professional and community activities. I have also had regard to those testimonials concerning your personal characteristics. Honesty, diligence and generosity are common themes. Evidence to a similar effect was given on your trial. I am sure that the thought of defrauding some person or company, other than in a tax context, is one which you would have never countenanced and would, indeed, have found quite abhorrent. I can only conclude that you have, as have many other otherwise honest people, adopted a different set of values where the objective is taxation minimisation. The authorities make it clear that no such distinction is to be drawn.' [38]

<table>
<thead>
<tr>
<th>2. Public opprobrium</th>
<th>Neutral</th>
</tr>
</thead>
</table>
| 'You have both been subjected to public humiliation.' [45]

<table>
<thead>
<tr>
<th>3. Reduction of employment/career prospects</th>
<th>Mitigating</th>
</tr>
</thead>
<tbody>
<tr>
<td>'It is truly tragic that such a career, built upon such hard work and dedication, is blighted by this offence.' [33]</td>
<td></td>
</tr>
<tr>
<td>'The loss you have suffered in relation to your profession is more significant than that suffered by Mr Wheatley. The submission made on your behalf that your career in the law is finished seems to me to be well-founded.' [53]</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>4. Large amount of money involved</th>
<th>Not raised</th>
</tr>
</thead>
<tbody>
<tr>
<td>'I am satisfied that $22,000 was your agreed share of the 11% 'tax.' This sum is considerably less than Mr Wheatley’s benefit of almost $200,000.' [51]</td>
<td></td>
</tr>
<tr>
<td>This involved a low amount of money not a large amount of money.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>5. High level of planning/sophistication</th>
<th>Aggravating</th>
</tr>
</thead>
<tbody>
<tr>
<td>'…calculated [and] elaborate deception…' [19] [22]</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>6. High level of harm to victim</th>
<th>Not raised</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>7. Restitution</th>
<th>Neutral</th>
</tr>
</thead>
<tbody>
<tr>
<td>'You have both made reparation in relation to your gains.' [45]</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>8. Ancillary orders</th>
<th>Mitigating</th>
</tr>
</thead>
</table>
| 'You consented to a pecuniary penalty order in the sum of $27,441.57, which I made on 26 March 2010. I have taken into account your consent to that order on the basis that it
Case 2B: *R v Hargraves* [2010] QSC 188 (79 ATR 406)

<table>
<thead>
<tr>
<th>Sentence</th>
<th>6.5 years imprisonment (3 years and 9 months non-parole) However, set aside on appeal and ordered 5 years imprisonment (2 years and 6 months non-parole)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Major offence/s</td>
<td><em>Criminal Code Act 1995</em> s 135.4 - Conspiracy to defraud the Commonwealth (ATO)</td>
</tr>
<tr>
<td>Offence description</td>
<td>Set up tax avoidance scheme (p. 406)</td>
</tr>
<tr>
<td>Offender status</td>
<td>Between 31-34 years old at time of offending, male.</td>
</tr>
<tr>
<td>Crime involving taking money/property/avoiding a legal obligation</td>
<td>Yes – taking money and avoiding tax obligation</td>
</tr>
<tr>
<td>Position of substantial influence?</td>
<td>Directors &amp; shareholders – respected and trusted co-director but appellants did not abuse a position of trust [223]</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Sentencing Variables</th>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Good character</td>
<td>Mitigating</td>
<td>'The prisoners’ good character, generosity and charity are factors in their favour.' [44]</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Neutral</td>
<td>'The total amount of tax which would eventually have been paid had the conspiracy not taken place would therefore have been about $2,228,770.' [20]</td>
</tr>
<tr>
<td>5. High level of planning/sophistication</td>
<td>Aggravating</td>
<td>'I shall sentence on the basis that the prisoners entered into an elaborate scheme, but did so initially without dishonesty… That said, the prisoners persisted in dishonest conduct for more than 3 years until they were caught.' [34]</td>
</tr>
</tbody>
</table>

constitutes co-operation for the purposes of s 320 of the *Proceeds of Crimes Act 2002* (Cth).’ [27]
The prisoners caused Phone Directories to send money to a London bank account owned by a company incorporated in the British Virgin Islands, purportedly for the provision of electronic services. The money was then laundered in a way which ordinarily would have been completely opaque to the Australian Taxation Office and in places (Jersey and Switzerland) beyond its jurisdiction to investigate. Much of it was repatriated anonymously in cash by the use of debit cards in machines which required no signature. Hargraves investigated investing some of it in Europe and he may have made investments. The scheme was discovered only by chance, through the carelessness ... These features place the case in a class above ordinary tax fraud. It is necessary to deter such conduct 'by the imposition of penalties that those minded to defraud governmental departments will find an unacceptable risk.' [38]

### 6. High level of harm to victim

| Aggravating | 'Tax evasion is not a game, or a victimless crime. It is a form of corruption and is, therefore, insidious.' [41] |

### 7. Restitution

| Mitigating | 'I accept the submission on behalf of the prisoners that it is relevant to take these penalty payments into account in assessing the sentence to be imposed.' [23]  
'I have referred above to the large amounts of money assessed by and paid to the ATO in respect of the years covered by the scheme. To the extent that this money is comprised of tax properly payable and interest for late payment, I disregard it.' [42]  
'The payment of penalty tax is a form of punishment that has been imposed upon the offender in addition to that which the Court imposes by way of sentence.' [223] |

### 8. Ancillary orders

| Not raised |

**Case 3B**  
*R v Stoten* [2010] QSC 188

**Sentence**  
6.5 years imprisonment (3 years and 9 months non-parole)
<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence Appealed?</td>
<td>Yes - <em>R v Stoten</em> [2010] QSA 328</td>
</tr>
<tr>
<td>Major offence/s</td>
<td><em>Criminal Code Act 1995 s 135.4 - Conspiracy to defraud the Commonwealth (ATO)</em></td>
</tr>
<tr>
<td>Offence description</td>
<td>Set up tax avoidance scheme (p. 406)</td>
</tr>
<tr>
<td>Offender status</td>
<td>30-33 years old at time of offending, male, solicitor.</td>
</tr>
<tr>
<td>Crime involving taking</td>
<td>Yes - taking money and avoiding tax obligation</td>
</tr>
<tr>
<td>money/property/avoiding a</td>
<td></td>
</tr>
<tr>
<td>legal obligation</td>
<td></td>
</tr>
<tr>
<td>Position of substantial</td>
<td>Directors &amp; shareholders – respected and trusted co-director but appellants did not abuse a</td>
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<tr>
<td>influence?</td>
<td>position of trust [223]</td>
</tr>
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</tr>
<tr>
<td></td>
<td>Remarks</td>
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<td></td>
<td>'The prisoners’ good character, generosity and charity are factors in their favour.' [44]</td>
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<tr>
<td>3. Reduction of employment/</td>
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<tr>
<td>career prospects</td>
<td></td>
</tr>
<tr>
<td>4. Large amount of money</td>
<td>Neutral</td>
</tr>
<tr>
<td>involved</td>
<td>'The total amount of tax which would eventually have been paid had the conspiracy not taken</td>
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<tr>
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<tr>
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</tr>
<tr>
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<tr>
<td></td>
<td>more than 3 years until they were caught.' [34]</td>
</tr>
<tr>
<td></td>
<td>'… offences … particularly difficult to detect… The prisoners caused Phone Directories to send</td>
</tr>
<tr>
<td></td>
<td>money to a London bank account owned by a company incorporated in the British Virgin Islands,</td>
</tr>
<tr>
<td></td>
<td>purportedly for the provision of electronic services. The money was then laundered in a way</td>
</tr>
<tr>
<td></td>
<td>which ordinarily</td>
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</table>
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6. High level of harm to victim

<table>
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<th>Type</th>
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<tbody>
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<td>'Tax evasion is not a game, or a victimless crime. It is a form of corruption and is, therefore, insidious.' [41]</td>
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7. Restitution

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<tbody>
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<tr>
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</tr>
<tr>
<td>'The payment of penalty tax is a form of punishment that has been imposed upon the offender in addition to that which the Court imposes by way of sentence.' [223]</td>
<td></td>
</tr>
</tbody>
</table>

8. Ancillary orders

<table>
<thead>
<tr>
<th>Type</th>
<th>Not raised</th>
</tr>
</thead>
</table>

Case 4B

<table>
<thead>
<tr>
<th>The Queen v Julie Anne Laird [2005] VSC 185</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence 7 years imprisonment (3 years and 6 months non-parole)</td>
</tr>
<tr>
<td>Sentence Appealed? No</td>
</tr>
<tr>
<td>Major offence/s Legal Practice Act 1996 (Vic) s 188 - 5 counts of deficiencies in solicitors trust account</td>
</tr>
<tr>
<td>Crimes Act 1958 (Vic) s 81 – 12 counts of obtaining property by deception (‘OPD’); s 74 – 2 counts of theft</td>
</tr>
</tbody>
</table>
## Offence description
19 counts involving $2,875,000

## Offender status
48 year old, female, educated at RMIT & did articled clerk’s course, solicitor at her own practice.

## Crime involving taking money/property/avoiding a legal obligation
Yes

## Position of substantial influence?
Each of these offences took place in grave breach of your trust as a solicitor

### Sentencing Variables

<table>
<thead>
<tr>
<th>Variables</th>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Good character</td>
<td>Neutral</td>
<td>'You have no prior convictions and although you did not seek to call before me witnesses as to your character, I accept that you were a person of previous good reputation. However, at the same time it must be remembered that your good reputation enabled you to persuade your clients that you were acting in their best interests.'</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Mitigating</td>
<td>'You have been dealt with by the legal profession tribunal and orders have been made prohibiting you from applying for a practising certificate for 20 years. It can be anticipated you will never practise again. You have now lost your reputation as a member of an honourable profession. These matters in themselves are a punishment of some weight.'</td>
</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Aggravating</td>
<td>'…apparent that substantial amounts of money were applied to the trust accounts of clients from whom you stole so as to hide your crime, it is also apparent that there are substantial sums of money which have been taken and for which there is no explanation as to how such sums have been applied.'</td>
</tr>
<tr>
<td>5. High level of planning/sophistication</td>
<td>Aggravating</td>
<td>'…you engaged in a systematic course of conduct involving false accounting, trust account deficiencies, and, ultimately 35 trust account defalcations.'</td>
</tr>
<tr>
<td>6. High level of harm to victim</td>
<td>Aggravating</td>
<td>'The victim impact statements filed before me demonstrate movingly the effect of your criminal conduct upon some of your victims.'</td>
</tr>
<tr>
<td>7. Restitution</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>8. Ancillary orders</td>
<td>Not raised</td>
<td></td>
</tr>
</tbody>
</table>

**Case 5B**  
*The Queen v Maurice Bernstein [2008] VSC 254*

| Sentence | Suspended sentence – 3 years imprisonment and fine of 240 penalty units |
| Sentence Appealed? | No |
| Major offence/s | Crimes Act 1958 s 74 – 4 counts of theft; 1 count of OPD  \nLegal Practices Act 1996 s 188 - 1 count of deficiency in trust account |
| Offence description | Drawing trust cheques & falsely describing it in a file memo – used to repay personal debts. Telling clients he would invest money but actually kept it ($100,000) (p. 2)  
Falsified entries in trust accounts and created false memoranda and records to hide fraud (p. 9) |
| Offender status | 60 year old, male, tertiary education, solicitor |
| Crime involving taking money/property/avoiding a legal obligation | Yes |
| Position of substantial influence? | Gross breach of trust of your oath and obligations as a solicitor |

**Sentencing Variables**

| Treatment | Remarks |
| 1. Good character | Mitigating | 'You are without any prior convictions and a number of witnesses gave evidence as to your reputation for good character and competence and efficiency as a solicitor. Some of them also spoke of your willingness to assist other practitioners. Mention was made too of the substantial contribution which you have made outside the law through your work on behalf of the North Eastern Jewish Community.' (p. 10, |
| 2. Public opprobrium | Neutral | 'I have taken into account the shame and loss of profession which you have suffered. They are no doubt a significant punishment for your betrayal of the trust of the profession. But other things being equal, I would imprison you now for being the thief that you are.' (p. 18) |
| 3. Reduction of employment/career prospects | Neutral | 'I have taken into account the shame and loss of profession which you have suffered. They are no doubt a significant punishment for your betrayal of the trust of the profession. But other things being equal, I would imprison you now for being the thief that you are.' (p. 18) |
| 4. Large amount of money involved | Aggravating | '…increasingly serious in terms of the amounts involved on each occasion…' (p. 7) |
| 5. High level of planning/sophistication | Aggravating | 'Offending was repeated and protracted over a substantial period of time… aggravated by the cunning and deceit with which you concealed your fraud from your partners and your clients… it was planned and premeditated.' (p. 7) |
| 6. High level of harm to victim | Aggravating | 'According… to Ms Kayser’s victim impact statement, the Estate of Elizabeth Freshman has suffered a loss of interest as a result of your offending which is estimated at between $55,000 and $65,000. Ms Kayser also speaks in her victim impact statement of her loss of trust in you and of the depressing effect upon her of you having let her down as you did…' (p. 10) |
| 7. Restitution | Neutral | 'You have repaid all the moneys which you misappropriated, although you have not paid any interest on them.' (p. 10) No discernible effect |
| 8. Ancillary orders | Neutral | Fine of 240 penalty units. No discernible effect |

**Case 6B**  
*The Queen v Omar Jihad Yusuf* [2008] VSC 575  
**Sentence**  
12 years imprisonment (9 years non-parole). Appeal court affirmed sentence. [39]  
**Sentence Appealed?**  
Yes – *Yusuf v The Queen* [2010] VSCA 266
<table>
<thead>
<tr>
<th>Major offence/s</th>
<th>Crimes Act 1958 s 81 - 107 counts of OPD; s 82 - 19 counts of OFAD</th>
</tr>
</thead>
<tbody>
<tr>
<td>Offence description</td>
<td>Fraudulent obtaining of loans for the purported purpose of purchase of trucks – total sum $7,297,400 – raising capital from public through investing schemes.</td>
</tr>
<tr>
<td>Offender status</td>
<td>40 year old male, migrant, completed Year 10, sole director of several companies</td>
</tr>
<tr>
<td>Crime involving taking money/property/avoiding a legal obligation</td>
<td>Yes</td>
</tr>
<tr>
<td>Position of substantial influence?</td>
<td>Yes – done in the course of conducting business with 109 members of the public – encouraged investments with formal documentation. Also 'totally unscrupulous…came'</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Sentencing Variables</th>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Good character</td>
<td>Neutral</td>
<td>'You have one prior conviction in respect of a false report made to police concerning a traffic incident. I do not regard it as of significance in the present context, although it is entirely consistent with the pervasive dishonesty which characterises the conduct which has brought you before this Court.' Treatment confirmed on appeal [25] [26]</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Aggravating</td>
<td>'Not only is the scale of your offending a matter bearing on the culpability of your conduct, but its extent, rapacity and monetary significance raises substantial issues of general deterrence and of individual deterrence. It also in my view raises a serious question of protection of the public.' Treatment confirmed on appeal [25] [26]</td>
</tr>
</tbody>
</table>
| 5. High level of planning/sophistication | Aggravating | '…your deception was deliberate and was pursued relentlessly for personal gain.' 'The penalties I impose must reflect…the
significant period of offending…'
Treatment confirmed on appeal [30]

| 6. High level of harm to victim | Aggravating | Net loss suffered by them of $5,568,752. 'The victim impact statements that have been filed on behalf of individual investors demonstrate that the effect of your actions was for many of them the total destruction of their accumulated savings. You have inflicted serious financial loss on a large number of individuals each of whom trusted you.' |

| 7. Restitution | Not raised |
| 8. Ancillary orders | Not raised |

| Case 7B | *The Queen v Ian Stuart Rau* [2010] VSC 370 |
| Sentence | 18 months imprisonment then released on recognisance ($500) |
| Sentence Appealed? | No |

| Major offence/s | Charge 1 - Carrying on a financial services business without holding an Australian Financial Services Licence (s 911A *Corporations Act 2001* (Cth)).
Charge 2-5 - Engaging in dishonest conduct in carrying on a financial services business contrary to s 1041G *Corporations Act 2001* (Cth).
Charge 6- Making a false document contrary to s 83A (1) of the *Crimes Act 1958* (Vic).
Charge 7 - Using a false document contrary to s 83A (2) of the *Crimes Act 1958* (Vic).
Charge 8 - *Crimes Act 1958* (Vic) s 81(1) - OPD |

| Offence description | Dishonest conduct whilst carrying on financial services business without a licence
Ponzi scheme with Hoy |
<p>| Offender status | Male, failed year 12 then trained as a radio technician; little formal/informal education to prepare for a career in managing other people’s money. |
| Crime involving taking money/property/avoiding a legal obligation | Yes |
| Position of substantial | Misleading investors with false promises – highly dishonest. |</p>
<table>
<thead>
<tr>
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<th>Remarks</th>
</tr>
</thead>
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<tr>
<td>1. Good character</td>
<td>Mitigating</td>
<td>'There are a number of matters that can be stated in your favour on the issue of sentence....You have no prior convictions. It is often stated that in 'white collar' cases that fact has a lesser significance than in other types of cases. That is because it is this type of offenders’ good character that allows him or her to be the repository of the very trust that they have breached. Whilst it is of lesser weight than otherwise it would be, prior good character remains a relevant sentencing consideration. It informs aspects of personal deterrence, rehabilitation and the concept of adequate punishment.' (p. 9, 11)</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Mitigating</td>
<td>'There are a number of matters that can be stated in your favour on the issue of sentence....I accept that you have suffered significant punishment already...your humiliation has been widely publicised...’ (p. 9, 11)</td>
</tr>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Mitigating</td>
<td>'There are a number of matters that can be stated in your favour on the issue of sentence....I accept that you have suffered significant punishment already. You will be disqualified from holding corporate office (s 206B Corporations Act).' (p. 9, 11)</td>
</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Neutral</td>
<td>Money lost as a result of investors relying on advice. No discernible effect.</td>
</tr>
<tr>
<td>5. High level of planning/sophistication</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>6. High level of harm to victim</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>7. Restitution</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>8. Ancillary orders</td>
<td>Not raised</td>
<td></td>
</tr>
</tbody>
</table>

Case 8B | *The Queen v Graeme Ronald Hoy [2011] VSC 95*
<table>
<thead>
<tr>
<th>Sentence</th>
<th>13 years and 9 months imprisonment (9 years non-parole)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence Appealed?</td>
<td><em>Hoy v The Queen</em> [2012] VSCA 49 – appeal dismissed</td>
</tr>
</tbody>
</table>
| Major offence/s | *Crimes Act 1958* (Vic)  
82(1) - 34 charges of OFAD, s81(1) - 10 charges of OPD  
*Corporations Act 2001* (Cth)  
Carrying on a financial services business without a licence (s.911A(1)) engaging in dishonest conduct in carrying on a financial services business (s.1041G(1)) and dishonestly making improper use of your position as a director with an intent to gain an advantage (s.184(2)(a)). [4] |
| Offence description | Ponzi scheme [8] |
| Offender status | 58 year old male, tertiary education [28]-[29] |
| Crime involving taking money/property/avoiding a legal obligation | Yes |
| Position of substantial influence? | Used your position as director dishonestly by executing a guarantee on behalf of Chartwell in respect of this loan. [23] |
| Sentencing Variables | Treatment | Remarks |
| 1. Good character | Mitigating | 'You have no prior convictions, save for minor traffic infringements. As I have observed, you have been an admirable husband and stepfather. Prior good character in cases involving white-collar crime is of lesser significance than in other types of crime. That good character is often the reason why an offender is positioned so as to effect the crime and it is often also a reason why the offender is the repository of the very trust he has breached. That said, it is not completely irrelevant – it informs aspects of rehabilitation and the genuineness of any asserted remorse – and I will give it some weight in the sentencing mix.' [36] |
| 2. Public opprobrium | Not raised | |
| **3. Reduction of employment/career prospects** | Mitigating | ‘You will be disqualified from holding office under the *Corporations Act 2001* (s.206B *Corporations Act 2001*). This itself is a punishment which I am obliged to take into account. Given the circumstances of your offending and the need for general deterrence, this disqualification is not one, however, that weighs heavily in your favour.’ [38] |
| **4. Large amount of money involved** | Aggravating | ‘The bald figures that can be calculated from your offending are breathtaking. Over a period of 15 months the deceptions you practised upon the public garnered Chartwell nearly $16m of investor funds. During that period, and also as a result of your dishonesty, you procured for Chartwell credit from the Commonwealth Bank in the sum of $5.83m. Those figures alone give some indication as to the scale of your dishonest conduct but say little about the lives that you have diminished in the process.’ [7] |
| **5. High level of planning/sophistication** | Not raised | This is clearly planned offending but no specific reference to planning. |
| **6. High level of harm to victim** | Aggravating | ‘Those figures alone give some indication as to the scale of your dishonest conduct but say little about the lives that you have diminished in the process.’ [7] |
|  |  | ‘the victims of your offending were largely small investors, often investing their superannuation. In addition to their witness statements, five Victim Impact Statements have been tendered. They make for depressing reading. One man, Mr E, still with young children to bring up, has been all but bankrupted; his wife has been bankrupted. Their friends whom they introduced to Chartwell are gone. His marriage is under 'huge stress'. You explained to him how he could achieve a better interest rate if his investment were larger and his erstwhile friends pooled their money with him.' [15] |
‘It is unnecessary to recite the current or past circumstances of all the people you preyed upon. You have diminished the lives of all of them. You have stolen from them and you have humiliated them, and for that you must be held to account.’ [19]

<table>
<thead>
<tr>
<th>7. Restitution</th>
<th>Not raised</th>
</tr>
</thead>
<tbody>
<tr>
<td>8. Ancillary orders</td>
<td>Not raised</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Case 9B</th>
<th>The Queen v Marc Di Cioccio [2012] VSC 15</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence</td>
<td>30 months imprisonment (14 months non-parole)</td>
</tr>
<tr>
<td>Sentence Appealed?</td>
<td>No</td>
</tr>
<tr>
<td>Major offence/s</td>
<td>Crimes Act 1958 s 82 - 3 counts of OFAD, s 194(4) - 1 count of negligently dealing with proceeds of crime.</td>
</tr>
<tr>
<td>Offence description</td>
<td>Created invoices from computer business at which he worked purporting to record the sale of computer equipment valued at $294,318 and then $65,000. Sham invoices</td>
</tr>
<tr>
<td>Offender status</td>
<td>32 year old, male, tertiary education.</td>
</tr>
<tr>
<td>Crime involving taking money/property/avoiding a legal obligation</td>
<td>‘total of $359,318 paid into business accounts’ [9]’…you did receive some direct financial benefit.’ [22]</td>
</tr>
<tr>
<td>Position of substantial influence?</td>
<td>Undermine trust – person in business responsible for invoicing</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Sentencing Variables</th>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Good character</td>
<td>Mitigating</td>
<td>'You have no prior convictions…' [41]</td>
</tr>
</tbody>
</table>

'without prior convictions and, having had the benefit of good education, ultimately with quite good job prospects. A number of people who have worked with you in the past, including a former delicatessen manager at the Coles Supermarket who worked with you for nine years, have remarked in testimonials that you are a quiet and gentle person by nature, hard
working, and willing to help others. It is said that your behaviour in the commission of these offences is out of character.' [46]

'I nevertheless consider that your background and character suggests you have reasonable prospects of rehabilitation. Those prospects should be encouraged.' [47]

<table>
<thead>
<tr>
<th>2. Public opprobrium</th>
<th>Not raised</th>
</tr>
</thead>
<tbody>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Neutral</td>
</tr>
<tr>
<td>'…ultimately quite good job prospects…' [46]</td>
<td></td>
</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Aggravating</td>
</tr>
<tr>
<td>'The amounts involved which I have already listed are very significant sums of money.' [14]</td>
<td></td>
</tr>
<tr>
<td>5. High level of planning/sophistication</td>
<td>Aggravating</td>
</tr>
<tr>
<td>'In short, the crimes involved planned and coordinated implementation and were somewhat brazen in nature.' [16]</td>
<td></td>
</tr>
<tr>
<td>'The invoices needed to be convincing and thus the generation involved some effort and attention. They were, in substance, the centrepiece of the deception and you created them dishonestly knowing the purpose for which they were to be employed.' [20]</td>
<td></td>
</tr>
<tr>
<td>6. High level of harm to victim</td>
<td>Aggravating</td>
</tr>
<tr>
<td>'Whilst the overall picture is a little opaque, it is clear that the ultimate losses to lenders as a result of your criminal activity runs to the tens of thousands of dollars if not hundreds of thousands of dollars.' [31]</td>
<td></td>
</tr>
<tr>
<td>'The cost caused to commerce, and to the community generally, by those like you who undermine that trust so that additional checks and balances must be put in place, or losses simply suffered, is significant.' [44]</td>
<td></td>
</tr>
<tr>
<td>7. Restitution</td>
<td>Neutral</td>
</tr>
<tr>
<td>Some monies have been repaid [29]</td>
<td></td>
</tr>
<tr>
<td>8. Ancillary orders</td>
<td>Not raised</td>
</tr>
<tr>
<td>Case 10B</td>
<td>The Queen v Andre Vincent Di Cioccio [2012] VSC 28</td>
</tr>
<tr>
<td>Sentence</td>
<td>7 years and 6 months imprisonment (5 years and 6 months non-parole)</td>
</tr>
<tr>
<td>Sentence Appealed?</td>
<td>Yes - <em>Di Cioccio v The Queen</em> [2013] VSCA 74 – appeal dismissed</td>
</tr>
<tr>
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<td>---</td>
</tr>
</tbody>
</table>
| Major offence/s | *Legal Profession Act 2004* (Vic) s 3.3.21 – 8 counts of causing deficiency in a legal trust account without reasonable excuse  
*Crimes Act 1958* (Vic) s 82 – 5 counts of OFAD [1] |
| Offence description | Criminal enterprise offences, offending over 2.5 years [48] |
| Offender status | 34 year old, male, tertiary education, solicitor. |
| Crime involving taking money/property/avoiding a legal obligation | Yes |
| Position of substantial influence? | Yes – as a solicitor – breach of trust [52] |
| Sentencing Variables | Treatment | Remarks |
| 1. Good character | Mitigating | Under heading ‘Personal circumstances and mitigating’  
'You have no prior convictions.' [78] |
| 2. Public opprobrium | Mitigating | Under heading ‘Personal circumstances and mitigating’  
'you have been publicly and personally shamed…’ [75] |
| 3. Reduction of employment/career prospects | Mitigating | Under heading ‘Personal circumstances and mitigating’  
'you will be stripped of your right to practise as a lawyer; you have or will be disqualified from acting as company director…[75] |
| 4. Large amount of money involved | Aggravating | 'The offences which I have summarised involved very substantial amounts of money, both individually and in aggregate. Ten of the offences involved individual amounts each over $100,000 all but one ran into at least tens of thousands of dollars. As I have said the aggregate amount exceeded $2.6M. These sums place you in the category of a serious offender.' [49] |
5. **High level of planning/sophistication**
   - **Aggravating**
   - 'Many of the offences, particularly those of obtaining financial advantage by deception, involved a real degree of sophistication and were clearly well planned. I refer to those which involved the careful crafting of false invoices; the forging of loan applications on behalf of clients, in one case using his identity documents; and preparing false income and wage documents for your wife. Not only that, some of them involved brazen personal attendances by you upon offices of financial institutions to make the relevant loan application and to sign documentation.' [50]
   - 'there were instances when you obtained money by deception in order to ‘cure’ trust account deficiencies caused by you having used trust monies for personal purposes. You were using the proceeds of one crime to cover up another.' [53]

6. **High level of harm to victim**
   - **Aggravating**
   - 'The precise status of the losses caused by your conduct and the ultimate impact on victims of your offending is difficult to discern... Accordingly it is likely that both institutions and individuals will have substantially suffered as a consequence of your offending.' [60]-[62]

7. **Restitution**
   - **Not raised**

8. **Ancillary orders**
   - **Neutral**
   - Compensation orders: (against Andre and Marc Di Cioccio) in favour of Circuit Finance Australia Pty Ltd for $26,248.73 and (against Andre only) in favour of Macquarie Leasing Pty Ltd for $138,900 and in favour of the Legal Services Board of Victoria for $172,429.35 [91]
   - No discernible effect.

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**Case 11B**  
*The Queen v Linacre [2014] VSC 615*

**Sentence**  
12 years imprisonment (8 years non-parole)

**Sentence Appealed?**  
No

**Major offence/s**  
*Crimes Act 1958 s 81 - 21 counts of OPD.  
Legal Practices Act 1996 s 188 - 5 counts of deficiency in trust*
<table>
<thead>
<tr>
<th><strong>Offence description</strong></th>
<th>Deceived numerous clients to hand over $12 million [2] Ponzi scheme [8]</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Offender status</strong></td>
<td>62 year old male, educated, solicitor since 1977, principal of his own firm [3]-[4]</td>
</tr>
<tr>
<td><strong>Crime involving taking money/property/avoiding a legal obligation</strong></td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Position of substantial influence?</strong></td>
<td>Yes – they placed complete trust in you….preyed on those who trusted you</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Sentencing Variables</strong></th>
<th><strong>Treatment</strong></th>
<th><strong>Remarks</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Good character</td>
<td>Mitigating</td>
<td>'I also observe that you have no prior convictions.' [49]</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Mitigating</td>
<td>'It was submitted by your counsel that your conduct and subsequent court hearing has brought you great shame and embarrassment.' [51]</td>
</tr>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Mitigating</td>
<td>'You have been struck off the roll of lawyers and will likely never practise again. Your counsel submitted that this was a loss that you would keenly feel. He noted that you were someone who relished being a lawyer, someone who enjoyed reading cases and talking about the law with friends and colleagues. I recognise that the loss of your ability to practise has had a deleterious effect on you.' [50]</td>
</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Aggravating</td>
<td>'A major aggravating factor is the significant amounts of money you stole or illegally disbursed out of your trust fund.' [35]</td>
</tr>
<tr>
<td>5. High level of planning/sophistication</td>
<td>Aggravating</td>
<td>'This was not a momentary lapse of judgment. It was prolonged and calculated to extract significant amounts of money from your victims. Over this lengthy period you had ample opportunity to reflect and think about what you had done and were doing. However, you kept going, deceiving more and more clients.' [36]</td>
</tr>
<tr>
<td>6. High level of</td>
<td>Aggravating</td>
<td>'The Crown tendered a bundle of nine victim</td>
</tr>
</tbody>
</table>
harm to victim  | impact statements. I have read them all carefully and they make for alarming reading. Regardless of the sheer amount of money you stole, the impact on the victims has been debilitating… Many of your victims have suffered and continue to suffer ill-health because of your criminality.' [37] [41]

7. Restitution  | Not raised
8. Ancillary orders  | Not raised

<table>
<thead>
<tr>
<th>Case 12B</th>
<th>The Queen v Brian Francis Maloney [2014] VSC 641</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence</td>
<td>5 years imprisonment (3 years non-parole)</td>
</tr>
<tr>
<td>Sentence Appealed?</td>
<td>No</td>
</tr>
<tr>
<td>Major offence/s</td>
<td>Multiple counts obtaining financial advantage by deception, theft, deficiency in trust account, failing to deliver trust money, continuing criminal enterprise</td>
</tr>
<tr>
<td>Offence description</td>
<td>Lawyer misappropriated over $1 million of clients’ money</td>
</tr>
<tr>
<td>Offender status</td>
<td>59 year old male, tertiary education worked in public service then developed suburban practice [2]</td>
</tr>
<tr>
<td>Crime involving taking money/property/avoiding a legal obligation</td>
<td>Yes</td>
</tr>
<tr>
<td>Position of substantial influence?</td>
<td>Breached a position of special trust &amp; responsibility (as a solicitor)</td>
</tr>
<tr>
<td>Sentencing Variables</td>
<td>Treatment</td>
</tr>
</tbody>
</table>
| 1. Good character | Mitigating | (under heading of 'Factors in mitigation')

'You have, until this offending, had an unblemished record including professionally. You have been a good family man and community member, including in the application of your legal skills to help others.' [40] |

2. Public opprobrium | Mitigating | (under heading of 'Factors in mitigation')

'you are much affected by deep shame and
<p>| | | |</p>
<table>
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</tr>
</thead>
<tbody>
<tr>
<td><strong>3. Reduction of employment/career prospects</strong></td>
<td>Mitigating</td>
<td>remorse, not only for yourself and what you have done but for the pain you have caused others.' [38]</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(under heading of 'Factors in mitigation')</td>
</tr>
<tr>
<td></td>
<td></td>
<td>'The loss of your status as a lawyer is painful given your enjoyment of your standing and the hard work you put in to achieve your qualifications and your reputation.' [46]</td>
</tr>
<tr>
<td></td>
<td></td>
<td>'You have lost everything you worked for during 25 years of practice.' [48]</td>
</tr>
<tr>
<td><strong>4. Large amount of money involved</strong></td>
<td>Aggravating</td>
<td>(under heading of 'Factors in aggravation')</td>
</tr>
<tr>
<td></td>
<td></td>
<td>'You have admitted the offending and the matters alleged by the Crown. In total you misappropriated $1,758,300 from Mr Gatt and repaid $1,099,824. Therefore the total amount lost by Mr Gatt was $651,375.' [25]</td>
</tr>
<tr>
<td></td>
<td></td>
<td>'I must take into account the gravity of the offence and the significant amount of money you misappropriated.' [50]</td>
</tr>
<tr>
<td><strong>5. High level of planning/sophistication</strong></td>
<td>Aggravating</td>
<td>(under heading of 'Factors in aggravation')</td>
</tr>
<tr>
<td></td>
<td></td>
<td>'…this was not a momentary lapse of judgment, it was a prolonged scheme to misappropriate Mr Gatt’s funds. Your actions were perpetrated over a period of six years. You had ample time to see the errors of your way and reverse your course. Instead you continued to deceive Mr Gatt.' [51]</td>
</tr>
<tr>
<td><strong>6. High level of harm to victim</strong></td>
<td>Aggravating</td>
<td>(under heading of 'Factors in aggravation')</td>
</tr>
<tr>
<td></td>
<td></td>
<td>'Mr Gatt has lost a substantial amount of money. He described in his victim impact statement how he trusted and respected you and the feeling that you took advantage of his position. Mr Gatt explained in his statement how he worked hard to make his money which you then encouraged him to invest in bogus transactions. Furthermore, Mr Gatt has suffered additional loss in that he was unable to finance his own personal borrowing for a house because he was awaiting funds from your firm.' [28]</td>
</tr>
</tbody>
</table>
Quite understandably, Mr Gatt has had his faith in the legal profession shaken. He notes, and I will speak about this further in a moment, that lawyers should be capable of being trusted as they are supposed to uphold the law and not use it for their own benefit.' [29] 'your actions have impacted greatly on your victim.' [52]

| 7. Restitution | Mitigating | (under heading of 'Factors in mitigation') 'You have admitted the offending and the matters alleged by the Crown. In total you misappropriated $1,758,300 from Mr Gatt and repaid $1,099,824. Therefore the total amount lost by Mr Gatt was $651,375.' [25] 'You have repaid a large part of the monies defrauded, although a significant loss remains suffered by your victim, Mr Gatt.' [41] |

| 8. Ancillary orders | Mitigating | Pay compensation to Mr Gatt in amount of $651,375. [70] Indicative of remorse. |

Case 13B | DPP v Porcaro [2015] VCC 658 |
Sentence | 8.5 years imprisonment (5.5 years non-parole) |
Sentence Appealed? | Yes – Porcaro v The Queen [2015] VSCA 244 – appeal did not amend treatment of variables but did amend the classification of one of the charges. |
Major offence/s | Crimes Act 1958 s 81 - 35 counts of OPD, s 82 - 9 counts of OFAD, s 74 - 3 counts of theft. |
Offence description | Ponzi scheme over almost 7 years – over $4.7 million of which $3.6 million not recovered, Continuing criminal enterprise offending [11] [12]. |
Offender status | 53 year old, male, completed Year 12, worked as an in-house law clerk then worked in a solicitor’s practice [28], [30]. |
Crime involving taking money/property/avoiding a legal obligation | Yes |
<table>
<thead>
<tr>
<th>Sentencing Variables</th>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Good character</td>
<td>Neutral</td>
<td>'No one in your family has ever been in trouble with the law before.' [28]</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Neutral</td>
<td>'As a result of this offending, you told Mr Cummins you rarely socialise, as a number of your friends and relatives were victims of your offending.' [32]</td>
</tr>
<tr>
<td>3. Reduction of employment/ career prospects</td>
<td>Mitigating</td>
<td>'You have not worked again. You have lost everything as a result of this offending…' [31]</td>
</tr>
</tbody>
</table>
| 4. Large amount of money involved | Aggravating | 'Your offending in the charges on the deception indictment was at a high level for this kind of offending…involved substantial amounts of money…'[19]  
'…normally attracts a significant sentence of imprisonment.' [38] |
| 5. High level of planning/ sophistication | Aggravating | 'Your offending in the charges on the deception indictment was at a high level for this kind of offending. It was sophisticated, planned and prolonged …'[19]  
'…normally attracts a significant sentence of imprisonment.' [38] |
| 6. High level of harm to victim | Aggravating | 'It involved deceiving many people into handing over money or financial securities, which they had put away for later life and your offending involved breach of trust…That is why your offending is of a high level.' [19] |
| 7. Restitution | Not raised | |
| 8. Ancillary orders | Not raised | |

**Case 14B**  
*The Queen v Linh Ngoc Nguyen* [2011] VSC 529

**Sentence**  
5 years and 6 months imprisonment (3 years non-parole)

**Sentence Appealed?**  
No

**Major offence/s**  
18 counts - OFAD (s 82 *Crimes Act 1958* (Vic)) [1]  
Continuing criminal enterprise offender

**Offence description**  
58 loan applications all containing fraudulent documents submitted to 3 financial institutions (total loans obtained =
### Offender status
- 37 year old, male, TAFE education, accredited mortgage broker

### Crime involving taking money/property/avoiding a legal obligation
- Yes

### Position of substantial influence?
- Yes – accredited mortgage broker

<table>
<thead>
<tr>
<th>Sentencing Variables</th>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Good character</td>
<td>Mitigating</td>
<td>“…you have a number of significant matters that must be taken into account in your favour… you have no prior or subsequent convictions of any note…”</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Aggravating</td>
<td>‘However it still remains that this is serious offending. The amount of money imperilled was substantial. The amount of money gained by you in the form of commissions was significant.’</td>
</tr>
<tr>
<td>5. High level of planning/sophistication</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>6. High level of harm to victim</td>
<td>Aggravating</td>
<td>‘The offending is serious. It is persistent and even though I am not prepared to find as a fact that you were aware of the purpose, it was also enabling for those wanting to set up crop houses, that being at least 20 of these applications. The flow-on consequence to the community from you obtaining these loans for those people are that marijuana crops have been grown, harvested and distributed. Whilst you are not the person behind that activity, if you had not applied for the loans and provided fraudulent details these persons would not have...’</td>
</tr>
</tbody>
</table>
been able to acquire the properties for that purpose. It demonstrates some of the serious consequences that flow from your offending. You, of course, are not to be sentenced for the trafficking or cultivation of that cannabis, and I shall ensure that I will not do that, but it does tend to highlight the seriousness of offences of this nature.' [49]

7. Restitution
Not raised

8. Ancillary orders
Not raised

---

Case 15B  
*DPP v Penny*[2012] VSC 25

<table>
<thead>
<tr>
<th>Sentence</th>
<th>6 years imprisonment (4 years non-parole)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Major offence/s</td>
<td>8 counts theft, 2 counts false accounting, 9 counts OFAD – continuing criminal enterprise offences</td>
</tr>
<tr>
<td>Offence description</td>
<td>Lengthy time (1997-2009). Advanced large sums of money often using false entities/real companies/clients but with slight changes to their names/details – all unauthorized Also drawing cheques and recording falsely, false loan agreements [9]</td>
</tr>
<tr>
<td>Offender status</td>
<td>62 year old, male, completed Year 11 then went on to get a degree in business (dux), accountant, partner at accounting firm. [2]</td>
</tr>
<tr>
<td>Crime involving taking money/property/avoiding a legal obligation</td>
<td>Yes</td>
</tr>
<tr>
<td>Position of substantial influence?</td>
<td>Position of trust [54]</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Sentencing Variables</th>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
</table>
| 1. Good character    | Mitigating | 'glowing references and describe you as a devoted community member…some of the most impressive character reports I have ever seen.' [56]  
'I will take into in your favour, that not only are
you a person without prior convictions but, that you are a positively a person of good character who has made a significant contribution to the community in which you and your family have resided all these years.' [58]

'I have given you great benefit for your previous exemplary life as a citizen of this community.' [61]

| 2. Public opprobrium | Neutral | You were considered an important and responsible citizen, that has been exposed as false and I have no doubt you have been the subject of unpleasant remarks and gossip. You feel ostracized by many members of the Mildura community…' [46]

'You have expressed shame, embarrassment…' [53]

| 3. Reduction of employment/career prospects | Mitigating | 'I doubt anyone will ever trust you with any funds in the future. I do not believe you will be able to practice in any way as an accountant, and any credibility that you had, in the community of Mildura is well and truly gone.' [52]

| 4. Large amount of money involved | Aggravating | 'Over a period of time you advanced to him very large sums of money…All of these were unauthorised and resulted in the eight charges of theft for which you will be dealt with.' [9]

'…vast sums of money involved…' [61]

| 5. High level of planning/sophistication | Aggravating | 'This offending was persistent, lengthy, fraudulent and done in a manner to try and cover your tracks. You commenced your offending at least back in 1995, although you are not charged with any offence prior to 1997, and you will not be punished for any offending not on the indictment, that has a relevance to which I shall subsequently refer.' [38]

| 6. High level of harm to victim | Aggravating | 'There are two victim impact statements in this matter. Each of them, unsurprisingly, talk about the shock, anger and dismay they feel at the betrayal of a trusted family friend. They refer to the loss that they have each suffered,
which is substantial, in terms of loss of their inheritance, the destruction of what their father had worked so hard to do and build, and the amount of time, effort and money, that has had to go into uncovering your fraudulent activity…' [39]

'…the consequences upon the victims of that offending, the level of breach of trust involved…' [59]

<table>
<thead>
<tr>
<th>7. Restitution</th>
<th>Not raised</th>
</tr>
</thead>
<tbody>
<tr>
<td>8. Ancillary orders</td>
<td>Not raised</td>
</tr>
</tbody>
</table>

**Case 16B**  
*DPP v Loukia Bariamis* [2013] VSC 457

**Sentence**  
6 years imprisonment (4 years non-parole) [44]

**Sentence Appealed?**  
No

**Major offence/s**  
*Crimes Act 1958* (Vic) s 82(1) - 3 counts OFAD.

**Offence description**  
Each offence was more than $50,000, continuing criminal enterprise offence. Obtained for the group the financial advantage of lending facilities totaling $12,150,000 [15] Using fraudulent overstatements

**Offender status**  
51 year old, male, tertiary education, provided significant assistance to authorities, already serving sentence for Cth offences

**Crime involving taking money/property/avoiding a legal obligation**  
Yes – 'you obtained GST and PAYG tax refunds in the sum of $1,820,939.' [8]

**Position of substantial influence?**  
'you abused the trust which you had as a registered tax agent.' [8]

**Sentencing Variables**  
<table>
<thead>
<tr>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Good character</td>
<td>Mitigating</td>
</tr>
<tr>
<td>Character to date …' [37]</td>
<td></td>
</tr>
<tr>
<td>--------------------------</td>
<td></td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Not raised</td>
</tr>
<tr>
<td>3. Reduction of employment/ career prospects</td>
<td>Not raised</td>
</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Aggravating</td>
</tr>
<tr>
<td>'you obtained for the group the financial advantage of lending facilities totalling $12,150,000.' [15]</td>
<td></td>
</tr>
<tr>
<td>In determining what the sentences of imprisonment should be, I take into account the gravity of your offending, which was very great…very great sum of money was never recovered…' [36]</td>
<td></td>
</tr>
<tr>
<td>5. High level of planning/ sophistication</td>
<td>Not raised</td>
</tr>
<tr>
<td>6. High level of harm to victim</td>
<td>Aggravating</td>
</tr>
<tr>
<td>'Because the Viking group went into liquidation, the loan moneys owing to the bank were never recovered. The bank lost a total of $48,630,000 under the facilities left owing by the Viking group. Of that amount, $33,550,000 is attributable to the extended fraudulent facilities which were obtained by your deception.' [18]</td>
<td></td>
</tr>
<tr>
<td>'It is true that there was no individual victim suffering personal hardship. That potentially aggravating consideration is not present. But white-collar crime is not a victimless crime in the sense that there are direct adverse consequences for the bank as an institution and potential indirect consequences for it customers, shareholders and others. Your crimes are very serious examples of the offences charged, among the worst in the history of the State for crimes of this kind.' [36]</td>
<td></td>
</tr>
<tr>
<td>7. Restitution</td>
<td>Not raised</td>
</tr>
<tr>
<td>8. Ancillary orders</td>
<td>Not raised</td>
</tr>
<tr>
<td>Case 17B</td>
<td>R v Coleman [2013] VSC 548</td>
</tr>
<tr>
<td>---------------</td>
<td>---------------------------</td>
</tr>
<tr>
<td>Sentence</td>
<td>5 years imprisonment (3 years non-parole) [50]</td>
</tr>
<tr>
<td>Sentence Appealed?</td>
<td>Yes – Coleman v The Queen [2014] VSCA 228 – appeal dismissed</td>
</tr>
<tr>
<td>Major offence/s</td>
<td>Legal Profession Act 2004 (Vic) s 3.3.21 – 1 count of deficiency in your trust account Crimes Act 1958 (Vic) s 74(1) - 1 count of theft, s 82(1) 12 counts of OFAD.</td>
</tr>
<tr>
<td>Offence description</td>
<td>Conduct including purchasing properties using fictitious identities and establishing false accounts</td>
</tr>
<tr>
<td>Offender status</td>
<td>47 year old, male, well educated, lawyer.</td>
</tr>
<tr>
<td>Crime involving taking money/property/avoiding a legal obligation</td>
<td>Yes</td>
</tr>
<tr>
<td>Position of substantial influence?</td>
<td>Conduct facilitated by your position as a solicitor</td>
</tr>
<tr>
<td>Sentencing Variables</td>
<td>Treatment</td>
</tr>
<tr>
<td>1. Good character</td>
<td>Neutral</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Not raised</td>
</tr>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Mitigating</td>
</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Not raised</td>
</tr>
</tbody>
</table>
dishonest solicitors…' [23]
This amount was specifically identified as being low and is therefore not relevant.

| 5. High level of planning/sophistication | Aggravating | The degree of planning and calculation involved in this repeated conduct demonstrates significant culpability… Acting in your capacity as a solicitor, you falsified the electoral register to create false identities. You deliberately falsified public land title records in order to perpetrate your frauds… your nefarious activities remained concealed for almost a decade after you first crossed the line…' [23] |

| 6. High level of harm to victim | Aggravating | 'Your crimes may have gone undetected but for your appropriation of Ms Nugent’s identity. In her victim impact statement she has explained the anguish and the distress that she suffered when, after finally purchasing a property in her own name, her first home owner’s grant application was declined, leaving her with inadequate funds but committed to a contract of sale. Her statement explains that as well as direct financial loss she has suffered depression and anxiety. She was distressed that you had appropriated not only her tax refund, but also her identity, when she was suffering significant ill health.' [24] |

| 7. Restitution | Neutral | '…some measure of restitution to your victims.. I do not regard it as a mitigating factor.' [35] |

| 8. Ancillary orders | Not raised |

<p>| Case 18B | DPP v Robert Gianello [2014] VCC |
| Sentence | 4 years imprisonment (2 years non-parole) |
| Major offence/s | Crimes Act 1958 s 82 - 3 counts of OFAD. |
| Offence description | Of $6 million, Gianello received just under $680,000 False invoicing scheme – continuing criminal enterprise offender. [2]-[3] |</p>
<table>
<thead>
<tr>
<th>Offender status</th>
<th>60 year old, male, well educated doctor, highly successful. [86]</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crime involving taking money/property/avoiding a legal obligation</td>
<td>Yes</td>
</tr>
<tr>
<td>Position of substantial influence?</td>
<td>Yes [45] breach of trust</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Sentencing Variables</th>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Good character</td>
<td>Neutral</td>
<td>'Each of you are persons otherwise of good character.' [44]</td>
</tr>
<tr>
<td></td>
<td></td>
<td>'Good reputation counts for less when sentencing for offences such as this, as it is your good reputations and your standing in the community generally, and with Phosphagenics in particular, which allowed each of you to put yourselves in the positions you did to commit these offences.' [49]</td>
</tr>
<tr>
<td></td>
<td></td>
<td>'A very impressive array of character evidence, in testimonials and oral evidence, was presented on the plea…All attest to the shock they experienced to discover the man they knew had been committing these frauds, that you had engaged in such large-scale fraud over such a protracted period. Their evidence, both written and oral, all showed the struggle to reconcile this with the man they knew and valued.' [90]</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Mitigating</td>
<td>'I accept that for each of you the effect of the revelation of the fraud and your participation in it has had significant personal and professional repercussions. Each of you are shamed, personally and professionally.' [61]</td>
</tr>
</tbody>
</table>
|                      |           | 'you are now 60 years of age, and find yourself, instead of enjoying the reputational and financial rewards of a career dedicated to scientific research at the highest of levels, disgraced, bankrupt and struggling to find any
| 3. Reduction of employment/career prospects | Mitigating | '…dismissed from his employment at Phosphagenics as a result.' [54]  
'…effect for you too has been devastating, personally and professionally. You have lost your employment…and limited employment prospects.' [94]  
'I accept that for each of you the effect of the revelation of the fraud and your participation in it has had significant … professional repercussions' [61]  
'…struggling to find any form of gainful work in your chosen field.' [86] |
| 4. Large amount of money involved | Aggravating | 'Your offending too is properly characterised as grave.... you benefited to the amount of about $100,000 yourself.' [101] |
| 5. High level of planning/sophistication | Aggravating | 'It is clear that this is long-term, persistent, barefaced, commercial, fraudulent activity.' [37]  
'your role in facilitating it cannot be ignored, and this too must be seen as a measure of your moral and legal culpability.' [93]  
'Your offending too is properly characterised as grave…your role in the defrauding involved the creation of numerous false invoices over the extended period of your involvement, and is properly to be regarded as a sophisticated and sustained scheme.' [101] |
| 6. High level of harm to victim | Not raised | |
| 7. Restitution | Mitigating | 'After unsuccessful negotiations over the terms of a deed of settlement, Phosphagenics issued proceedings against Dr Gianello, his wife, as a
co-director of Bynex, and Bynex in the Supreme Court in late October 2013, and judgment was entered against him in December 2013 for the full amount claimed, namely, $6,053,722, together with interest and costs. He too entered into a deed with Phosphagenics in relation to the directing of any future entitlement to benefits flowing from the sale of PMP-Vic’s intellectual property in the development of cPMP to Alexion.' [54]

'…partial restitution has already been made by each of you and recovery efforts are continuing.' [58]

'In respect of each of you, I accept this conduct counts in your favour as evidence of remorse…evidence of restitution…' [60]

'Your family home and all of your assets have gone in restitution.' [94]

<table>
<thead>
<tr>
<th>8. Ancillary orders</th>
<th>Not raised</th>
</tr>
</thead>
</table>

### Case 19B

**DPP v Woei-Jia Jiang [2014] VCC**

<table>
<thead>
<tr>
<th>Sentence</th>
<th>2 years and 6 months imprisonment (12 months non-parole)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence Appealed?</td>
<td>No</td>
</tr>
<tr>
<td>Major offence/s</td>
<td><em>Crimes Act 1958 s 82 – 3 counts of OFAD.</em></td>
</tr>
<tr>
<td>Offence description</td>
<td>Of $6m, Jiang received just over $1.1 million False invoicing scheme – continuing criminal enterprise offender [2]-[3]</td>
</tr>
<tr>
<td>Offender status</td>
<td>51 year old, male, well educated, doctor.</td>
</tr>
<tr>
<td>Crime involving taking money/property/avoiding a legal obligation</td>
<td>Yes</td>
</tr>
<tr>
<td>Position of substantial influence?</td>
<td>Yes [45] breach of trust</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Sentencing</th>
<th>Treatment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Remarks</td>
<td></td>
</tr>
<tr>
<td>Variables</td>
<td>Neutral</td>
</tr>
<tr>
<td>----------------------------------</td>
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<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Mitigating</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Mitigating</td>
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</tr>
<tr>
<td><strong>4. Large amount of money involved</strong></td>
<td>Aggravating</td>
</tr>
<tr>
<td><strong>5. High level of planning/sophistication</strong></td>
<td>Aggravating</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>6. High level of harm to victim</strong></td>
<td>Not raised</td>
</tr>
<tr>
<td><strong>7. Restitution</strong></td>
<td>Mitigating</td>
</tr>
<tr>
<td></td>
<td></td>
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<td></td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>8. Ancillary orders</td>
<td>Not raised</td>
</tr>
</tbody>
</table>

**Case 20B**  
*DPP v Esra Ogru* [2014] VCC

**Sentence**  
6 years imprisonment (2 years non-parole)

**Sentence Appealed?**  
No

**Major offence/s**  
*Crimes Act 1958* s 82 – 7 counts of OFAD.

**Offence description**  
Of $6m, Ogru received just under $4 million  
False invoicing scheme – continuing criminal enterprise  
offender [2]-[3]

**Offender status**  
39 year old, female, well educated, doctor, highly successful,  
made significant contribution to genetics after her daughter was  
born with a rare but serious abnormality

**Crime involving taking money/property/avoiding a legal obligation**  
Yes

**Position of substantial influence?**  
Yes – [45] breach of trust; breach of fiduciary duty

**Sentencing Variables**  

<table>
<thead>
<tr>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
</table>
| Neutral   | 'Each of you are persons otherwise of good character.' [44]  
'Good reputation counts for less when sentencing for offences such as this, as it is  
your good reputations and your standing in the community generally, and with Phosphagenics  
in particular, which allowed each of you to put yourselves in the positions you did to commit  
these offences.' [49] |
| Mitigating | 'I accept that for each of you the effect of the  
revelation of the fraud and your participation in  
it has had significant personal and professional repercussions. Each of you are shamed, |
<p>| | | |</p>
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<tr>
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</tr>
</thead>
<tbody>
<tr>
<td><strong>3. Reduction of employment/career prospects</strong></td>
<td><strong>Mitigating</strong></td>
<td>'I accept that for each of you the effect of the revelation of the fraud and your participation in it has had significant … professional repercussions' [61]</td>
</tr>
<tr>
<td></td>
<td></td>
<td>'You resigned from Phosphagenics in disgrace... had to relinquish your position on the various prestigious government advisory committees and boards to which you had been appointed. You will be disqualified from holding a position as a director or managing a corporation for a period. Whilst you have secured a well-paid international consultancy position advising, somewhat ironically, on investment in biotechnology and healthcare stocks, your career opportunities are likely to be diminished.' [78]</td>
</tr>
<tr>
<td><strong>4. Large amount of money involved</strong></td>
<td><strong>Aggravating</strong></td>
<td>'…this is grave offending. The total moneys fraudulently diverted from Phosphagenics and the amount you personally received are very high, in the order of $6 million and $4 million respectively.' [75]</td>
</tr>
<tr>
<td><strong>5. High level of planning/sophistication</strong></td>
<td><strong>Aggravating</strong></td>
<td>'It is clear that this is long-term, persistent, barefaced, commercial, fraudulent activity.' [37]</td>
</tr>
<tr>
<td></td>
<td></td>
<td>'…this is grave offending. Your offending spanned a period of nearly nine years...It was sophisticated fraud involving many lawyers of concealment…' [75]</td>
</tr>
<tr>
<td><strong>6. High level of harm to victim</strong></td>
<td><strong>Not raised</strong></td>
<td></td>
</tr>
<tr>
<td><strong>7. Restitution</strong></td>
<td><strong>Mitigating</strong></td>
<td>'She also entered into a deed with Phosphagenics in relation to the accounting to it of any future benefits flowing from the sale personally and professionally.' [61]</td>
</tr>
<tr>
<td></td>
<td></td>
<td>'The gravity of the offending also bears on the severity of the consequences for you of its discovery. You are publicly and privately shamed. Your reputation is tarnished. You resigned from Phosphagenics in disgrace.' [78]</td>
</tr>
</tbody>
</table>
of PMP-Vic’s intellectual property in the development of cPMP to Alexion.' [53]

'In respect of each of you, I accept this conduct counts in your favour as evidence of remorse…evidence of restitution…' [60]

| 8. Ancillary orders | Not raised |

| Case 21B | The Queen v Stephen Michael Grant [2006] VSC 235 |
| Sentence | 3 years imprisonment - suspended sentence |
| Sentence Appealed? | No |
| Major offence/s | Legal Practice Act 1996 (Vic) s 188(1)(a) – 6 counts of having a deficiency in your trust account as a solicitor. Crimes Act 1958 (Vic) s 82(1) - 3 counts of OFAD, s 83(1)(b) - 1 count of dishonestly producing an accounting document knowing it to be false. |
| Offence description | Short period – 2 Dec 2003 to 30 Jun 2004 Conduct included drawing trust cheques, forging signatures etc. |
| Offender status | 47 year old, male, tertiary education, solicitor, partner at firm. |
| Crime involving taking money/property/avoiding a legal obligation | Yes |
| Position of substantial influence? | Yes – solicitor is person in position of trust (p. 10) |

<table>
<thead>
<tr>
<th>Sentencing Variables</th>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Good character</td>
<td>Mitigating</td>
<td>‘You have no prior convictions and before the occurrence of these offences you were obviously a person of good character. The testimonials from your family and friends were extremely impressive. They have provided you with remarkable support. I therefore consider the importance of specific deterrence to be extremely low.’ (p. 11)</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Neutral</td>
<td>'On 8 March 2005 you voluntarily surrendered your practising certificate. You then made a complete disclosure both to the Law Institute and later to the police. In March of this year, the relevant arm of the Victorian Civil and Administrative Tribunal ('VCAT') disqualified you from holding a practising certificate for a period of five years and ordered that for a further period of five years you can only hold an employee certificate with no access to a trust account. You were ordered to pay costs of $6,180, with a stay of six months. Mr Lasry told me that you do not intend to seek to practise as a lawyer in the future.' (p. 8-9)</td>
</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Aggravating</td>
<td>'The total loss suffered by your clients as a result of the ten offences was $275,071.78.' (p. 6) '…it seems to me that count 6 and counts 2 and 3 require the heaviest sentences … they involve by far the greatest amounts of money…' (p. 13)</td>
</tr>
<tr>
<td>5. High level of planning/sophistication</td>
<td>Aggravating</td>
<td>‘…it seems to me that count 6 and counts 2 and 3 require the heaviest sentences … display the greatest degree of planning and calculation and the greatest degree of moral culpability.' (p. 6) '…conducted involved some degree of planning and calculation, the offending demonstrated more a spontaneous and simplistic reaction to an urgent crisis rather than a carefully planned crime.' (p. 13)</td>
</tr>
<tr>
<td>6. High level of harm to victim</td>
<td>Neutral</td>
<td>'I was told that none of the clients remain out of pocket as they have been reimbursed by the Legal Practitioners' Fidelity Fund ('the Fidelity Fund').' (p. 6) Note: This is not restitution made by the accused</td>
</tr>
</tbody>
</table>
| 7. Restitution | Neutral | No discernible effect 'Even though the amounts were in some cases very small, the breach of trust on your part was
still significant. I was told that none of the clients remain out of pocket as they have been reimbursed by the Legal Practitioners' Fidelity Fund ("the Fidelity Fund").' (p. 6)

'I accept that you are genuine in your desire to do everything possible, within the constraints imposed by other demands, to ensure that the debt owed to the Fidelity Fund is eventually repaid.' (p. 9)

| 8. Ancillary orders | Not raised |

| Case 22B | The Queen v Russell Andrew Johnson [2014] VSC 175 |
| Sentence | 6 years imprisonment (3.5 years non-parole) |
| Major offence/s | Crimes Act 1958 s 83 – 3 counts of false accounting, s 74 - 2 counts of theft, s 81 - 1 count of OFAD. Corporations Act 2001 - 1 count of submitting false document to ASIC |
| Offence description | Continuing criminal enterprise offender Conduct over 2.5 years |
| Offender status | 41 year old, male, sole director [4], post graduate education, worked trading in derivative financial products [13] |
| Crime involving taking money/property/avoiding a legal obligation | Yes |
| Position of substantial influence? | Director |
| Sentencing Variables | Treatment | Remarks |
| 1. Good character | Mitigating | 'Other than the behaviour which brings you before the court, you are undoubtedly a person of good character. You have no previous criminal convictions. Many witnesses testified, and I accept, that you have been a person of good reputation, strong values and a person who has cared for others. For those reasons, I am quite confident that you are highly unlikely
<table>
<thead>
<tr>
<th>Case</th>
<th>Nature</th>
<th>Argument</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Public opprobrium</td>
<td>Not raised</td>
<td>ever to reoffend. In your case, rehabilitation is not a significant sentencing consideration. Nor is specific deterrence.' [127]</td>
</tr>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Mitigating</td>
<td>'An effect of your conviction for the count charged under the Corporations Act is that you will automatically be disqualified from managing a corporation for a period of 5 years. Of itself that is a penalty which I take into account in sentencing you in respect of it.' [128]</td>
</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Aggravating</td>
<td>“…the deficiency was of a very high order.' [8] 'As reflected by the maximum penalties available for them, the crimes of which you have been convicted are serious crimes. The Crown submits that the conduct in which you engaged is a serious example of those serious offences. I agree… Self-evidently, they involved massive sums of money causing…' [90]</td>
</tr>
<tr>
<td>5. High level of planning/sophistication</td>
<td>Aggravating</td>
<td>'As reflected by the maximum penalties available for them, the crimes of which you have been convicted are serious crimes. The Crown submits that the conduct in which you engaged is a serious example of those serious offences. I agree. You committed the offences over a period of 30 months. Your crimes were committed with a sophisticated degree of orchestration and planning…' [90]</td>
</tr>
<tr>
<td>6. High level of harm to victim</td>
<td>Aggravating</td>
<td>'As reflected by the maximum penalties available for them, the crimes of which you have been convicted are serious crimes. The Crown submits that the conduct in which you engaged is a serious example of those serious offences. I agree…a loss spread over 4,500 investors of something in the order of $47 million. It may be regarded as fortunate that those investors can expect a recovery of something in the order of 69 cents in the dollar. Nevertheless, the global loss is still very high indeed.’ [90]</td>
</tr>
<tr>
<td>7. Restitution</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>----------------</td>
<td>------------</td>
<td></td>
</tr>
<tr>
<td>8. Ancillary orders</td>
<td>Not raised</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Case 23B</th>
<th><em>R v Ida Ronen</em> [2005] NSWSC 991</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence</td>
<td>8.5 years’ imprisonment (4 years and 6 months non-parole)</td>
</tr>
<tr>
<td>Major offence/s</td>
<td><em>Criminal Code Act</em> 1995 s 135.4 - Defrauding the Commonwealth (the ATO).</td>
</tr>
</tbody>
</table>

| Offence description | The offenders operated a highly successful clothing business that traded under the name of Dolina. The 3 offenders conspired to defraud the Commonwealth of income tax by concealing substantial proportions of cash income from the takings of Dolina’s stores. Ida would arrange for the shops’ takings to be brought to her house, where she would set aside a substantial proportion of the cash, which was not banked in the ordinary course of business. Ida split the cash between herself and her two sons, Nitzan and Izhar. Large amounts of this distributed cash were remitted overseas so as to make it undetectable to authorities. After the introduction of GST, the scheme became more complicated and involved the making of false till rolls. The unbanked cash was not declared as income. |

| Offender status | 72 year old, female, migrant, successful business woman, director and shareholders of companies trading under the Dolina name. |

| Crime involving taking money/property/avoiding a legal obligation | Yes – avoiding tax obligation |

| Position of substantial influence? | Yes - Directors and shareholders of companies trading under the Dolina name. |

<table>
<thead>
<tr>
<th>Sentencing Variables</th>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
</table>
| 1. Good character    | Mitigating | ‘There was a considerable body of references placed before the court relating to Mrs Ronen. These references attest to her qualities as a mother, grandmother and a loyal friend. In addition, she is praised for her charitable works particularly in relation to a number of Jewish organisations and especially in relation to the ————————————————————————————-
assistance she has provided to Bulgarian immigrants coming to Australia. She was described in one as an ‘‘angel of mercy’’. It appears that she has provided both practical and moral support for persons arriving in the country who may be lacking facility in the English language; and who lack financial well-being and employment.’ (p. 81)

'Each offender is a person of previous unblemished good character. Each has worked very hard in the establishment and continuance of a highly successful business. Each offender is well regarded in the community especially in the Jewish community where they have practiced philanthropy at a high level.' (p. 82)

<table>
<thead>
<tr>
<th>2. Public opprobrium</th>
<th>Not raised</th>
</tr>
</thead>
<tbody>
<tr>
<td>3. Reduction of employment/ career prospects</td>
<td>Not raised</td>
</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Aggravating</td>
</tr>
<tr>
<td>5. High level of planning/ sophistication</td>
<td>Aggravating</td>
</tr>
</tbody>
</table>

'But whether the amount concealed is closer to $16,000,000 than to $17,000,000, it is quite apparent that the dimension of the conspiracy was that of a fraud on a very large scale.' (p. 69)

'…no suggestion that there is any point of real distinction between the offenders in terms of the level of criminality displayed…The overall cash skimmed throughout the entire period of the conspiracy was, as I have found, somewhere between $15,000,000 and $17,000,000. The tax payable on this amount was in excess of $8,000,000.' (p. 78)

'Although the cash skim itself was simple and straightforward, Mrs Ronen herself was a most meticulous bookkeeper. She recorded the actual takings of each of the shops and the subsequent distribution of cash in a set of books kept at her home.' (p. 70)

'took additional steps in relation to the concealment of cash…' (p. 71)

'…method of bookkeeping utilized by Mrs Ronen, although meticulous, was by no means sophisticated… on the other
hand…simplicity…offset by the deceptive system of creating false till rolls and false records when the GST was introduced.' (p. 78-9)

'conspiracy in the present offences and its manner of implementation over 9 or so years must be regarded as a situation where the offences fall into the worse category of offences of this type.' (p. 79)

| 6. High level of harm to victim | Neutral | ‘…loss to the revenue…calculated to be $12.77 million (approximately although of course it does not cover the entire period of the conspiracy).’ (p. 85) No further remarks therefore no discernible effect.

| 7. Restitution | Mitigating | ‘In the same way [that is in favour of the offenders], I take into account, in general terms, the terms of settlement reached between the offenders and the Commissioner of Taxation…recognition of the amount of the penalty which has been agreed to be paid namely, $7,180,508.’(p. 83)

| 8. Ancillary orders | Not raised |

| Case 24B | R v Izhar Ronen [2005] NSWSC 991 |
| Sentence | 8.5 years imprisonment (5 years and 6 months non-parole) |
| Major offence/s | Criminal Code Act 1995 s 135.4 - Defrauding the Commonwealth (the ATO). |
| Offence description | The offenders operated a highly successful clothing business that traded under the name of Dolina. The 3 offenders conspired to defraud the Commonwealth of income tax by concealing substantial proportions of cash income from the takings of Dolina’s stores. Ida would arrange for the shops’ takings to be brought to her house, where she would set aside a substantial proportion of the cash, which was not banked in the ordinary course of business. Ida split the cash between herself and her two sons, Nitzan and Izhar. Large amounts of this distributed cash were remitted overseas so as to make it undetectable to authorities. After the introduction of GST, the |
scheme became more complicated and involved the making of false till rolls. The unbanked cash was not declared as income.

<table>
<thead>
<tr>
<th>Offender status</th>
<th>46 year old, male, incomplete tertiary education, director and shareholders of companies trading under the Dolina name.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crime involving taking money/property/ avoiding a legal obligation</td>
<td>Yes – avoiding tax obligation</td>
</tr>
<tr>
<td>Position of substantial influence?</td>
<td>Yes - Directors and shareholders of companies trading under the Dolina name.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Sentencing Variables</th>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Good character</td>
<td>Mitigating</td>
<td>‘…references that attest to the generosity and philanthropy of Izhar…very hard working person who has prospered because of his industry.’ (p. 82)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>‘Each offender is a person of previous unblemished good character. Each has worked very hard in the establishment and continuance of a highly successful business. Each offender is well regarded in the community especially in the Jewish community where they have practiced philanthropy at a high level.’ (p. 82)</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>3. Reduction of employment/ career prospects</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>4. Large amount of money involved</td>
<td>Aggravating</td>
<td>‘But whether the amount concealed is closer to $16,000,000 than to $17,000,000, it is quite apparent that the dimension of the conspiracy was that of a fraud on a very large scale.’ (p. 69)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>‘…no suggestion that there is any point of real distinction between the offenders in terms of the level of criminality displayed…The overall cash skimmed throughout the entire period of the conspiracy was, as I have found, somewhere between $15,000,000 and $17,000,000. The tax payable on this amount</td>
</tr>
</tbody>
</table>
was in excess of $8,000,000.' (p. 78)

<table>
<thead>
<tr>
<th>5. High level of planning/sophistication</th>
<th>Not raised</th>
</tr>
</thead>
<tbody>
<tr>
<td>6. High level of harm to victim</td>
<td>Neutral</td>
</tr>
<tr>
<td>7. Restitution</td>
<td>Mitigating</td>
</tr>
<tr>
<td>8. Ancillary orders</td>
<td>Not raised</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Case 25B</th>
<th>R v Nitzan Ronen [2005] NSWSC 991</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence</td>
<td>8.5 years imprisonment (5 years &amp; 6 months non-parole)</td>
</tr>
<tr>
<td>Major offence/s</td>
<td>Criminal Code Act 1995 s 135.4 - Defrauding the Commonwealth (the ATO).</td>
</tr>
<tr>
<td>Offence description</td>
<td>The offenders operated a highly successful clothing business that traded under the name of Dolina. The 3 offenders conspired to defraud the Commonwealth of income tax by concealing substantial proportions of cash income from the takings of Dolina’s stores. Ida would arrange for the shops’ takings to be brought to her house, where she would set aside a substantial proportion of the cash, which was not banked in the ordinary course of business. Ida split the cash between herself and her two sons, Nitzan and Izhar. Large amounts of this distributed cash were remitted overseas so as to make it undetectable to authorities. After the introduction of GST, the scheme became more complicated and involved the making of false till rolls. The unbanked cash was not declared as income.</td>
</tr>
<tr>
<td>Offender status</td>
<td>47 year old, male, migrant, incomplete tertiary education, director and shareholders of companies trading under the</td>
</tr>
<tr>
<td>Crime involving taking money/property/ avoiding a legal obligation</td>
<td>Yes – avoiding tax obligation</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Position of substantial influence?</td>
<td>Yes - Directors and shareholders of companies trading under the Dolina name.</td>
</tr>
</tbody>
</table>

### Sentencing Variables

<table>
<thead>
<tr>
<th></th>
<th>Treatment</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1. Good character</strong></td>
<td>Mitigating</td>
<td>‘…generosity and benevolence …supported a number of Jewish organisations…philanthropic man…hard and industrious worker…’ (p. 82) 'Each offender is a person of previous unblemished good character. Each has worked very hard in the establishment and continuance of a highly successful business. Each offender is well regarded in the community especially in the Jewish community where they have practiced philanthropy at a high level.’ (p. 82)</td>
</tr>
<tr>
<td><strong>2. Public opprobrium</strong></td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td><strong>3. Reduction of employment/ career prospects</strong></td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td><strong>4. Large amount of money involved</strong></td>
<td>Aggravating</td>
<td>‘But whether the amount concealed is closer to $16,000,000 than to $17,000,000, it is quite apparent that the dimension of the conspiracy was that of a fraud on a very large scale.’ (p. 69) ‘…no suggestion that there is any point of real distinction between the offenders in terms of the level of criminality displayed…The overall cash skimmed throughout the entire period of the conspiracy was, as I have found, somewhere between $15,000,000 and $17,000,000. The tax payable on this amount was in excess of $8,000,000.’ (p. 78)</td>
</tr>
<tr>
<td><strong>5. High level of planning/ sophistication</strong></td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td><strong>6. High level of</strong></td>
<td>Neutral</td>
<td>‘…loss to the revenue…calculated to be $12.77'</td>
</tr>
<tr>
<td>harm to victim</td>
<td>million (approximately although of course it does not cover the entire period of the conspiracy).’ (p. 85) No further remarks therefore no discernible effect.</td>
<td></td>
</tr>
<tr>
<td>7. Restitution</td>
<td>Mitigating 'In the same way [that is in favour of the offenders], I take into account, in general terms, the terms of settlement reached between the offenders and the Commissioner of Taxation…recognition of the amount of the penalty which has been agreed to be paid namely, $7,180,508.'(p. 83)</td>
<td></td>
</tr>
<tr>
<td>8. Ancillary orders</td>
<td>Not raised</td>
<td></td>
</tr>
</tbody>
</table>

**Case 26B**  
*The Queen v Sonya Denise Causer [2010] VSC 341*

| Sentence | 8 years imprisonment (5 years non-parole) |
| Sentence Appealed? | No |
| Major offence/s | *Crimes Act 1958 s 74* - 24 counts of theft |
| Offence description | Misappropriated over $19 million from employer (Clive Peeters) $16 million recovered |
| Offender status | 39 year old, female, tertiary education; accountant. |
| Crime involving taking money/property/avoiding a legal obligation | Yes |
| Position of substantial influence? | Yes - duties with Clive Peeters were expanded, giving offender responsibility for the payroll system, which included authorization of salary payments to employees, payment of superannuation contributions and the remittance of group tax and payroll tax to the ATO and SRO – grossly abused the trust of employer |

<p>| Sentencing Variables | Treatment | Remarks |
| 1. Good character | Mitigating | 'There are many mitigating factors in your favour…You have no prior convictions and are of good character.' |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Public opprobrium</td>
<td>Not raised</td>
<td></td>
</tr>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Mitigating</td>
<td>'There are many mitigating factors in your favour...I take into account that your reputation and career as an accountant is ruined and any future employment will almost certainly be in a very different sphere.'</td>
</tr>
</tbody>
</table>
| 4. Large amount of money involved | Aggravating | 'The magnitude of the theft. This is one of the largest, if not the largest, thefts perpetrated by a person in a position of trust in the history of this State. Notwithstanding the fact that a significant amount has been repaid, the scale of your embezzlement is significant.'
<p>|   |   | 'Notwithstanding the mitigating factors I have mentioned, it is nevertheless necessary to send a message to all those in a position of trust and handling large (or for that matter small) sums of money that dishonest dealings with those funds must result in significant punishment.' |
| 5. High level of planning/sophistication | Aggravating | 'Not only was it perpetrated month by month over a period of two years, but it was calculated and required a degree of sophistication.' |
| 6. High level of harm to victim | Aggravating | 'The effect of the loss of the funds on Clive Peeters’ financial position – the absence of that amount of cash, whilst a the triggering cause, must have played a part in its ultimate collapse.' |
| 7. Restitution | Mitigating | 'There are many mitigating factors in your favour...You have provided restitution to the company of over $16 million, leaving a shortfall of some $3 million. Your reimbursement to the company includes a small contribution of personal funds. This has resulted in your matrimonial home being sold and you living in sparse rental accommodation, a situation that is likely to continue upon your release.' |
| 8. Ancillary orders | Not raised |   |</p>
<table>
<thead>
<tr>
<th>Case 27B</th>
<th>The Queen v David Tansey [2012] VSC 221</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence</td>
<td>4 years imprisonment (2 years &amp; 6 months non-parole)</td>
</tr>
</tbody>
</table>
| Sentence
Appealed? | No |
| Major offence/s | Crimes Act 1958 s 74 - 25 charges of theft |
| Offence description | Theft by a solicitor from clients – 44 separate transactions and a total amount of $1,990,081.21 stolen from 11 separate clients over a period of 4.5 year. Restored $674,877. Continuing criminal enterprise |
| Offender status | Aged between 46-50 years old; male; tertiary education. |
| Crime involving taking money/property/avoiding a legal obligation | Yes |
| Position of substantial influence? | Yes – barrister & solicitor |
| Sentencing Variables | Treatment | Remarks |
| 1. Good character | Mitigating | 'I accept that you are a person of previous good character…However, as the Court of Appeal said in R v Coukoulis, although the fact that you have had no prior convictions is of importance, it must be recognised that your reputation as a legal practitioner enabled you to obtain the money you stole. Whilst your previous good character has some broad relevance, it is of little weight when dealing with a breach of trust by a solicitor who is an officer of the court.' [57] |
| 2. Public opprobrium | Not raised | |
| 3. Reduction of employment/career prospects | Mitigating | 'I note that you have been unemployed since ceasing your employment as a storeman on 30 November 2011…' [63] 'By the time you are eligible for parole, you will be aged in your early sixties and it may be difficult to obtain employment.' [64] |
| 4. Large amount of money involved | Aggravating | 'In total, you stole $1,990,081.21 from 11 separate clients. You restored $674,877, leaving an amount of $1,315,203.36 |
outstanding.' [36]

'All of the offences involved misappropriation of funds from SESI accounts in the names of the various clients. Though the method used was essentially the same in each case, the amounts stolen varied and I have broadly taken the approach that the larger the amount stolen the more serious the offence.' [68]

<table>
<thead>
<tr>
<th>5. High level of planning/ sophistication</th>
<th>Aggravating</th>
<th>'...offences are equally serious...necessarily carefully premeditated offences and involved concealment of earlier offences...' [65]</th>
</tr>
</thead>
<tbody>
<tr>
<td>6. High level of harm to victim</td>
<td>Aggravating</td>
<td>'There were nine victim impact statements in evidence before me, the tenor of which was similar. Though the Legal Practitioners Fidelity Fund compensated most of the victims for their financial losses, the misappropriations nevertheless caused the victims stress and trauma. Your conduct was described as ‘a grave betrayal of trust’ and ‘reprehensible’. One victim was shocked that a lawyer could use funds belonging to a client for his personal use. Yet others were distressed that you brought disrepute upon a formerly respected legal firm under whose name you carried on your legal practice. One of your victims has suffered great emotional stress and states that she ‘now questions everything and distrusts everyone’.' [37]</td>
</tr>
<tr>
<td>7. Restitution</td>
<td>Mitigating</td>
<td>'I also note that you voluntarily made partial restitution of $674,877 which must be acknowledged as a mitigating factor.' [63]</td>
</tr>
<tr>
<td>8. Ancillary orders</td>
<td>Neutral</td>
<td>'...in order to ensure that your rehabilitation is not hampered by the imposition of an overly severe compensation order, I order you to pay compensation to the Legal Services Board of $318,047.57 which is half the amount sought.' [64] No discernible effect.</td>
</tr>
</tbody>
</table>

Case 28B | *The Queen v Wendy Hope Jobson* [2013] VSC 214
Sentence | 8 years imprisonment (5 years non-parole)
Sentence Appealed? | No
Major offence/s | *Crimes Act 1958* s 74 – Theft, 6 rolled up charges
<table>
<thead>
<tr>
<th>Offence description</th>
<th>Theft by employee from employer totalling over $7.8 million – over 6 years – 1478 separate transactions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Offender status</td>
<td>50 year old, female, TAFE education; administrative manager</td>
</tr>
<tr>
<td>Crime involving taking money/property/avoiding a legal obligation</td>
<td>Yes</td>
</tr>
<tr>
<td>Position of substantial influence?</td>
<td>Yes – administrative manager – had access to group’s accounts with the NAB [7]</td>
</tr>
<tr>
<td>Sentencing Variables</td>
<td>Treatment</td>
</tr>
<tr>
<td>1. Good character</td>
<td>Mitigating</td>
</tr>
<tr>
<td>2. Public opprobrium</td>
<td>Not raised</td>
</tr>
<tr>
<td>3. Reduction of employment/career prospects</td>
<td>Neutral</td>
</tr>
</tbody>
</table>
| 4. Large amount of money involved | Aggravating | 'The amounts covered by each charge are substantial…' [4]  
‘…you stole $7,818,893.66, little of which has been recovered and most of which is unlikely ever to be recovered.' [21] |
| 5. High level of planning/sophistication | Aggravating | ‘… the objective facts surrounding your offences suggest a calculated and protracted course of deliberately dishonest conduct.' [9] |
| 6. High level of harm to victim | Neutral | 'Your offending was extremely grave, and represents a gross breach of trust. In his victim impact statement, Mr Mitchell Koroneos describes you as a trusted friend and worker…The fact that there is a single victim is in no way, of course, a mitigating feature; but it is the absence of an aggravating factor often
encountered in these cases.' [10] [11]

'I received a victim impact statement from Mitchell Koroneos, which speaks of the impact the offences have had on him, his family and his business. I take that victim impact statement into account when fixing sentence.' [21]

<table>
<thead>
<tr>
<th>7. Restitution</th>
<th>Mitigating</th>
<th>'You remitted $195,849.98…following the sale of your matrimonial home, and I take that into account in your favour.' [21]</th>
</tr>
</thead>
<tbody>
<tr>
<td>8. Ancillary orders</td>
<td>Not raised</td>
<td></td>
</tr>
</tbody>
</table>
APPENDIX B - AUTHORSHIP STATEMENTS

A GENERAL DETERRENCE ARTICLE

1. Details of publication and executive author

<table>
<thead>
<tr>
<th>Title of Publication</th>
<th>Publication details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Marginal) general deterrence doesn't work - and what it means for sentencing</td>
<td>(2011) 35 Crim LJ 269</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Name of executive author</th>
<th>School/Institute/Division if based at Deakin; Organisation and address if non-Deakin</th>
<th>Email or phone</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mirko Bagaric</td>
<td>Faculty of Business &amp; Law</td>
<td><a href="mailto:mirko.bagaric@deakin.edu.au">mirko.bagaric@deakin.edu.au</a></td>
</tr>
</tbody>
</table>

2. Inclusion of publication in a thesis

<table>
<thead>
<tr>
<th>Is it intended to include this publication in a higher degree by research (HDR) thesis?</th>
<th>Yes</th>
<th>If Yes, please complete Section 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>If No, go straight to Section 4.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

3. HDR thesis author’s declaration

<table>
<thead>
<tr>
<th>Name of HDR thesis author if different from above. (If the same, write “as above”)</th>
<th>School/Institute/Division if based at Deakin</th>
<th>Thesis title</th>
</tr>
</thead>
<tbody>
<tr>
<td>Theodosios Raymond Alexander</td>
<td>Faculty of Business &amp; Law</td>
<td>A Rational Approach to Sentencing White Collar Offenders</td>
</tr>
</tbody>
</table>

If there are multiple authors, give a full description of HDR thesis author’s contribution to the publication (for example, how much did you contribute to the conception of the project, the design of methodology or experimental protocol, data collection, analysis, drafting the manuscript, revising it critically for important intellectual content, etc.)

Mirko and I’s mutual interest in sentencing led to our ongoing collaboration on academic publications regarding the law of sentencing. Mirko developed the broad parameters of this article in terms of examining the available literature to ascertain the validity of general deterrence theory. We then split the workload evenly. We both engaged in research, drafting, and editing. After we collated the relevant research and data, I attempted the first round of drafting, and we went back and forth until the final draft was ready.

I declare that the above is an accurate description of my contribution to this paper, and the contributions of other authors are as described above.

<table>
<thead>
<tr>
<th>Signature and date</th>
<th>Theo Alexander</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>11/10/2016</td>
</tr>
</tbody>
</table>

4. Description of all author contributions

<table>
<thead>
<tr>
<th>Name and affiliation of author</th>
<th>Contribution(s) (for example, conception of the project, design of methodology or experimental protocol, data collection, analysis, drafting the manuscript, revising it critically for important intellectual content, etc.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mirko Bagaric</td>
<td>See above, mutual and equal contribution to the project. Mirko successfully submitted our article to the Criminal Law Journal.</td>
</tr>
</tbody>
</table>
5. Author Declarations
I agree to be named as one of the authors of this work, and confirm:
i. that I have met the authorship criteria set out in the Deakin University Research Conduct Policy,
ii. that there are no other authors according to these criteria,
iii. that the description in Section 4 of my contribution(s) to this publication is accurate,
iv. that the data on which these findings are based are stored as set out in Section 7 below.
If this work is to form part of an HDR thesis as described in Sections 2 and 3, I further
v. consent to the incorporation of the publication into the candidate’s HDR thesis submitted to Deakin University and, if the higher degree is awarded, the subsequent publication of the thesis by the university (subject to relevant Copyright provisions).

<table>
<thead>
<tr>
<th>Name of author</th>
<th>Signature*</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mirko Bagaric</td>
<td>Mirko Bagaric</td>
<td>14/12/2016</td>
</tr>
</tbody>
</table>

6. Other contributor declarations
I agree to be named as a non-author contributor to this work.

<table>
<thead>
<tr>
<th>Name and affiliation of contributor</th>
<th>Contribution</th>
<th>Signature* and date</th>
</tr>
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If there are multiple authors, give a full description of HDR thesis author’s contribution to the publication (for example, how much did you contribute to the conception of the project, the design of methodology or experimental protocol, data collection, analysis, drafting the manuscript, revising it critically for important intellectual content, etc.)

This article was further to our previous articles focusing on sentencing. After looking at recent sentencing decisions and debating their effectiveness, we decided to analyse the efficacy of state-imposed sanctions to realise sentencing principles. This article built on our work from the first article associated with this thesis. This was a collaborative effort, and we would continuously add to and edit the article until completion. We divided the research load equally. I focused on drafting from ‘Australian study involving matched pairs of offenders’, however I was still heavily involved with the other areas, in terms of research, interpretation of the research, editing and making necessary changes. I, along with Mirko, engaged in numerous rounds of editing and ensuring our intellectual content was of a high standard.

I declare that the above is an accurate description of my contribution to this paper, and the contributions of other authors are as described below.

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<td>Mirko Bagaric</td>
<td>As indicated above, Mirko and I shared the equal burden of researching, drafting and editing the article. His drafting efforts centred on the first half of the article, up to ‘Australian study involving matched pairs of offenders’. However, he was as equally engaged in the other sections, particularly through research and ensuring the content was intellectually sound.</td>
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As per our previous collaborations, Mirko and I shared the responsibilities of the publication equally. This article follows on from previous sentencing research we have explored. The broad concept for the article was developed by Mirko and I then became the co-author after it became evident that the principle of totality is especially apposite in relation to white-collar offending. I substantially contributed to the research of all the areas explored in the article. Mirko and I divided up the sections of the article and each drafted the allocated parts. We then edited and improved each other’s draft manuscripts, incorporating or changing parts were appropriate. I proof read the article numerous times, and ensured the article was compliant with AGLC3 referencing guide.

*I declare that the above is an accurate description of my contribution to this paper, and the contributions of other authors are as described below.*

signature and date: Theo Alexander
11/10/2016

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<td>Mirko Bagaric</td>
<td>As indicated above, Mirko contributed equally throughout the duration of the publication. He too substantially researched the principle of totality, drafted different parts of the manuscript and had several attempts at editing and refining the article, until it was ready for submission to the UNSW Law Journal.</td>
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In pursuit to add to our previous research on contemporary sentencing issues, Mirko and I mutually decided on this article’s hypothesis. We divided the workload equally between us, with each contributing to the research, analysis and editing. After we pooled together our research and data collection, I drafted the ‘introduction’, ‘the current state of the law’ and ‘the absence of prior convictions should mitigate’ sections. Mirko focused on the other potentially mitigating factors. We would then swap our drafted sections and make appropriate changes or additions. We both engaged in the final edit and review of the article, before it was ready for submission.

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<td>Mirko Bagaric</td>
<td>As indicated above, Mirko and I have a equal partnership, and contributed to the publication proportionately. Mirko focused on drafting the following sections: ‘abstract’, ‘good acts should not mitigate penalty’, ‘offenders with physical of financial dependants receive a reduced dependence’, ‘first-offender and dependents discounts will not undermine other valid sentencing objectives’ and ‘conclusion’.</td>
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I developed the concept for the article, as this area of law lacks settled principles and requires significant reform. I undertook half of the data collection, analysis and drafting. We each proof read and edited the article numerous times. I wrote approximately 65% of this article.

I declare that the above is an accurate description of my contribution to this paper, and the contributions of other authors are as described below.

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General deterrence is broadly understood as the theory that correlates increased sanctions with decreased crime rates. It is one of the principal objectives of sentencing in Australia; regularly used by courts to increase penalties in criminal matters in an endeavour to discourage others from committing offences. Imposing harsh sanctions on offenders, so the theory runs, discourages by example other people from breaking the law. General deterrence theory is a virtually unchallenged orthodoxy in Australian courts. Yet, it is in this area of the criminal law that the greatest discord between legal theory and social reality exists. The reality is that general deterrence, as universally applied, does not work. The overwhelming trends evident in empirical research suggest that higher penalties do not serve as disincentives to crime. The current practice of increasing penalties to give effect to general deterrence has no social utility. Accordingly, it is merely the infliction of additional punishment in the absence of any associated direct or indirect benefit. It is therefore socially and morally unjustifiable. There may yet be other justifications for imposing harsh penalties on offenders, but they must be found elsewhere than within the rubric of general deterrence. This article sets out the current relevance of general deterrence to the sentencing calculus. It then examines the empirical data regarding the efficacy of punishment to deter offenders, and makes suggestions for reform in light of these empirical findings.

INTRODUCTION

It is trite to observe that general deterrence is one of the principal objectives of sentencing. It operates to increase the severity of the sanctions imposed on offenders by reference to its effects on people other than the offender. It assumes that the imposition of punishment on offenders will deter other people from committing (a) the same or similar crimes, and (b) crimes in general. Intuitively, it is a persuasive theory. This is because it relies upon a series of seemingly sound premises:

P1: Humans have a strong desire to avoid hardships or pain.
P2: Criminal sanctions normally involve the imposition of hardships or pain.
P3: Imposing pain on offenders illustrates to people the adverse consequences stemming from criminal conduct.
P4: People will avoid engaging in conduct that risks pain being imposed on them.
P5: The greater the potential pain, the stronger the desire to avoid being subjected to it.

Conclusion: General deterrence is justifiable.

The inductive force of this seemingly “sound” reasoning is strong; however, even seemingly strong inductive arguments can lead to a false conclusion. General deterrence is one such argument. The false conclusion is exposed and debunked when tested against the empirical evidence. The overwhelming weight of scientific testing establishes that there is no – or, at best, a slight – connection between higher penalties and lower crime.

This conclusion is not new. It has been noted repeatedly in the academic literature of the United States, especially in the past five or so years. However, what has not been clearly and widely
articulated is that the disjunction between higher penalties and lower crime rates does not necessarily mean that general deterrence as a theoretical proposition is totally flawed; rather, the crude theory upon which it has traditionally been based requires re-examination.

There are two forms of general deterrence. *Marginal general deterrence* concerns the correlation between the severity of the sanction and the prevalence of an offence. *Absolute general deterrence* concerns the threshold question of whether there is any connection between criminal sanctions, of whatever nature, and the incidence of criminal conduct.\(^2\)

Only marginal deterrence has been disproved. Absolute general deterrence works. In this article, the authors examine the research data that demonstrates the failure of marginal general deterrence but which supports the effectiveness of punishment to achieve absolute general deterrence.\(^3\)

Implications for sentencing law and practice are also discussed. In short, it means that legislatures and courts should not increase sentences in the futile pursuit of marginal general deterrence. However, the pursuit of absolute general deterrence remains a valid sentencing objective. This can be achieved simply by ensuring that offenders are penalised by the imposition of appropriate pain and hardship, but such penalties should not be aggravated in order to achieve an unattainable objective.

In precise terms, the impact of the suggested reforms is that penalties should be reduced to the extent that they are currently increased in pursuit of the objective of marginal general deterrence. Given the “instinctive synthesis”\(^4\) required by the process of criminal sentencing, it is unlikely that any reduction could be precisely measured. However, essentially it means that penalties in relation to types of offences where marginal general deterrence currently plays a central role, such as drug and revenue offences, should be significantly reduced.

These proposed changes can best be achieved by legislative reform. This is unlikely given the near universal political trend towards tougher sanctions. However, the suggested reforms in this article can also be achieved by judicial redefinition of the meaning of general deterrence and how it is accommodated within the sentencing calculus. The authors recommend that general deterrence should be confined to absolute general deterrence.

The next section of this article provides an overview of the current role of general deterrence in the sentencing inquiry. This is followed by an examination of the empirical data regarding general deterrence, and an explanation of possible sociological and institutional reasons for the failure of marginal general deterrence. The next section provides a basis for rejecting the logical form of the argument. The authors then look at the success of absolute general deterrence by way of contrast. A brief discussion of the normative criticisms of general deterrence then follows before reform proposals are set out in the concluding remarks, along with the limitations of these proposals.

**THE ROLE OF GENERAL DETERRENCE IN THE SENTENCING INQUIRY**

The form in which general deterrence most often appears in the sentences of courts is as marginal general deterrence.\(^5\) In this form, it has long enjoyed a cardinal role in sentencing law and practice; widely endorsed as the paramount objective of sentencing. Nearly half a century ago the New Zealand Supreme Court in *R v Radich* stated that:

> One of the main purposes of punishment … is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilised countries, in all ages, [deterrence] has been the main purpose of punishment and still continues so. The fact that punishment does not entirely prevent


\(^3\) The analysis in this article builds on the analysis by one of the authors a decade earlier; see Bagaric M, “Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals” (2000) 24 Crim LJ 21. The current analysis of the data on general deterrence has been used to suggest reforms to the specific area of tax offenders; see Bagaric M et al, “The Fallacy of General Deterrence and the Futility of Imprisoning Offenders for Tax Fraud” (2011) (July) Australian Taxation Forum. This article extrapolates the reform proposals to sentencing law in general.


all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment, or with only light punishment.  

This passage has been cited with approval in numerous cases and deterrence remains a key sentencing concept in each Australian jurisdiction. General deterrence is relevant to sentencing for most offences, including where the offence is prevalent; public safety is at issue; the offence is hard to detect; it involves a breach of trust; or where vulnerable groups need protection.

It is particularly important in relation to offences involving a material benefit to the offender. Thus, in relation to drug distribution offences, tax and social security frauds, it has been held to be the most important factor in determining a sentence.

In the context of large scale drug offences, the court said in Aconi v The Queen that:

[18] It can … be accepted that the applicant had an important role in the distribution chain, having access, for distribution purposes, to relatively large quantities of high grade heroin. In those circumstances this was a case in which the starting point for the sentencing of the applicant could be expected to be severe. As was pointed out by Kennedy J in Serrette v The Queen [2000] WASCA 405 at [2], it has frequently been said that those who engage in the illicit drug trade, whatever their role in the enterprise, must expect heavy sentences in which general deterrence will be the principal purpose of the punishment. This is especially so where an offender plays an important role in the distribution process.  

In a similar vein, in R v Riddell it was noted that:

[57] Courts have also long recognised the importance of general deterrence in sentencing in respect of drug importation offences. In R v Cheung … Sully J said:

The importation of heroin into this country in any amount and at any time constitutes a deliberate threat to the well being of the Australian community … The importation or the attempted importation of, and the trafficking or attempted trafficking [of heroin] … is in a very real sense a declaration of war upon this community … In the face of such challenges each of the institutional supports of our society has a role to play. That of the Courts is to punish and deter according to law. Obviously, the Courts alone cannot meet adequately, let alone defeat, the challenge of which I have been speaking. What the Courts can do is to punish drug-related crime in a way which signals plainly to drug traffickers, especially foreign drug traffickers, that the Courts are both able and willing to calibrate their sentences until a point is reached at which, to a significant extent even if never perfectly, fear of punishment risked will neutralise the greed which is the only possible motive of those who … engage in drug-related crime when they are themselves not drug dependent.

In the context of taxation offences, in R v Izhar Ronen, the New South Wales Court of Criminal Appeal said:


For example, in Walden v Hensler (1987) 163 CLR 561 at 569; 29 A Crim R 85, Brennan J stated that the “chief purpose of the criminal law is to deter those who are tempted to breach its provisions”. See also R v Williscroft [1975] VR 292 at 298-299; R v Porter (1933) 55 CLR 182 at 186; R v Lambert (1990) 51 A Crim R 160 at 171.

Sentencing Act 1991 (Vic), s 5(1)(b); Criminal Law (Sentencing) Act (SA), s 10(j); Sentencing Act 1995 (NT), s 5(1)(c); Penalties and Sentences Act 1992 (Qld), s 9(1)(c).


R v Riddell (2009) 194 A Crim R 524 at [57]. The court noted at [58] that: “This passage has been cited with approval on numerous occasions. Its relevance is not restricted to the importation of the particular drug in that case. It is an important statement of principle relating to the importation of any illegal drug. Sully J reiterated his comments in R v Nguyen [2004] NSWSC 144 at [53], which involved the importation of ecstasy. See also R v Chen (2002) 130 A Crim R 300 at [286]; R v Law

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It has been stated time and time again and in all jurisdictions that the most important aspect of punishment in relation to frauds on the Commonwealth’s revenue is general deterrence.\(^{16}\)

More recently, in a unanimous judgment of the Victorian Court of Appeal in \textit{DPP (Cth) v Gregory}, Warren CJ, Redlich JA and Ross AJA said that:

\[53\] In seeking to ensure that proportionate sentences are imposed the courts have consistently emphasised that general deterrence is a particularly significant sentencing consideration in white collar crime and that good character cannot be given undue significance as a mitigating factor, and plays a lesser part in the sentencing process. In the case of taxation offences general deterrence is also given special emphasis in order to protect the revenue as such crimes are not particularly easy to detect and if undetected may produce great rewards. “Deterrence looms large” as the present process of self assessment reposes on the taxpayer a heavy duty of honesty …

\[54\] In many if not most cases, imprisonment will be the only sentencing option for serious tax fraud in the absence of powerful mitigating circumstances.\(^{17}\)

The same enthusiasm for general deterrence applies in relation to social security offences. Over a decade ago, Underwood J in \textit{Hrasky v Boyd} stated:

For many years now, Australian courts have emphasised the importance of general deterrence when imposing sentence for what is loosely referred to as social security fraud. In \textit{Laxton v Justice} (1985) 38 SASR 377, Olsson J said at 381:

\begin{enumerate}
\item Offences of this type are now prevalent. The offence is difficult to detect and penalties should reflect a concern for the protection of the revenue.
\item Frauds of this kind must be viewed seriously because they threaten the basis of the social security system which is designed to provide financial security for those in the community who are in need. A deterrent penalty is called for…\(^{18}\)
\end{enumerate}

These comments were expressly endorsed in \textit{Emms v Barr}\(^{19}\) and have been adopted in numerous decisions since.\(^{20}\)

The allegiance by the courts to general deterrence theory is so steadfast that judges have refused to renounce it even in the face of apparent legislative disavowal of it as a sentencing objective.

For example, general deterrence is not specifically mentioned as one of the relevant sentencing factors in the \textit{Crimes Act 1914 (Cth)}.\(^{21}\) This was apparently in response to a specific recommendation by the Australian Law Reform Commission that it not be adopted as a sentencing objective because sentences should be commensurate with the seriousness of the offence committed. It was considered unfair to impose heavier sanction on a particular accused because of the effects it might have on the behaviour of others (discussed further below).\(^{22}\)

In \textit{DPP (Cth) v El Karhani}, while noting that general deterrence is one of “the fundamental principles of sentencing, inherited from the ages”, the court attributed the legislative omission of...
general deterrence to a “legislative slip”. The court stated that general deterrence is still an important sentencing consideration and no less important than the other factors expressly mentioned, even though it is absent from the detailed list of relevant sentencing criteria.

The courts appear so keen to invoke the power of general deterrence to discourage offenders from their criminal ways that they have adopted it a priori as an article of faith. In Yardley v Betts, the court stated: “the courts must assume, although evidence is wanting, that the sentences which they impose have the effect of deterring at least some people from committing crime”. Similarly in Fern, King CJ held that:

Courts are obliged to assume that the punishments which Parliament authorises will have a tendency to deter people from committing crimes. The administration of criminal justice is based upon that assumption.

The basis of the imperative to pursue deterrence as a sentencing goal is unclear. It is not as if there are no other sentencing objectives for which the courts can justify punishing wrongdoers: denunciation, rehabilitation and reparation to name a few. Even if there were not, to the extent that the law pretends to logical consistency, it would seem preferable to abandon punishment altogether, than to punish criminals on the basis of a flawed rationale.

It is only on rare occasions that the courts have expressed concern or equivocation regarding the efficacy of punishment to deter crime. In Pavlic v The Queen, Green CJ stated that:

[General deterrence is only one of the factors which are relevant to sentence and must not be permitted to dominate the exercise of the sentencing discretion to the exclusion of all the other factors which the law requires a judge to take into account. Secondly, although a court is entitled to proceed on the basis that there is a general relationship between the incidence of crime and the severity of sentences, there is no justification for the view that there exists a direct linear relationship between the incidence of a particular crime and the severity of the sentences which are imposed in respect of it such that the imposition of heavier sentences in respect of a particular crime will automatically result in a decrease in the incidence of that crime.]

Most recently, in Glascott v The Queen, the Victorian Court of Appeal observed that punishment will not deter offenders who are “emotionally wrought or otherwise irrational” at the time of offending. Of course, this observation still works on the presumption that offenders would be deterred if they were in control of their faculties at the time of offending.

Thus, general deterrence has been and remains an important consideration in the sentencing calculus. In relation to some categories of offences it is even the most important sentencing variable. When general deterrence is factored into the sentencing equation it is an aggravating factor and thereby operates to increase the severity of the penalty. The central and repeated rationale offered by the courts for pursuing this objective is that it will deter other people from committing crime. In the next section the validity of this assumption will be examined.

**THE EMPIRICAL DATA ESTABLISHING THAT GENERAL DETERRENCE DOES NOT WORK**

The theory that criminal sanctions deter crime has a long history, dating back more than 300 years. Despite this pedigree, it has been difficult to either prove or disprove the soundness of the theory. The

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23 DPP (Ch) v El Karhani (1990) 21 NSWLR 370 at 378; 51 A Crim R 123.
24 See Crimes Act 1914 (Cth), s 16A.
25 Yardley v Betts (1979) 1 A Crim R 329 at 333 (emphasis added). See also R v Dixon (1975) 22 ACTR 13 at 18.
27 These are discussed in Bagaric and Edney, n 4.
30 The history of deterrence theory can be traced to the works of Cesare Beccaria (see Beccaria C, On Crimes and Punishments (Henry Paolucci translation, 1986; original 1764) and Jeremy Bentham (see Bentham J, The Principles of Morals and Legislation (1988 translation; original 1789).
main reason for this is the number of other variables that contribute to the crime rate. In order to demonstrate the link between crime and penalty levels, it would be necessary to control for all other variables which may affect the crime rate while increasing the dependent variable being the penalty levels. Even if this could be done, it would be difficult, except perhaps in relation to homicide offences, to get accurate information regarding actual crime rates due to the large number of offences which are unreported.

The complexity of the inquiry was noted more than 30 years ago by the Report of the Panel of the National Research Council in the United States. The Panel concluded that the research evidence that does exist regarding marginal deterrence is, overall, inconclusive.

We cannot yet assert that the evidence warrants an affirmative conclusion regarding deterrence. We believe scientific caution must be exercised in interpreting the limited validity of the available evidence and a number of competing explanations for the results. Our reluctance to draw stronger conclusions does not imply support for the position that deterrence does not exist, since the evidence certainly favors a proposition supporting deterrence more than it favors one asserting that deterrence is absent.

Several years earlier, after a comprehensive review of the evidence regarding marginal deterrence, Zimring and Hawkins were more definitive in their findings regarding the link between harsher sentences and lower crime. They stated:

Studies of different areas with different penalties, and studies focusing on the same jurisdiction before and after a change in punishment level takes place, show rather clearly that the level of punishment is not the major reason why crime rates vary. In regard to particular penalties, such as capital punishment as a marginal deterrent to homicide, the studies go further and suggest no discernible relationship between the presence of the death penalty and homicide rates.

The failure of even the death penalty to act as a marginal deterrence is exemplified by the experience in New Zealand. Between 1924 and 1962 the death penalty for murder was in force, then abolished, then revived, and abolished again. The changes generally followed some level of public debate and were well publicised. Although the murder rates fluctuated during this period, they bore no correlation to the prevailing penalty, whether capital punishment or life imprisonment. Similar findings have emerged in the United States.

However, whilst the absence of a link between homicides and the death penalty has been challenged by some commentators, the evidence used in support of the link has been debunked; primarily because the data upon which it is based is statistically insignificant and the evidence goes against the overwhelming trend of empirical data. As has been pointed out by Richard Berk, the main findings in support of the hypothesis that capital punishment is a deterrent to homicide relate to

31 For a discussion regarding the difficulties in evaluating data relating to deterrence, see Wilson JQ, “Penalties and Opportunities” in Duff A and Garland D, A Reader on Punishment (1994) p 177; von Hirsch A et al, Criminal Deterrence and Sentence Severity (1999) Ch 5.

32 For example, see Walker N, Why Punish? (1991) p 16.


34 Blumstein et al, n 33, p 7.


37 For example, see Cochran J et al, “Deterrence or Brutalization? An Impact Assessment of Oklahoma’s Return to Capital Punishment” (1994) 32 Criminology 107 at 129.


11 observations out of a sample size of 1,000 observations where the homicide rate dropped in an American state following an execution in the previous year. The data is statistically meaningless and contrary to the trend of 99% of the observations. Berk stated:

Whatever one makes of those 11 observations, it would be bad statistics and bad social policy to generalize from the 11 observations to the remaining 989. So, for the vast majority of states for the vast majority of years, there is no evidence for deterrence in these analyses. Even for the remaining 11 observations, credible evidence for deterrence is lacking.

Berk concluded:

It is apparent that for the vast majority of states in the vast majority of years, there is no evidence of a negative relationship between executions and homicides.

The strongest evidence in support of the theory of marginal general deterrence stems from the considerable drop in serious crime levels in the United States over the past 30 years. This drop coincided with increased penalties (including mandatory imprisonment in some states) and significant increases in the imprisonment rate. Statistically, between 1990 and 2009:

(a) the rate of violent crime in the United States dropped by more than 60%, with most of the decline being recorded after 1996;

(b) the violent victimisation rates per 1,000 people aged 12 years or older dropped from 44 to 17.

During this period the imprisonment rate rose from 1.15 million to 2.3 million prisoners. Currently, the rate at which the United States imprisons its citizens is approximately 750 per 100,000 people (the highest in the world), which is nearly double that of 20 years ago. At face value, these figures suggest a causal link between imprisoning greater numbers of offenders and effectively reducing the crime rate.

A number of detailed studies have been undertaken to examine and explain this apparent causal link between crime and imprisonment rates. For example, William Spelman has stated that up to 21% of crime reduction is attributable to the increased rate of imprisonment. However, Spelman is unclear whether the reduction is attributable to the incapacitation of offenders (who are thereby prevented from committing crimes whilst they are imprisoned) or to the salutary effects of marginal deterrence. Clearly, if, during that decade, around one million American offenders were taken from the streets and imprisoned for various periods of time, it was to be expected that the opportunity to commit crimes, and hence add to the crime statistics, was significantly impaired.

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40 Situations in which five or more executions occurred in a state in a single year.
41 Each “observation” is the homicide rate in an American state over the period of one year.
42 Berk, n 39 at 330.
44 Bureau of Justice Statistics, Key Facts at a Glance: Violent Crime Trends, http://www.bjs.ojp.usdoj.gov/content/glance/tables/viortrdtab.cfm viewed 8 September 2011. The rate of decline in other forms of crime was similar.
47 On balance, studies show that a 10% increase in imprisonment rates produce a 2% to 4% reduction in the crime rate, most of which is in relation to non-violent offenders: see Warren R, “Evidence-based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy” (2009) 43 USF L Rev 585 at 594 and the references cited therein.
48 As noted below, some of this reduction is also attributable to more police.
Further, it has been noted that similar crime reduction trends occurred in Canada, the nearest neighbour to the United States, over approximately the same period. During that period, the imprisonment rate in Canada actually fell.\footnote{Paternoster R, “A Century of Criminal Justice: Crimes and Punishment: So, How Much Do We Really Know About Criminal Deterrence?” (2010) J Crim L & Criminology 765 at 803.}

Empirical evidence not only questions the causal link between higher penalties and lower crime, but also provides strong evidence of alternative explanations for falling crime rates. For example, it has been argued that 50% of the fall in the United States crime rate is the result of an increased number of women from disadvantaged groups (teenagers, the poor and minority groups) having abortions. It is argued that these pregnancies would have resulted in births of children who would have been most likely to commit crimes as adults. Thus, so it is argued, the legalisation of abortion in the 1970s resulted in lower crime rates in the 1990s; with each 10% rise in abortions corresponding to a 1% drop in crimes two decades later.\footnote{Ellison M, “US Study Ties Crime Fall to Abortions”, The Age (11 August 1999) p 13.} In commenting on the causal link between increased abortions and reduced crime, Steven Levitt stated:

The five states that allowed abortion in 1970 (three years before Roe v Wade) experienced a decline in crime rates earlier than the rest of the nation. States with high and low abortion rates in the 1970s experienced similar crime trends for decades until the first cohorts exposed to legalized abortion reached the high-crime ages around 1990. At that point, the high-abortion states saw dramatic declines in crime relative to the low-abortion states over the next decade. The magnitude of the differences in the crime decline between high- and low-abortion states was over 25 per cent for homicide, violent crime and property crime … Panel data estimates confirm the strong negative relationship between lagged abortion and crime. An analysis of arrest rates by age reveals that only arrests of those born after abortion legalization are affected by the law change.\footnote{Levitt, n 46 at 182-183.}

Recent empirical research from Germany is consistent with United States findings regarding the failure of marginal general deterrence.\footnote{Entorf H, Crime, Prosecutors and the Certainty of Conviction, IZA Discussion Paper No 5670 (Goethe University Frankfurt, April 2011).} At the Goethe University, Frankfurt, Horst Entorf reviewed 24 years of criminal sentencing practices in West German states for correlates of the crime rate. Entorf sought to examine the effect of each stage of the prosecution process, from investigation to conviction, on the commission rates of two specific crimes (“major property” and “violent crimes”), in order to assess their relative contribution to the overall effect of the criminal prosecution process on crime rates. The results were analysed by the theoretical econometric analysis methodology, which considered the deterrent effects of formal and informal, as well as custodial and non-custodial, sanctions.\footnote{Theoretical econometrics studies statistical properties of econometric procedures; such properties include power of hypothesis tests and the efficiency of survey-sampling methods, of experimental designs, and of estimators. See Pindyck RS and Rubinfeld DL, Econometric Methods and Economic Forecasts (4th ed, McGraw-Hill, 1998).}

The results of the research challenged the perceived wisdom about marginal general deterrence. It was discovered that a deterrent effect was found at “the first two stages of the criminal prosecution process” (charge and conviction) rather than at the “less robust” severity of punishment stage (sentencing). Entorf also found that:

Results presented in [the] article suggest that crime is particularly deterred by certainty of conviction.

Here, contrary to popular belief, neither police nor judges but public prosecutors play the leading role.

Extending severity of sentences, however, does not seem to provide a suitable strategy for fighting crime. In particular, the length of the imprisonment terms proves insignificant.\footnote{Entorf, n 52, p 4 (emphasis added).}

As a consequence, he suggested that the public policies pursued by courts and legislatures in the name of marginal deterrence must be reconsidered. Building more prisons, creating harsher mandatory sentencing regimes and devoting more resources to the detention of offenders must be critically questioned. Fashionable policies which divert offenders from the criminal justice system (and
therefore reduce the likelihood of conviction after detection) must be abandoned. Political policies to universally increase minimum sentences and judicial responses to public criticism of “deficient” sentences should not be countenanced. The role of deterrence must be redefined:

“General deterrence” is still capable of curbing crime rates, but just by a more rigorous application of existing penal laws rather than by reforms extending the severity of measures. The latter strategy, followed in the US, might bear the risk that the prison population increases without any effect of deterrence.55

These conclusions, derived from both common law and civil law experiences over three decades, beg the question: why do higher sentences fail to deter would-be offenders?

**Sociological and Institutional Suggestions for the Failure of Marginal General Deterrence**

It is not central to the argument in this article to establish why marginal general deterrence does not work. The only point that needs to be established to negate the justification for marginal general deterrence as a sentencing objective is that it in fact does not work. However, the law is a conservative enterprise and a tenable explanation for the failure of marginal general deterrence will assist in advancing the reform proposals.

The most obvious explanation is that the risks of hardship and pain occasioned by criminal offending are not adequately transmitted to potential offenders.56 In other words, there is a failure of “threat communication” as it affects risk perception and negatively impacts crime rates.57 Yet studies repeatedly show that awareness of potentially severe sanctions does not produce less crime. In one of the most wide-ranging studies of its type, 1,500 respondents in 54 large urban countries were interviewed to assess whether respondents had higher estimates of the certainty and severity of punishment and its timeliness (celerity) in jurisdictions where the levels were in fact higher.58 No such link was established. The authors of the study (Kleck, Sever, Li and Gertz) noted that this is irrespective of whether the respondents had prior convictions or had no prior experience with the criminal justice system. They concluded that:

There is generally no significant association between perceptions of punishment levels and actual levels that CJS [criminal justice system] agencies work hard to achieve, implying that increases in punishment levels do not routinely reduce crime through general deterrence mechanisms. Increases in punishment might do so through incapacitative effects, the effects of treatment programs linked with punishment, or other mechanisms, but are not likely to do so in any way that depends on producing changes in perceptions of risk … Thus, increased punishment levels are not likely to increase deterrent effects, and decreased punishment levels are not likely to decrease deterrent effects.59

A second explanation is that higher sentences do nothing to address the underlying causes of criminal behaviour. The deterrence argument is based on the economic rationalist theory of choice; it assumes that offenders rationally “choose” to offend in a type of criminological cost/benefit calculation. Of course, sociologists argue that this theory fails to account for the myriad reasons that predispose some individuals, and some groups, to crime. As Henry observed:

[M]uch of the criminological literature has demonstrated that there are a variety of motivations that shape criminal activity ranging from biological predispositions, psychological personality traits, social

55 Entorf, n 52, p 30.
learning, cognitive thinking, geographical location and the ecology of place, relative deprivation and the strain of capitalist society, political conflict and social and sub-cultural meaning.

This observation is considered self evident by many sociologists. Lamenting the failure of politics to adequately respond to this problem, Michael Tonry has suggested that the (desired) deterrent effect of harsher penalties on such offenders is “better characterized as ideological rather than as evidence-based”. In his survey of the academic literature, Tonry made the following simple observation:

Most people sent to prison are socially and economically disadvantaged, most are or have been alcohol or drug dependent, and most lack strong private systems of familiar or social support. Most after their release are stigmatized and often are explicitly handicapped by laws precluding many kinds of employment. Neither in the United States nor in the United Kingdom are strong systems of state support in place to provide adequate housing or income to ex-prisoners. In lawyer talk, a judge could take “judicial notice” (ie form a conclusion without needing to hear evidence) that already disadvantaged ex-prisoners facing additional handicaps and lacking systems of support are more likely than other people to engage in crime. Duh!

A third explanation is the question of delay and similar systemic failure. In a recent wide-ranging extensive analysis of deterrence research, it has been postulated that a central reason for the ineffectiveness of marginal general deterrence is the extent of delays between detection and the imposition of punishment:

It is argued that the empirical evidence does support the belief that criminal offenders are rational actors, in that they are responsive to the incentives and disincentives associated with their actions, but that the criminal justice system, because of its delayed imposition of punishment, is not well-constructed to exploit this rationality.

This is an argument favoured by economic rationalists who consider that the effectiveness of punishment is increased by: (1) frequency of application; (2) immediacy of application; and (3) punishment used in conjunction with positive reinforcement of pro-social behaviour. Thus the amount of delay is an important part of the punishment-effectiveness matrix. As Friedman and Brinker have pointed out:

Punishment is not one single strategy but a collection of strategies that exist on a continuum from very mild to highly aversive approaches. Given our definition of punishment as a behavior-reducing technique, it is important to understand the nature of this continuum.

Hence, there are numerous sociological and institutional explanations for the failure of marginal general deterrence. It is conceded that none of them have been firmly proven. But cumulatively, they operate to soften the weight of the logical arguments in favour of marginal general deterrence.

**THE LOGICAL FAILURE OF THE LOGICAL FORM OF THE ARGUMENT**

As discussed in the introduction, the appeal of marginal general deterrence stems from the logical argument that can be made in support of its objective: the reduction of crime. The authors do not disagree with this objective, but challenge the means consistently adopted by courts and legislatures to achieve it. As noted in the preceding section, a number of sociological and institutional arguments have been advanced to explain the failure of marginal general deterrence. None have universal acceptance and hence the logical form of the argument remains potentially persuasive.

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61 Tonry M, “Less Imprisonment is No Doubt a Good Thing” (2011) 10(1) *Criminology and Public Policy* 137 at 139.

62 Paternoster, n 49. The same conclusion is reached in Tonry M, “The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings” (2009) 38 *Crime and Justice* 65 at 69, where Tonry stated that “[t]he clear weight of the evidence is that the marginal deterrence hypothesis cannot be confirmed”. See also Webster C, Doob A and Zimring F, “Proposition 8 and Crime Rates in California: The Case for the Disappearing Deterrent” (2006) 5 *Criminology and Public Policy* 417.

Cognitive and behavioural explanations have also been advanced to explain the gap between general marginal deterrence in theory and reality. Again, none of these theories have been proven. In years to come it is hoped that psychologists and other behavioural experts will provide a valid explanation for the failure of marginal general deterrence.

But it is not necessary to wait until that time to at least diminish the intuitive appeal of the marginal deterrence theory. The logical form of the argument in favour of marginal general deterrence is set out in the introduction of this article. As noted, it is an ostensibly logically valid argument. And in fact, the evidence relating to marginal general deterrence partially supports the argument. As discussed above, absolute general deterrence does work. This is established by premises one to four.

The premise which has not been validated by empirical inquiry is the last one: the claim that the greater the potential punishment, the stronger the desire to avoid being subjected to it.

Logically this premise may seem appealing, but paradoxically it is the logical assessment of the premise that illustrates its flaw. An incontestable aspect of the human condition is that the matters which influence human action are not confined to logic alone. We are moved significantly, and perhaps principally, by our emotions and desires. If human action was dictated totally by logic people would avoid high-risk behaviour which involves short-term enjoyment, but is known to carry significant risks. The continued high incidence of tobacco use, alcohol consumption and the obesity epidemic plaguing Australia (which has been subjected to near saturation levels of public health campaigns) is concrete proof that human behaviour is not solely, and perhaps not even principally, guided by logical considerations.

Accordingly, there is no basis for simply assuming that when deciding whether or not to commit a crime, humans are automatically influenced by the size of the penalty which may be imposed if apprehended.

This apparent gulf between our logical beliefs and action is a phenomenon that has been recognised for centuries. In the 18th century, Scottish philosopher David Hume distinguished between two states of mind: beliefs and desires. Beliefs are copies or replicas of the way we believe the world to be. Desires are representations of how we would like the world to be; they are our wants and are impacted greatly by our emotional preferences. On their own, beliefs can never provide a source of motivation; “they are perfectly inert, and can never either prevent or produce any action”. It is only our desires that can motivate us. We can assess beliefs for truth and falsehood – a true belief being one which is a copy of the way the world actually is. In order for an action to occur, we need: (a) desire that prompts us to effect a certain change in the world; and (b) a belief informing us how this change can be achieved.

According to Hume, only beliefs can be true or false, and hence are subject to reason. Desires, on the other hand are “original facts and realities”, they just fall upon us. They cannot be true or false and therefore are not amenable to rationality: “Tis not contrary to reason to prefer the destruction of

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65 A federal government study (the National Health Survey) reported that in 2007-2008, 61.4% of Australians were overweight or obese: Department of Health and Ageing, National Health Survey 2007-08 (2008), http://www.health.gov.au/internet/healthyactive/publishing.nsf/Content/overweight-obesity viewed 8 September 2011.


67 Hume, n 66, p 458.

68 Hume, n 66, p 416.
the whole world to the scratching of my finger”.69 A desire “must be accompay’d with some false judgment, in order to its being unreasonable”; and even then “tis not the [desire] which is unreasonable, but the judgment”.70

Thus, the fallacy of the logical argument in support of marginal general deterrence is exposed if one looks at the argument, not through the prism of a purely logical construct, but instead through the lens of the actual sentiments that shape human conduct. The reason that people are not discouraged from committing crime by the size of the penalty is obvious: even in rational people there are an array of other more compelling factors that drive behaviour, these include anger, revenge, greed and jealousy, which cannot be negated even by harsh penalties.

The only consideration that can dilute the strength of these factors is an individual’s awareness that to act on them would ensure they remain dissatisfied primarily because they will be apprehended – hence the success of absolute general deterrence, which is now discussed.

Ultimately, whatever the reasons, the empirical evidence supports the contention that marginal general deterrence is an illusory concept – a mirage – which does little, if anything, to influence crime rates and trends.71

THE SUCCESS OF ABSOLUTE GENERAL DETERRENCE

By contrast, the evidence relating to absolute general deterrence is much more positive. There have been several natural social phenomena which have demonstrated human behavioural responses to a drastic reduction in the likelihood (perceived or real) of punishment for criminal behaviour. The key aspect to these phenomena was that the change occurred abruptly and the decreased likelihood of the imposition of criminal sanctions was the only apparent change in social conditions.

Perhaps the clearest instance of this was the police strike in Melbourne in 1923, which led to over one-third of the entire Victorian police force being sacked.72 Once news of the strike spread, mobs of thousands poured into the city centre and engaged in widespread property damage, looting of shops, and other acts of civil unrest including assaulting government officials and torching a tram. The civil unrest lasted for two days, and was only quelled when the government enlisted thousands of citizens, including many ex-servicemen to act as “special” law enforcement officers. This behaviour was in complete contrast to the normally law-abiding conduct of the citizens of Melbourne.

The Canadian Sentencing Commission, after reviewing the available literature, also took the view that absolute deterrence works:

Even if there seems to be little empirical foundation to the deterrent efficacy of legal sanctions, the assertion that the presence of some level of legal sanctions has no deterrent effects whatsoever, has no justification. The weight of the evidence and the exercise of common sense favour the assertion that, taken together, legal sanctions have an overall deterrent effect which is difficult to evaluate precisely.73

The Canadian Sentencing Commission noted that “the old principle that it is more the certainty than the severity of punishment which is likely to produce a deterrent effect has not been invalidated by empirical research”.74 The connection between the certainty of punishment and the crime rate has

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69 Hume, n 66, p 416.
70 Hume, n 66, p 416.
71 Tonry, n 61 at 141.
72 The discussion regarding the events of the strike comes from Milte K and Weber TA, Police in Australia (1977) pp 287-292.
74 Canadian Sentencing Commission, n 73, pp 136-137. In this context certainty means the likelihood of being detected and having a sanction imposed. See also Entorf, n 52.
been reproduced by numerous studies.\textsuperscript{75} This point has not been totally missed by the courts:

The deterrent to an increased volume of serious crimes is not so much heavier sentences as much as the impression on the minds of those who are persisting in a course of crime that detection is likely and punishment is certain. The first of these factors is not within the control of the courts, the second is. Consistency and certainty of sentence must be the aim … Certainty of punishment is more important than increasingly heavy punishment.\textsuperscript{76}

The strongest empirical evidence in support of absolute deterrence comes from the United States, which has over the past two decades seen a marked increase in police numbers\textsuperscript{77} and a sharp decrease in crime. The near universal trend of data confirms that an increased police presence equates to an increased actual and perceived likelihood of detection; invariably resulting in a reduction in crime rates.\textsuperscript{78}

The connection is complex due to the number of changes that occurred concurrently during this period and which may also have had an effect on the crime rate. The changes include such things as better police methods, a generally improving economy, and other variables previously noted including abortion trends and the greater use of imprisonment. However, it has been noted that the greatest reduction in crime numbers occurs where police are highly visible.

This accords with the ostensible success of “zero tolerance”\textsuperscript{79} policing, particularly in locations such as New York City, where the deployment of the greatest number of extra police resulted in the sharpest decline in crime in the metropolis.\textsuperscript{80} This trend was evident well over a decade ago. In a period of only several years following the introduction of zero tolerance policing, the rates of violent and property crime fell by approximately 35%.\textsuperscript{81}

After evaluating the large number of surveys analysing the connection between more police and the crime rate, Raymond Paternoster concluded:

What we are left with, then, is that clearly police presence deters crime, but it is probably very difficult to say with any degree of precision how much it deters. Let us take Levitt’s estimate as a reasonable guess, that increasing the size of the police force by 10% will reduce crime by about 4% or 5%.\textsuperscript{82}

The causal link between lower crime rates and an increased perception of being caught supports the theory of absolute deterrence. Being detected acts as a retardant to crime because there is an

\textsuperscript{75} For example, see Ross HL, “Law, Science and Accidents: The British Road Safety Act of 1967” (1973) 2 The Journal of Legal Studies 1 at 26 where road accident casualty rates were compared from 1961 to 1970 in order to determine the impact of the breathalyser in 1967. A significant drop in the casualty rate was noted after the introduction, thereby leading to the conclusion that this was due to an increased subjective probability of detection and punishment.

\textsuperscript{76} R v Griffiths (1977) 137 CLR 293 at 327 (emphasis added).

\textsuperscript{77} Levitt, n 46 at 177, where Levitt estimated the increase at about 14%.

\textsuperscript{78} For a discussion, see Eck J and Maguire ER, “Have Changes in Policing Reduced Violent Crime?: An Assessment of the Evidence”, in Blumstein and Wallman, n 47, p 207.

\textsuperscript{79} Zero tolerance policing is founded on “broken windows” theory which provides that strict enforcement of minor crime and restoring physical damage and decay, such as broken windows and graffiti, would prevent the fostering of an environment which was conducive to more serious of fences being committed: see Wilson JQ and Kelling G, “Broken Windows” (1982) 249(3) The Atlantic Monthly 29.

\textsuperscript{80} Zimring FE, The Great American Crime Decline (2007).


\textsuperscript{82} Paternoster, n 49 at 799. See also Levitt, n 46. But see Eck and Maguire, n 78, p 207, who argue that these conclusions are not valid, principally because of the incomplete nature of the data and cursory analysis involved.
underlying assumption that if caught then some hardship awaits. Vice versa, if rather than punishing offenders police handed out lollies or movie tickets, one assumes that more police would result in more crime.

Thus, absolute general deterrence does work, at least to the extent that if there was no real threat of punishment for engaging in unlawful conduct, the crime rate would soar. It follows that the threat of punishment discourages potential offenders from committing crime. This justifies the punishment of wrongdoers. However, the evidence does not support the view that this relationship operates in a linear fashion, that is, the deterrent effect of sanctions does not increase in direct proportion to the severity of sanctions.

While the objective of deterrence justifies imposing punishment, it is at best a remote consideration when it comes down to the question of how much punishment should be imposed. Absolute general deterrence provides a justification for imposing punishment but it does not justify the imposition of penalties that exceed the objective gravity of the offence. The precise duration of penalties must be determined by other sentencing considerations, such as proportionality.

As discussed above, it seems that people are not totally irrational when they contemplate committing crime. The evidence shows that to the extent that potential offenders do make a cost/benefit decision about committing crimes, they generally only weigh up the risk of being caught, not what will happen when they are apprehended. Thus, the best way to reduce crime is to increase the perception in people’s minds that they will get caught if they break the law. The size of the penalty does not seem to impact on this decision.

**NORMATIVE OBJECTION TO GENERAL DETERRENCE**

The strongest theoretical criticism of general deterrence is that it involves inflicting additional pain on the individual in order to advance the interests of the community. This concept of sacrificing or harming the interests of one person to benefit others is a very persuasive criticism of the utilitarian theory of punishment (and morality in general).

It is regarded as being repugnant to the current moral orthodoxy which is the human rights ethic. Within this ethic, each individual is regarded as being morally autonomous and complete and it is therefore inappropriate to aggregate interests to defeat the rights of personhood.

This objection to marginal general deterrence was noted by Andrew Ashworth who stated that giving weight to general deterrence involves treating “citizens merely as numbers to be aggregated in an overall social calculation.” At the core of this objection is the Kantian maxim that a person should always be treated as an ends, and never as a means.

The normative objection against marginal general deterrence is strong – but not necessarily insurmountable. Most human rights theorists accept that no right is absolute and can be defeated in order to promote the greater good. Public rights can sometimes trump private rights. But in order to fall into this category, the offsetting benefit must be clearly established. In the case of marginal general deterrence, this balancing process does not even commence. This is because the evidence does not support the theory that increasing the severity of penalties (the offsetting benefit) leads to a reduction in crime. In other words, if harsher penalties do not equate to fewer crimes, then sacrificing individual rights for this objective is unjustifiable, and morally unconscionable.

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Accordingly, the normative objection remains sufficiently strong to justify rejecting marginal deterrence as a sentencing aim. Unless its effectiveness can be proven, then marginal deterrence should no longer be pursued by courts, particularly in light of its moral repugnance.

CONCLUDING REMARKS — REFORM PROPOSALS

A number of points emerge from the above discussion. The most important is that courts should no longer increase sentences to pursue the objective of marginal general deterrence. The practice of imposing harsher sentences to discourage other offenders from committing the same or similar offences does not work. The additional pain that is inflicted on offenders to pursue this objective has no positive social effects and is therefore pointless.

As a result there should follow a general reduction of penalty severity to the extent that marginal general deterrence currently drives sentencing outcomes. In relation to crimes such as revenue and drug offences, this would result in a considerable reduction in the tariff for such offences.

These reforms are best achieved by legislative change. This is unlikely to happen as the “law and order” agenda coalesces with a public perception that being “tough on crime” means increasing penalties for criminal offences or instigating mandatory sentencing regimes. Political leadership in this area is unlikely to risk the alienation that challenging, or even confronting, these perceptions would entail. This is especially true as long as arguments in favour of longer sentences appear, rightly or wrongly, more economically attractive than those in favour of more police.

These reforms can yet be achieved by judicial reassessment of the meaning and role of general deterrence in the sentencing process. General deterrence as an objective should be interpreted as confined to absolute general deterrence. This means that sentences that impose a hardship in the form of a deprivation that people would seek to avoid are seen as intrinsically satisfying the deterrent objectives of sentencing. Most sentencing options, such as fines, licence disqualifications and compulsory work orders would satisfy this criteria, although a possible exception to this may be suspended sentences. General deterrence could only justify the imposition of a more severe sentence where the sentence that would be imposed amounted to no hardship whatsoever. Thus, there is a need to rethink sanctions in the nature of bonds and the statutory equivalents thereto. Instead of imposing a bond, a fine would normally be a preferable disposition.

The authors do not suggest this reform because imprisonment, and even very long terms of imprisonment, is inappropriate. Rather, it is just that such dispositions will need to be justified by reference to other criteria. There are a number of other sentencing objectives which can be used to justify long jail terms, especially the principle of proportionality and the goal of incapacitation.

Finally, it is important to identify the qualifications or limits to the reforms in this article. The empirical evidence suggesting that marginal general deterrence does not work is weighty. But it is not definitive for the reasons set out earlier in this article – in particular the number of variables that impact on the crime rate. Further, most of the data is derived from the United States. Also, generally speaking, the data is not offence specific. It may be the case that certain forms of crimes are more amenable to deterrence by harsh penalties than others and that United States findings are not transferrable to the Australian setting.

However, the trend of the data against the efficacy of harsh punishment to deter crime is so strong that it should now be assumed that marginal general deterrence is an illusion. This should be the default position given that it is morally wrong to sacrifice the interest of individuals for the common good unless there is a demonstrable overall benefit to be attained. No such demonstrable benefit exists in the case of marginal general deterrence and it should be abandoned.

88 For a discussion of the ambit of sentencing options throughout Australia, see Laws of Australia, Thomson Reuters service, Sentencing.

89 It has been argued that suspended sentences constitute no punishment at all, see Bagaric M, “Suspended Sentences and Preventive Sentence: Illusory Evils and Disproportionate Punishments” [1999] UNSW Law J 6.
The capacity of criminal sanctions to shape the behaviour of offenders: Specific deterrence doesn’t work, rehabilitation might and the implications for sentencing

Mirko Bagaric and Theo Alexander

There is a considerable gap between the law and knowledge regarding the efficacy of state-imposed sanctions to achieve several key sentencing objectives. Two sentencing objectives which often carry considerable weight in the sentencing calculus are rehabilitation and specific deterrence, despite the fact that neither has been proven to be attainable. This article examines the empirical data on whether specific deterrence and rehabilitation are attainable, and consequently whether they should be retained or abolished as sentencing objectives.

INTRODUCTION

The questions addressed in this article

Sentencing is a purposeful endeavour. It has a number of objectives. The key ones include denunciation, retribution, specific deterrence, general deterrence, community protection and rehabilitation. While these objectives may in theory be desirable, it is not clear whether they are pragmatically achievable.

Legislatures and courts assume that sanctions can achieve such goals, despite the fact that there is little, if any, proof (or inquiry) into the efficacy of punishment to achieve them. This is somewhat ironic given the forensic, evidence-driven, criminal trial process which is a precursor to many sentencing hearings.

Sentencing is the area of law where there is arguably the greatest gap between theory and evidence. This article goes some way towards bridging the gap between assumption and knowledge in relation to two of the key sentencing objectives. It provides an analysis of the current empirical evidence regarding whether criminal sanctions are capable of (a) rehabilitating offenders; and (b) specifically discouraging offenders from future offending.

In short, the article seeks to provide answers to the questions: “Does rehabilitation work?” and “Does specific deterrence work?” If the answer is no, logically and normatively courts and legislatures should reform this area of the law. Previously, the authors undertook a similar analysis regarding general deterrence.

The meaning of specific deterrence and rehabilitation

Specific deterrence aims to discourage crime by punishing individual offenders for their transgressions, thereby convincing them that crime does not pay. In effect, it attempts to dissuade offenders from re-offending by inflicting an unpleasant experience on them (normally imprisonment) which they will seek to avoid in the future.

Rehabilitation, like specific deterrence, aims to discourage the commission of future offences by the offender. The main difference between the two lies in the means used to encourage desistence from
crime. While specific deterrence focuses on frightening an offender into not re-offending, rehabilitation seeks to alter the values of the offender so that he or she no longer desires to commit criminal acts: it involves the renunciation of wrong doing by the offender and the re-establishment of the offender as an honourable, law-abiding citizen. It is achieved by “reducing or eliminating the factors which contributed to the conduct for which [the offender] is sentenced”. Thus, it works through a process of positive internal attitudinal reform.

Rehabilitation and specific deterrence both aim to alter the behaviour of offenders

Rehabilitation and specific deterrence generally operate to influence the sentencing discretion in different ways. Specific deterrence, where it is relevant, aggravates the penalty, whereas rehabilitation normally mitigates the penalty. Both are analysed in the same article because they have the commonality that they seek to evoke attitudinal change in the offender, albeit by different means. In relation to both goals, the court attempts to directly change the sentiments and behaviour of the particular offender (to make him or her more law-abiding), as opposed to striving to achieve wider goals such as denunciation and general deterrence which only incidentally relate to the offender.

It is difficult to establish conclusively the efficacy of punishment to attain the goals of rehabilitation or specific deterrence. This is because of the many variables that influence human decision-making, and the difficulty of establishing controlled experimental groups in the real environment that is the criminal justice system. Given that rehabilitative programs are often undertaken in the prison setting, there is also the real possibility that specific deterrence and rehabilitation may occur simultaneously, or that they may, in fact, counteract each other. Yet, as discussed below, it is possible to develop a clear picture of where the evidence currently stands and, in fact, this is necessary to properly direct future inquiry.

It is clear that criminal inclination can change – but can sentencing impact on this?

At the outset it is important to recognise that there is no question that people can change their attitudes and behaviour to become law-abiding. Few people commit offences for the duration of their lives. Thus, the process of self-reform is not only possible, but typical. The reasons that people stop committing crime are many and varied, but there are some well-established links between the human traits and crime, and logically it would seem that the most effective way to reduce recidivism is to attempt to dissociate the individual from the criminogenic influences.

However, this rarely presents itself as a viable option. Many factors that increase the risk of a person committing an offence are intrinsic and relate to immutable personal characteristics. As discussed further below, the main factors that fall into this category, in the Australian context, are being male, young and Indigenous.

Then there are social or situational considerations that increase the risk a person will offend. Most of them are entrenched and difficult to surmount, and include lower socio-economic status and unemployment. Poor people are grossly over-represented in jails across the world. As people become more affluent, they commit less crime – apparently because they then have more to lose by being imprisoned. There are numerous other well-documented causes of crime. Empirical studies also

3 For example, see Vartzokas v Zanker (1989) 51 SASR 277 at 279; 44 A Crim R 243.
4 Channon v The Queen (1978) 33 FLR 433 at 438.
7 For example, see Box S, Recession, Crime and Punishment (1987) p 96, who, after reviewing 16 major studies between income inequality and crime, concluded that income inequality is strongly related to crime; see also Carlen P, “Crime, Inequality and Sentencing” in Duff RA and Garland D (eds), A Reader on Punishment (1994) p 309. Prison numbers illustrate this quite graphically. In Australia, the rate of Indigenous imprisonment is 14 times higher than that of the general population: see ABS, http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4512.0Dec%202006 viewed 22 May 2012.
show that there is a link between legal compliance and the content of law. Normative issues are closely linked to compliance with the law. People obey the law not only because it is in their self-interest to do so, but also because they believe it is morally proper to do so. As will be seen later in this article, it is on these attitudinal dimensions which many rehabilitative programs are focused.

Thus, there is no doubt that an individual’s inclination to commit crime can be changed and reduced, and in fact most people voluntarily desist from crime at some point – although the general trend is that “those who start early in crime tend to finish late”. This article focuses on whether external measures taken by the criminal justice system can positively impact on the process.

Overview of conclusions reached
The authors conclude that there is no evidence that inflicting harsh sanctions on people makes them less likely to re-offend in the future. The evidence is, in fact, to the contrary. The level of certainty of this conclusion is very high – so high, that specific deterrence should be abolished as a sentencing consideration.

The evidence about rehabilitation is less conclusive, but on balance it seems that specific forms of interventions may be able to reduce recidivism. Importantly, it seems that offenders can even be rehabilitated in a custodial setting. This could potentially have an unexpected impact on the sentencing calculus. The pursuit of rehabilitation normally leads to less severe sanctions; however, if offenders could be effectively reformed while in prison, it could diminish the mitigatory role of rehabilitation. However, the current state of knowledge about the capacity to reform offenders is so rudimentary that it does not strongly support any change in the law or policy changes. All that can be said with confidence, at this stage, is that there is a pressing need for more empirical research relating to rehabilitation.

The role of specific deterrence and rehabilitation in current sentencing practice is considered in the next part of this article. Then the empirical evidence is examined regarding the efficacy of punishment to specifically deter offenders followed by the same inquiry made in relation to rehabilitation. Finally, the authors set out the implications of the findings in this article for law reform and further research.

THE ROLE OF SPECIFIC DETERRENCE AND REHABILITATION IN CURRENT SENTENCING LAW AND PRACTICE

Rehabilitation is expressly set out as a sentencing consideration in the sentencing statutes of all Australian jurisdictions and is an important objective recognised in common law. Rehabilitation is normally given most weight in relation to young offenders and those with a little or criminal record. It also has a strong role where the offender has voluntarily disclosed the crime; where the offender has favourably responded to previous court orders and where there is a considerable delay between the offence and sentencing during which the offender has not re-offended.

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9 Weatherburn, n 6 at 3.
10 Crimes (Sentencing) Act 2005 (ACT), s 7(1)(d); Crimes Act 1914 (Cth), s 16A(2)(n); Crimes (Sentencing Procedure) Act 1999 (NSW), s 11; Sentencing Act 1995 (NT), s 5(1)(b); Sentencing Act 1991 (Vic), s 5(1)(c); Penalties and Sentences Act 1992 (Qld), s 9(1)(b); Criminal Law (Sentencing) Act 1988 (SA), s 10(m); Sentencing Act 1997 (Tas), s 3(e)(ii); Sentencing Act 1995 (WA), s 6(4)(b).
11 Yardley v Betts (1979) 22 SASR 108 at 112 (King CJ); 1 A Crim R 329.
13 FJL v Western Australia [2010] WASCA 8; Skipworth v Western Australia [2008] WASCA 64 at [13] (McLure J); Cameron v The Queen (2002) 209 CLR 339 at [65].
15 R v Todd [1982] 2 NSWLR 517 – but this is given less weight where the cause of the delay is attributable to the offender; Scook v The Queen (2008) 185 A Crim R 164; Gok v The Queen [2010] WASCA 185.
Offenders with a poor criminal history are not necessarily excluded from consideration of their prospects for rehabilitation, particularly where there is some evidence that the offender has taken steps to integrate him or herself into the community. In respect of very grave offences, rehabilitation is sometimes regarded as irrelevant – swamped by other considerations, in the form of community protection and general and specific deterrence.

Basten J in *Elyard v The Queen* noted that in evaluating an offender’s prospects of rehabilitation, the court will normally look to several sources, including:

(a) evidence of the past conduct and behaviour of the offender
(b) professional opinions, taking into account past conduct and behaviour and expressing views as to future prospects, and
(c) at least in some cases, the opinions and expressions of intention of the offender himself or herself.

There are a number of common indicators suggestive of good prospects for rehabilitation, including obtaining employment, completion of a drug rehabilitation program, attendance at a residential rehabilitation program, apology to the victim of the offence, compliance with onerous bail conditions, rendering of compensation, evidence of abstinence from drug or alcohol use, remorse and support of family members.

Rehabilitation operates normally to reduce the severity of the sanction. Although there are many rehabilitative programs offered in prison, rehabilitation generally is advanced by defence lawyers as a basis for avoiding a custodial term, or at least reducing the length of the term that would otherwise have been imposed. This follows from the fact that a custodial sentence is not considered as rehabilitative.

Specific deterrence is a central common law sentencing objective and is given express statutory recognition in all Australian jurisdictions. Specific deterrence applies most acutely in relation to serious offences and to offenders with significant prior convictions, since it is assumed previous sanctions have failed to stop their offending behaviour. Conversely, it has little application where an offender has voluntarily desisted from further offending or where the offender was suffering from impaired intellectual or mental functioning at the time of the offence.

Where specific deterrence is applicable to the sentencing of an offender, it operates to increase the severity of the sanction. It is not feasible to ascertain the exact weight that is accorded to specific deterrence given the instinctive synthesis approach to sentencing (where only two considerations – pleading guilty and co-operating with authorities – are accorded specific weighting), however,

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16 Vartzokas v Zanker (1989) 51 SASR 277 at 279 (King CJ); 44 A Crim R 243.
21 For example, see R v Houston (1982) 8 A Crim R 392 at 399; Muldrock v The Queen (2001) 244 CLR 120 at [56]-[58].
22 Crimes Act 1914 (Cth), ss 16A(2)(i); Crimes (Sentencing) Act 2005 (ACT), s 7(1)(b); Crimes (Sentence Procedure) Act 1999 (NSW), s 3A(b); Sentencing Act (NT), s 5(1)(c); Penalties and Sentences Act 1992 (Qld), s 9(1)(c); Criminal Law (Sentencing) Act 1988 (SA), s 10(1)(j); Sentencing Act 1997 (Tas), s 3(e)(j); Sentencing Act 1991 (Vic), s 5(1)(b).
23 See, for example, DPP v Zullo [2004] VSCA 153; DPP v Lawrence (2004) 10 VR 125.
24 See, for example, Saunders v The Queen [2010] VSCA 93.
logically, it can operate to extend the length of a prison term or convert what would have otherwise been a non-custodial term into a term of imprisonment.28

INEFFECTIVENESS OF SPECIAL DETERRENCE

As noted in the introduction to this article, it is difficult to obtain information regarding the effectiveness of sanctions in deterring offenders from committing offences at the expiry of a sanction. Offenders may not re-offend for numerous reasons, apart from the fear of being subject to more punishment.

In some cases the offending is aberrant conduct which would not have been repeated; a suitable opportunity may not again present itself (this obviously relates most acutely to opportunistic offences); rehabilitation may have occurred;29 or the socio-economic status of the offender may improve for the better. Further, offenders are obviously always ageing, and, as discussed below, empirical evidence strongly supports the view that criminal behaviour is mainly a young man’s endeavour.

However, the overwhelming weight of evidence available supports the view that severe punishment (namely imprisonment) does not deter offenders: the recidivism rate of offenders does not vary significantly regardless of the form of punishment to which they are subjected.

One of the rare studies which has been used to suggest that prison can deter offenders is a six-year follow-up study of a large sample of offenders sentenced in Wales and England in January 1972.30 The study revealed that reconviction rates for imprisonment were lower than for suspended sentences. Nigel Walker suggested that this supports the capacity of imprisonment to specifically deter offenders. This hypothesis, though, is far from strong. As Walker noted:

Strictly speaking, all that this tells us is that the suspended sentence is less effective than an actual prison sentence. It is theoretically possible that the absolute efficacy of an actual prison sentence is nil (or even a minus quality) and that the absolute efficacy of a suspended sentence is even less: that is, that it increases the likelihood of reconviction.31

While Walker ultimately thinks that this explanation is unlikely, it is unsound to rely on comparisons involving the use of suspended sentences. The sting in the suspended sentence supposedly lies in the risk that the offender may be sent to jail if he or she transgresses during the term of the sentence. However, it is questionable whether such a risk is capable of comprising a punitive measure. Every person in the community faces the risk of imprisonment if he or she commits an offence punishable by imprisonment.32

In this way the natural and pervasive operation of the criminal law casts a permanent Sword of Damocles over all our heads: each action we perform is potentially subject to the criminal law. Despite this, it is not tenable to suggest that we are all undergoing some type of criminal punishment. Accordingly, the suspended sentence is arguably not, in fact, a sanction in the proper sense. Walker further noted that the results of the same survey indicated that re-conviction rates for offenders dealt with by way of fine were about the same as that expected for the whole sample; “neither markedly better nor markedly worse than those for imprisonment”.33 Thus, when a hard form of treatment (imprisonment) is compared with the fine, which is a much softer sanction, there is no variation in the

31 Walker, n 30, p 44.
32 Which are the only type of offences for which a suspended sentence can generally be restored.
33 Walker, n 30, p 45.
re-conviction rate. However, if specific deterrence did work, one would expect the pain of imprisonment to be a more powerful regulator of future behaviour than a fine.\textsuperscript{34}

**ABS study on reimprisonment casts doubt on specific deterrence**

The crudest way to measure the effectiveness of specific deterrence is to measure the trajectories of offenders once they are released from prison, so far as their subsequent criminal offending is concerned. A comprehensive study into this was undertaken by the Australian Bureau of Statistics (ABS) in 2010.\textsuperscript{35}

The report is significant for a number of reasons. It is an Australian study; it was conducted over an extensive period; the sample size is very large; and it was conducted by an independent body. The report is based on a 14-year longitudinal study for the period 1 July 1994 to 30 June 2007. The study grouped prisoners into two cohorts. The first consisted of those released between 1 July 1994 and 30 June 1997. This consisted of 28,584 people. The second comprised prisoners released between 1 July 2001 and 30 June 2004. It consisted of 26,700 people.

The study compared recidivism rates from both cohorts within three years of release. It also examined the 10-year reimprisonment rate for the earlier cohort.

More generally, the report looked at the general profile of prisoners. In relation to the total prison numbers, 92% were male and 18% were Indigenous. The median age of prisoners for their first stint of imprisonment was 28 years old.\textsuperscript{36}

In terms of the general imprisonment rate during the study period, it was noted that from 1994 to 2007 the prison population grew on average at the rate of 3.7% annually and the number of prisoners with prior imprisonment grew at a rate of 3.2% each year, although this was not steady – with the rate ranging from 56% to 62%.\textsuperscript{37} Thus, more than half of all the people sentenced to imprisonment during the survey period had previously served a term of imprisonment.

The data on the portion of released prisoners who return to imprisonment within the respective three-year periods are even more illuminating. The report noted that for the 1994 to 1997 cohort, about 20% were reimprisoned within two years; one-quarter was reimprisoned within three years, and 40% by the end of the 10-year survey period.\textsuperscript{38}

A surprising finding, given that rehabilitative measures had presumably improved in the decade to 2004-2007, was that prisoners released in the later cohort were more likely to be reimprisoned than the earlier cohort over an equivalent three-year follow up period.\textsuperscript{39} The reimprisonment rate for the latter cohort was 17% higher than for the earlier one – the rate for 1994 to 1997 was 25.1% compared to 29.5% for the 2004 to 2007 cohort.\textsuperscript{40}

These findings are significant because in raw terms they provide firm evidence that imprisonment does not strongly diminish the likelihood of re-offending. Forty per cent of individuals who are sentenced to imprisonment are not sufficiently discouraged by the experience to ensure that they are not again imprisoned. The figure of 40% is conservative because the study only recorded reimprisonment rates; it did not record recidivism per se. Thus, released offenders who committed

\textsuperscript{34} There is some evidence to show that offenders who are dealt with lightly are unlikely to re-offend. A study of shoplifters showed that those who were dealt with by simply being apprehended and interrogated by store police, and then set free, rarely re-offended: see Andenaes J, “Does Punishment Deter Crime?” in Ezorsky G (ed), Philosophical Perspectives of Punishment (1978) p 342.


\textsuperscript{36} ABS Report, n 35, p 15.

\textsuperscript{37} ABS Report, n 35, p 12.

\textsuperscript{38} ABS Report, n 35, p 16.

\textsuperscript{39} The implications of this are further discussed later in the article.

\textsuperscript{40} ABS Report, n 35, p 25.
crimes for which they were not imprisoned were not recorded. Of course, this information alone does not present a knock-down argument against specific deterrence – it is possible that the rate of offending that resulted in imprisonment would have been higher had the cohorts not had a first stint of imprisonment.

However, drilling into the data raises further concern about the efficacy of specific deterrence. The report identified several statistically relevant key factors that affected reimprisonment. The most important were:

• **Age**: Prisoners aged 17-19 years old were 2.6 times more likely than the general cohort to be reimprisoned; whereas those aged 35 and above were less than 0.5 times likely to be reimprisoned;\(^{41}\)

• **Indigenous background**: Prisoners with this profile were twice as likely to be reimprisoned within 10 years;

• **Offence type**: Prisoners who were released after being sentenced for burglary or theft had the highest rate of reimprisonment, whereas those serving time for drug or sex offences had the lowest reimprisonment rates;

• **Prior imprisonment**: An offender who has been in jail previously was nearly three times more likely to be imprisoned within 10 years than a first-time prisoner; and

• **Length of imprisonment**: The reimprisonment rate for prisoners over a 10-year period who served 0 to six months was 0.8, but increased to 1.2 times for those who served more than 18 months.\(^{42}\)

The last consideration is illuminating. If imprisonment did actually deter future offending, it is to be expected that a longer period of imprisonment would be more effective at achieving this objective. The fact that the opposite occurs casts considerable doubt on the plausibility of specific deterrence.

This is reinforced by studies that compare re-offending rates of prisoners with similar profiles and backgrounds, with adjustments made for factors which are known to influence re-offending. A limitation of this type of analysis is that it is most often undertaken overseas, and in particular in the United States. However, a relatively recent analysis was undertaken in Australia.

**Australian study involving matched pairs of offenders**

Don Weatherburn, in a study for the New South Wales Bureau of Crime Statistics and Research, which was also released in August 2010, titled *The Effect of Prison on Adult Re-offending*,\(^{43}\) compared re-offending rates for people convicted of burglary and non-aggravated assault. The study compared 96 “matched pairs” of burglars and 406 matched pairs of offenders convicted of non-aggravated assault. Offenders were matched by reference to offence type, previous convictions, prior prison terms, number of concurrent offences and bail status at final hearing. A regression process was undertaken to control factors such as gender, race, age, plea and legal representation. One member of each pair received a non-custodial term for the relevant offence, the other was sentenced to prison.

The study looked at offenders who were convicted in the years 2003 and 2004 and each matched pair was followed up for five years or until he or she was convicted of another offence (whichever came first).\(^{44}\)

The study noted that “prison exerts no significant effect on the risk of recidivism for burglary … [and] … the effect of prison on those who were convicted of non-aggravated assault seems to have been to increase the risk of further offending”.\(^{45}\) The report concluded that:

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There is no evidence that prison deters offenders convicted of burglary or non-aggravated assault. There is some evidence that prison increases the risk of offending amongst offenders convicted of non-aggravated assault but further research with larger samples is needed to confirm the results. This conclusion is limited by the fact that it relates to only two offence categories, but is made more compelling by the fact that it is consistent with the overwhelming trend of international research and literature reviews in this area.

Wide-ranging international studies also suggest specific deterrence is a fallacy

One of the most wide-ranging studies that has been conducted regarding the effectiveness of special deterrence was a literature review by Gendreau et al published in 1999 involving a review of 50 different studies, which related to a sample of 336,052 offenders – dating back to 1958 – which provided 325 comparisons. The study compared the recidivism rate of people who were sentenced to imprisonment as opposed to community service and those who were sentenced to longer and shorter terms of imprisonment.

The review established that recidivism rates for offenders who were sent to jail were similar to those who received a community sanction. Longer terms of imprisonment also did not reduce re-offending and, in fact, resulted in a 3% increase in recidivism. The authors concluded:

The data in this study represents the only quantitative assessment of the relationship between time spent in prison and offender recidivism. The database consisted of 325 comparisons involving 336,052 offenders. On the basis of the results, we can put forth one conclusion with a good deal of confidence. None of the analysis conducted produced any evidence that prison sentences reduce recidivism. Indeed, combining the data from the more vs. less and incarceration vs. community groupings resulted in 4% and 2% increases in recidivism.

This is confirmed by more recent empirical analysis. Nagin et al provided the most recent extensive literature review regarding specific deterrence. They reviewed separately the impact of custodial sanctions versus non-custodial sanctions and the effect of the length of sentence on re-offending. The review examined six experimental studies where custodial versus non-custodial sentences were randomly assigned; 11 studies which involved matched pairs; 31 studies which were regression based; and seven other studies which did not neatly fit into any of those three categories, and included naturally occurring social experiments which allowed inferences to be drawn regarding the capacity of imprisonment to deter offenders.

The last category included a study based on clemency granted to over 20,000 prisoners in Italy in 2006. A condition of release was that if those who were released re-offended within five years they would be required to serve the remaining (residual) sentence plus the sentence for the new offence. It was noted that there was a 1.24% reduction in re-offending for each month of the residual sentence. This observation can be explained on the basis that the threat of future imprisonment discouraged imprisonment. However, it was also noted that offenders who had served longer sentences prior to

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47 In the Australian context, the same conclusions have been reached in relation to juvenile offenders in the following reports: Kraus J, “A Comparison of Corrective Effects of Probation and Detention on Male Juvenile Offenders” (1974) 49 British Journal of Criminology 49; Weatherburn D et al, “The Specific Deterrent Effect of Custodial Penalties on Juvenile Reoffending” (2009) 33 Australian Institute of Criminology Reports: Technical and Background Paper 10.
49 Gendreau et al, n 48.
51 Nagin et al, n 50, pp 144-155.
being released had higher rates of re-offending, supporting the view that longer prison terms reduce the capacity for future imprisonment to shape behaviour.\textsuperscript{52}

Nagin et al concluded that offenders who are sentenced to imprisonment do not have a lower rate of recidivism than those who are not and, in fact, some studies show that the rate of recidivism is higher:

Taken as a whole, it is our judgment that the experimental studies point more toward a criminogenic rather than preventive effect of custodial sanctions. The evidence for this conclusion, however, is weak because it is based on only a small number of studies, and many of the point estimates are not statistically significant.\textsuperscript{53}

The review suggests that not only do longer jail terms not deter, but neither do tougher jail conditions. Studies also show that offenders who are sentenced to maximum security prisons as opposed to minimum security conditions do not re-offend less.

These general findings are supported by a more recent experimental study by Green and Winik\textsuperscript{54} who observed the re-offending of 1003 offenders who were initially sentenced for drug-related offences between June 2002 and May 2003, by a number of different judges whose sentencing approaches varied significantly (some were described as “punitive”, others as “lenient”), resulting in differing terms of imprisonment and probation. The study concluded that the length of imprisonment or probation had no effect on the rate of re-offending during the four-year follow-up period.

**Speculation regarding the reasons for the failure of specific deterrence**

Accordingly, the weight of evidence supports the view that subjecting offenders to harsh punishment is unlikely to increase the prospect that they will become law-abiding citizens in the future. This conclusion is so well established that in some circles the debate has moved on from whether specific deterrence works, to identifying the reasons that it does not and why it probably increases recidivism rates. Nagin et al suggested a number of reasons including that prison culture normalises and fosters criminal orientations; prison stigmatises people and reduces their opportunities to integrate into the normal community through employment and other activities; and prison fails to address the reasons for the offending.\textsuperscript{55}

However, the search for the reasons for the failure of specific deterrence is arguably misplaced. It assumes that there ought to be a link between the experience of imprisonment and crime reduction. There is no necessary basis for this assumption. Imprisonment is the most severe sanction in our system of justice. It is unpleasant. It necessarily involves a deprivation of liberty and a consequential inability to engage in and pursue many of the activities that are central to living a prosperous life, such as family relationships, career opportunities, shaping one’s environment and so on. These deprivations are obvious to all members of the community. It is not clear that the experience of these denials should be more determinative than the threat of them. In any event, from the perspective of law reform, the important inquiry is whether specific deterrence works, not the reasons for this – and on this matter, the issue is resolved.

**Rehabilitation: No Clear Evidence Whether It Works**

**Overview of historical context and conflicting evidence**

The effectiveness of rehabilitation as a way of reducing repeat offending has been the subject of a large number of studies. The most damaging objection to rehabilitation as a suitable goal of sentencing has been that it does not work. Following extensive research conducted between 1960 and 1974, Robert Martinson concluded in an influential paper that empirical studies had not established that any

\textsuperscript{52} Nagin et al, n 50, pp 155.

\textsuperscript{53} Nagin et al, n 50, p 145.

\textsuperscript{54} Green D and Winik D, “Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism Among Drug Offenders” (2010) 48 Criminology 357.

\textsuperscript{55} Nagin et al, n 50, pp 126, 128. See also Jacobs B, “Deterrence and Deterrability” (2010) 48 Criminology 417.
rehabilitative programs had worked in reducing recidivism.\textsuperscript{56} Several years after this work, the Panel of the National Research Council in the United States also noted that there were no significant differences between the subsequent recidivism rates of offenders regardless of the form of punishment.

“This suggests that neither rehabilitative nor criminogenic effects [that is, the possible corrupting effects of punishment] operate very strongly.”\textsuperscript{57}

However, several years later, Martinson softened his position, stating that some types of rehabilitation programs, particularly probation parole, may be effective and that generally “no treatment … is inherently either substantially helpful or harmful. The critical factor seems to be the conditions under which the program is delivered”.\textsuperscript{58} And indeed there is now mounting evidence that rehabilitation works for some in some circumstances. Stephen Brody made the following cautionary observations slightly more than a decade ago:

Research so far has on the whole confirmed what one would expect: that individual success may sometimes be claimed by routine psychotherapy or counselling with intelligent, articulate, neurotic offenders; by guidance in personal, social, and domestic matters among those hampered by incompetence in these spheres; by sympathy and encouragement for those unsure of their limits and capabilities; and by direct assistance and support for those weighed down by practical difficulties. But none of these approaches is appropriate for other than a minority of the offender population, whose misdemeanours reflect some real psychological maladjustment and not just their social “deviance”.\textsuperscript{59}

That there is some level of success with rehabilitative techniques in relation to the least dysfunctional offenders does not strongly support the rehabilitative ideal. It is equally consistent with the proposition that crime is an aberrant act for people with this profile.

However, further support for the rehabilitative ideal started occurring approximately 20 years ago. Following a wide-ranging review of the published studies in rehabilitation (which compared the recidivism rate of offenders who were subject to rehabilitative treatment to those who were not), Howells and Day in 1999 suggested that certain programs appeared to reduce recidivism. In particular, success had been observed in relation to cognitive-behavioural programs. These programs target factors that are (presumably) changeable and are directed at the criminogenic needs of offenders, that is, factors which are directly related to the offending, such as anti-social attitudes, self-control, and problem-solving skills.\textsuperscript{60} Promising programs have been developed in the areas of anger management, sexual offending and drug and alcohol use. These appear to be more successful than programs based on, for example, confrontation or direct deterrence, physical challenge, or vocational training.\textsuperscript{61}

Some more recent studies have tended to debunk the view the rehabilitative techniques are finally starting to make positive inroads. The most commonly used rehabilitation program in the United Kingdom is known as the Reasoning and Rehabilitation (R&R) Program. It is grounded in the theory that many people commit crime because of deficits in their “social intelligence”. To remedy this, the program uses cognitive-behavioural and educational methods to tackle the deficiency. Initially, there were a number of surveys that showed positive outcomes associated with this technique.

However, the optimism regarding the effectiveness of R&R programs has been questioned. In 1995, Wilkinson noted:

\begin{itemize}
  \item Blumstein et al, n 29, p 66.
\end{itemize}

(2012) 36 Crim LJ 159
How effective the programme is seen as being in reducing offending depends on the outcome measure chosen and on how comparisons are made. Considering that 67% of the R&R group were reconvicted within two years compared to 56% of offenders sentenced to custody from time of sentence, it would seems R&R did not reduce offending. Alternatively, the fact that 5% fewer of the R&R group were reconvicted than predicted on the basis of age and previous convictions, compared to 14% more of the custody group after release, could be taken as indicating success.\(^{62}\)

It concluded that the evidence did not support the hypothesis that the programs reduce recidivism by promoting pro-social attitudes.

**Enhanced commitment to rehabilitation in Australia**

Australian jurisdictions have been devoting increased resources into rehabilitation over the past decade. The rehabilitative methods employed in Australian are set out in a detailed study of the programs in a paper written by Heseltine et al for the Australian Institute of Criminology and published in 2011.\(^ {63}\) The paper focused only on rehabilitation programs in the custodial environment, particularly changes and improvements to prison-based correction rehabilitation programs since 2004 – when the previous report was issued.

In relation to the overall national picture, the report noted:

Each jurisdiction, without exception, has attempted to respond to the challenges that were identified in the 2004 program review. In particular, recent years have seen the development of a number of more intensive programs ... Furthermore, each jurisdiction has demonstrated an ongoing commitment to the delivery of custodial offender treatment programs in ways that are congruent with current conceptions of “good practice”. There is an increased confidence in being able to move from theory through to policy and practice, especially in relation to the development of programs for sex and violent offenders. In conclusion, the overall quality of Australian offender rehabilitation programs appears to be improving, although ongoing evaluations have yet to establish the effectiveness of these programs on criminal justice outcomes.\(^ {64}\)

A variety of the programs are delivered in Australian prisons. The precise programs are catalogued in the above report.\(^ {65}\) The main programs are:

- **Cognitive skills programs**, which use cognitive behavioural methods to improve decision-making and problem-solving skills, teach moral thinking and self-regulation, and equip offenders to understand the antecedents of offending and develop plans to prevent relapse;

- **Drug and alcohol programs**, which explain the effects of drugs and alcohol, the link between substance abuse and offending, teaching techniques to cease using drugs and alcohol, and restructure cognition related to substance use and work on techniques to improve interpersonal skills;

- **Anger management programs**, which use cognitive behavioural and interpersonal methods in an attempt to improve insight into angry responses, reduce stress, restructure anger cognition and develop problem-solving and interpersonal skills and a plan to prevent relapse;

- **Sex offender programs**, which use behavioural and cognitive methods to assist offenders better understand the effects on the victims, develop relationship skills and alter deviant arousal responses and develop a plan to prevent relapse;

- **Violent offender programs**, which, like sex offender programs, also principally employ behaviour and cognitive behavioural strategies to prevent re-offending;

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\(^{64}\) Heseltine et al, n 63, p x.

\(^{65}\) Heseltine et al, n 63, pp 15-33.
Domestic violence programs, which use cognitive behavioural techniques to assist offenders to develop understanding of the nature of abuse, improve their ability to manage negative emotion, change attitudes about violence, learn about the impact of their offending on victims and improve relationship skills; and

Special programs for female and Indigenous offenders, both of which modify elements of more general programs to the needs of those offenders.

The report noted that: there are well-established programs in the Australian Capital Territory; an increasing number of programs in New South Wales; substantial development of programs in the Northern Territory; an increasing suite of programs in Queensland; South Australia had delivered on its 2004 plan to develop intensive sex offender and violent offender programs; Tasmania had developed numerous new intensive offender rehabilitation programs since 2004; in Victoria more than 5,000 offenders participated in rehabilitation programs and retention rates for those undertaken in custody exceeded 90%; and in Western Australia a lack of experienced staff compromised the delivery of therapeutic programs for several years, although this had considerably improved in the last two years of the reporting period.66

More rehabilitative programs, yet higher reimprisonment rates

From the perspective of this article, the most interesting part of the report was the effectiveness of the increased commitment to the rehabilitative ideal. Unfortunately, no information was available about whether this additional commitment to rehabilitation had proven to be effective – the necessary data and information were simply not available. The report stated:

The current study aimed to review the effectiveness of prison-based offender rehabilitation programs. This was not possible given the paucity of research reports/evaluations and research reports that are currently available.67

While there was no direct evaluation of the programs, it is possible to make an indirect, albeit crude assessment, of their effectiveness. As noted above, a parallel study was undertaken by the ABS on prisoner recidivism over the 14-year period 1994 to 2007, and most relevantly for current purposes, the study looked at two cohorts of prisoners for the years 1994 to 1997 and 2004 to 2007. The study noted that over a three-year follow-up period the rate of reimprisonment increased – and in fact considerably – for the latter cohort.

Tellingly, this was during the period when rehabilitative methods had become more sophisticated and more widely used in the prison environment. This suggests a failure of these programs. This conclusion, however, is tentative and is subject to a number of caveats. There is no data on the exact number of offenders in the respective cohorts who underwent rehabilitative programs, and there is no data on the completion rate of those who participated in such courses.

The trend of recent evidence suggests rehabilitation is possible for some offenders

The report by Heseltine et al, while being unable to evaluate the effectiveness of rehabilitation programs currently operating in Australian prisons, summarised recent studies into the effectiveness of certain rehabilitation programs, and noted that while there were mixed results, there were some programs that reported positive outcomes.

This was especially the case in relation to sexual offender programs, where some studies showed that the recidivism rate of offenders completing the program was less than half of that of other offenders.68 The results of programs directed towards violent offenders were less positive, but a wide-ranging review of studies focusing on United Kingdom programs noted that reductions in

67 Heseltine et al, n 63, p 37.
68 Heseltine et al, n 63, p 14.
offending for violent offences by around 7%-8% had occurred. Overseas studies reported some success with anger management programs, but an Australian study (a shorter program of 20 hours) showed no positive outcomes related to program completion. There is no cogent evidence supporting the effectiveness of domestic violence programs or victim awareness programs. However, drug and alcohol programs have been shown to be effective at reducing substance abuse and re-offending.

This assessment is consistent with the findings of Mitchell et al, who undertook a major analysis of studies into the effectiveness of drug treatment programs in prison. The studies they focused on related to drug users and compared re-offending patterns of offenders who completed a drug rehabilitation program with those who did not complete a program, or completed only a minimum program between the years 1980 to 2004. They analysed 66 studies in total. The report concluded that:

Overall, this meta-analytic synthesis of evaluations of incarceration-based drug treatment programs found that such programs are modestly effective in reducing recidivism.

Moreover, it was noted that programs which involve dealing with the multiple problems of drug users (termed “therapeutic communities”) were the most successful, whereas there was no evidence to support good outcomes associated with “boot camp” programs.

**Forum sentencing, circle sentencing and drug courts**

The sentencing process has also been used in a bid to decrease re-offending. A number of different initiatives have been used, including forum sentencing, drug courts and circle sentencing. These have had mixed results.

Forum sentencing is based on restorative justice. It is conducted in two courts in New South Wales and involves offenders being dealt with by way of “community conference” as opposed to the normal criminal justice process. A study by the New South Wales Bureau of Crimes Statistics and Research compared re-offending rates of 264 offenders who were dealt with by way of forum sentencing, to those dealt with by the conventional sentencing process. The study concluded that there was no evidence that forum sentencing reduced the likelihood of re-offending, the amount of time before re-offending occurred, or the seriousness of any subsequent reoffending.

A variant of forum sentencing is “circle sentencing” which is used in relation to eligible Indigenous offenders. A 2008 study into its effectiveness indicated similar negative results to forum sentencing:

Taken as a whole, the evidence presented here suggests that circle sentencing has no effect on the frequency, timing or seriousness of offending.

More success has been attained by drug courts, whose processes involve judicial supervision of offenders and compulsory drug treatment. There are also rewards and sanctions to encourage compliance with programs. A study published in 2008 examined the recidivism rate of offenders who were dealt with by the drug court in New South Wales, and found that those who completed the drug court program were 37% less likely to be reconvicted of offences than a comparison group. The findings of the study led the researchers to recommend expanding the operation of drug courts.

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69 Heseltine et al, n 63, pp 18, 20, 22, 27 30.
71 Mitchell et al, n 70, p 17.
73 Jones, n 72 at 12.
74 A form of this type of sentencing is used in all Australian jurisdictions, except Tasmania.
Thus, the most that can be confidently said at this point regarding the capacity of criminal punishment to reform is that there is some evidence that it will work for a portion of offenders and that there is no firm evidence showing that it cannot work for the majority of offenders.

Overall, the jury is still out on the ability of criminal sanctions to reform offenders. In 1992, one commentator stated: “our understanding … of what works, with which offenders and under what conditions, in reducing offending … [is] still embryonic”.27 Twenty years later, that remains the case.

CONCLUSION

Sending offenders to jail does not reduce the likelihood that they will re-offend. This is established by numerous studies which find no link between increased legal compliance and experience in jail and the length of the jail term. The evidence is so powerful and pointed, that this finding can be expressed with a very high degree of certainty. It follows that the legislature should abolish specific deterrence as a sentencing objective.

The weight of evidence, in fact, suggests that sentencing offenders to imprisonment may marginally increase the chance of recidivism. However, the evidence pointing to this conclusion is not definitive and, hence, no policy or legal changes should be made on the basis of this assertion.

These changes should result in more lenient sentences in cases where the offender has a considerable criminal history and therefore where specific deterrence would normally have loomed large in the sentencing determination.

The evidence relating to rehabilitation is less clear. A striking aspect of rehabilitation is how little is known about its effectiveness, especially in the Australian context where considerable (and increasing) resources are directed in the hope of rehabilitating offenders. The weight of empirical data (though it is far from uniform or consistent) suggests that rehabilitative programs can reduce the likelihood of recidivism, especially for certain forms of offences, such as sex-offenders. Moreover, it seems that this can be achieved with programs that are administered in a custodial setting.

If this is proven to be correct, it entails that, paradoxically, the goal of rehabilitation should lose its mitigatory impact, insofar as being a basis for not imprisoning offenders or reducing the length of prison terms is concerned (if effective rehabilitation programs become widespread in prisons). However, the actual level of knowledge regarding the impact of rehabilitative programs on recidivism rates is so small that no policy or legal changes should be made at this point.

There is a pressing need for detailed and wide-ranging research to be undertaken first on the effectiveness of rehabilitative programs in the custodial setting; secondly, outside the custodial setting; and thirdly, comparing the effectiveness of these programs. This research will have strong implications for the desirability of continuing to pursue the rehabilitative ideal and the manner in which it should be pursued, and, in particular, the extent to which rehabilitation should mitigate the punitive aspects of a sentence.

REHABILITATING TOTALITY IN SENTENCING:  
FROM OBSCURITY TO PRINCIPLE

MIRKO BAGARIC* AND THEO ALEXANDER**

I INTRODUCTION

The totality principle applies in cases of multiple offending to reduce the total effective sentence that is imposed on offenders. This is normally achieved by either making some or all of the individual sentences concurrent, or by reducing the length of the individual sentences. Although totality is a well-established sentencing doctrine, its scope and its impact on the overall sentence are unclear. Current orthodoxy maintains that principles of proportionality and mercy underpin totality. This article argues that neither of these is capable of providing a solid foundation for totality, and that this area of law will remain unsatisfactorily indeterminate until a clear and defensible rationale is adopted. It is suggested that the main justification for the principle is that offenders who are sentenced for multiple offences have not had the opportunity to be rehabilitated through the imposition of earlier sanctions. While this provides a logical basis for distinguishing these offenders from those who have been sentenced for each offence separately, the size of the sentencing discount merited is not considerable given the relative importance of rehabilitation in the overall sentencing calculus.

A Totality in Sentencing

Sentencing is not an exact science, thus there is no single sentence that is objectively correct.1 This view has resulted in suggestions that sentencing law is unprincipled and a jurisprudential wasteland.2

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The complexities and vagaries of sentencing law are compounded when an offender is sentenced for more than one offence. In such circumstances, the effective sentence is governed by several discrete sentencing considerations, the most important of which is the principle of totality.3

The totality principle is a “principle of sentencing formulated to assist a court when sentencing an offender for a number of offences.”4 It operates to ensure that the sentence reflects the overall criminality of the offending behaviour, as opposed to a linear, mathematical cumulation of the penalty for each offence. This stance is to be contrasted with the position in other jurisdictions where consecutive sentences are common, the most obvious example being the United States,5 where penalties exceeding imprisonment for over a century are sometimes imposed. Such hardships are not confined to offences that shock the community. It has been noted that “[t]he same wrong can be prosecuted as multiple offenses, resulting in decades- to centuries-long sentences for first-time non-violent offenders, sentences sometimes far surpassing those for murderers.”6

The effect of the totality principle is normally to reduce the overall sentence. Accordingly, offenders who are sentenced for a number of offences at the same time receive a reduced sentence compared to those who commit identical offences consecutively after the sentence for each offence has been served. An offender who commits a robbery on each of five consecutive days and is sentenced for all of the robberies at the one hearing will serve considerably less time in prison than an offender who commits five robberies several years apart, and is sentenced for each offence individually.

While, in theory, the totality principle can be stated with elegant simplicity, its scope and application are unclear. In particular, the manner in which the principle applies to offences of a different nature and those committed many years apart is uncertain. The logical reasoning process by which the totality computation is achieved remains obscure – verging on arbitrary. Moreover, the justification and rationale for totality remains unsettled and, in fact, there has been surprisingly little scholarly consideration of its foundation.

3 Totality is a commonly invoked sentencing principle. A recent report, published by the Victorian Sentencing Advisory Council, analysed the sentencing appeals determined by the Victorian Supreme Court of Appeal for two calendar years (2008 and 2010): Sentencing Advisory Council, ‘Sentence Appeals in Victoria: Statistical Research Report’ (Report, Sentencing Advisory Council, March 2012). In 2008, there were 114 offender appeals and totality was invoked as a ground in 21 of these appeals – making it the fifth most utilised appeal ground: at 92. In 2010, there were 153 offender appeals and totality was again invoked as an appeal ground on 21 occasions – making it the fifth most frequently utilised ground for that year as well: at 95. Totality was invoked as an appeal ground less commonly in relation to Crown sentencing appeals: at 93, 96. Although in 2010, the approach to cumulation was invoked by the Crown as a ground of appeal in seven of the 27 cases.


6 Ibid 37. The totality principle discussed in this paper focuses on Australian case law and legislation. However, it operates similarly in the United Kingdom: see Sentencing Council, ‘Offences Taken into Consideration and Totality: Definitive Guideline’ (2012).
B  Overview of Article: Key Findings and Reform Proposals

In this article we provide a rationale for the totality principle and discuss the extent to which totality should operate to mitigate sentences.

In the next section, we examine the current operation of the principle and argue that its scope is vague. We also examine the mechanics by which totality is given effect and the circumstances in which it applies.

In section three, we discuss the rationale and justification for the principle. It emerges that there is no accepted, stand-alone jurisprudential or normative justification for totality. On the basis of the current approach, the only ideal that potentially justifies totality is the principle of proportionality. However, this alone cannot justify substantial reductions in sentences. In the end, the totality principle seems to be based on an innate desire not to impose sanctions that crush offenders. It is not clear whether this merciful tendency should outweigh the dictates of a rational system of punishment and sentencing.

In section four we make reform proposals. To the greatest extent possible, luck should not define much of what is meaningful in people’s lives. Whether or not an offender guilty of multiple offences or a repeat offender happens to get sentenced consecutively or at the same time for all or some of the offences, is often a matter of fortuity. Thus, a principled reason is necessary to justify totality. On a closer analysis there is, in fact, a tenable basis for punishing less severely offenders who are sentenced for multiple offences than those who commit identical offences and are sentenced consecutively.

Two aspects of sentencing aim to dissuade offenders from reoffending: specific deterrence and rehabilitation. Offenders who are sentenced for multiple offences are denied the advantages of such interventions in relation to each offence – had they been sentenced consecutively they may have been deterred from reoffending or rehabilitated. This sets them apart from offenders who commit offences consecutively. Potentially, this different treatment supports lower sentences for offenders sentenced for multiple offences. However, logically, the validity of this justification is contingent on the efficacy of sentencing to achieve the goals of specific deterrence and rehabilitation. The current state of the relevant empirical data provides some support for this proposition so far as rehabilitation is concerned, but not so in the case of specific deterrence.

Totality applies not only to sentences of imprisonment, but also to other sentencing dispositions such as fines and civil penalties. However, in the context of imprisonment it applies most acutely and has been subject to the most extensive analysis. In this article, the focus is on its application in relation to

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7 See generally Bernard Williams, Moral Luck (Cambridge University Press, 1982); Mirko Bagaric, How to Live: Being Happy and Dealing with Moral Dilemmas (University Press of America, 2006) ch 1.
8 See discussion in section IV C below.
9 See discussion in section IV B below.
10 See Camilleri’s Stock Feeds Pty Ltd v Environmental Protection Agency (1995) 32 NSWLR 683, 704; Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560, 581 [94].
sentences of imprisonment. The recommendations made in the last part of the article, however, apply to all applications of totality.

II   EXISTING LAW

A   Common Law Doctrine

1   Circumstances in Which Totality Applies

Totality is a common law construct. It applies in cases of multiple offending by the one offender. More specifically, the circumstances in which it applies are: (i) when an offender is being sentenced for more than one offence; (ii) when an offender is already undergoing a prison term and is being sentenced for a separate offence or offences; and (iii) when an offender has completed a sentence and is being sentenced for an offence which was committed before or during the period of the initial sentence.

While totality has a statutory basis or recognition in all Australian jurisdictions, the common law remains highly relevant.

2   The Totality Principle

The totality principle can be stated in concise terms: it ‘requires a sentencing judge to impose a sentence or sentences which reflect the overall criminality of the offending for which the offender has been convicted.’

In a more expansive form, the totality doctrine is set out in the following passage by David Thomas in *Principles of Sentencing*,

> The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is ‘just and appropriate’. The principle has been stated many times in various forms: ‘when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong[’]; ‘when … cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences’.

Thus, the effect of the principle is to reduce the sentence which an offender would have otherwise received. In *R v MAK* (‘MAK’) the Court stated that the

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14 A good overview of the workings of the principle is provided by Howie J in *Cahyadi v The Queen* (2007) 168 A Crim R 41.
totality principle should not be applied in a manner that gives the impression that there ‘is some kind of discount for multiple offending’. However, pragmatically, there is no limit at all, given that the effect of the principle is precisely to reduce the total effective sentence in cases of multiple offending. The statement in MAK is, however, defensible if it is interpreted to mean that totality should not be applied to the extent that it confers an unjust penalty reduction in cases of multiple offending.

It is settled that the totality principle is a final step in the sentencing process, which requires the sentencer to reflect on the entire gravamen of the offending and impose an appropriate penalty. In R v Creed, Chief Justice King stated that ultimately a sentencing judge has to ‘stand back and look at the overall picture and decide whether the total of what would otherwise be the appropriate sentence is a fair and reasonable total sentence to impose.’ In a similar vein, in Postiglione v The Queen, Justice Kirby described the principle of totality as being in the nature of a check to be applied after reaching a conclusion as to the appropriate sentence, having regard to the objective criminality of the conduct and matters of mitigation.

**B Mechanics of the Totality Process**

Offenders are ultimately concerned with the total effective sentence that is to be served, rather than with the mechanism by which it is arrived at. However, the courts have stated that the methodology for invoking the totality principle is important. The preferred approach in sentencing an offender for a number of offences is to determine the exact penalty for each offence and then set an effective term. In Pearce v The Queen (‘Pearce’), McHugh, Hayne and Callinan JJ noted one way to give effect to the proportionality principle:

To an offender, the only relevant question may be ‘how long’, and that may suggest that a sentencing judge or appellate court should have regard only to the total effective sentence that is to be or has been imposed on the offender. Such an approach is likely to mask error. A judge sentencing an offender for more than one offence must fix an appropriate sentence for each offence and then consider questions of cumulation or concurrence, as well, of course, as questions of totality.

However, there are in fact a number of ways to apply the totality principle. The first is to adopt the approach in Pearce and impose a proportionate sentence.

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16 As discussed later, the difficulty of this construction lies in the fact that there is no basis for ascertaining the size of the discount that is appropriate.

17 (1985) 37 SASR 566, 568.


20 For a discussion of the degree of flexibility that is available, see Yeonata v The Queen [2012] NSWCCA 211.
for each offence and then to make some or all of the discrete sentences concurrent – either wholly or in part. The second way, which was expressly endorsed by the High Court in *Mill*, is to lower the sentence for each offence or for some of the offences below that which would otherwise have been imposed. This approach is used less commonly. However, it is sometimes the only method by which the principle of totality can be given effect – for example, when the offender has already served a sentence for a relevant offence.

A middle course is referred to as ‘moderate and cumulate’. The difference between this approach and the first is discussed in *Director of Public Prosecutions (Vic) v Grabovac*, where the Court expressed disapproval of a moderate and cumulate technique. The Court stated:

In general a court should avoid imposing artificially inadequate sentences in order to accommodate the rules relating to cumulation. In other words, … where practicable when applying accepted rules of sentencing as to totality, proportionality and the like and in order to fashion an appropriate total effective head term in relation to a series of offences, it is preferable to achieve a satisfactory result by passing appropriate individual sentences and to make those sentences wholly or partially concurrent, rather than by an order or orders for the cumulation of unnecessarily reduced individual sentences. Nevertheless, a rule of this kind can only be a precept or guideline to be applied as and when practicable.

Subsequent decisions have not rejected the moderate and cumulate approach, and it has been suggested that there is no meaningful distinction between this and the first approach. This is correct from the perspective of the total effective sentence that is arrived at, but the ‘moderate and cumulate’ approach does

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21 It has been noted that there is some leeway accorded in fixing each individual sentence and that an appeal court will not scrutinise each sentence too finely. In *Hennessy v The Queen* [2012] NSWCCA 241, the Court stated at [23]–[24]:

While it may have been better for his Honour to have fixed different sentences for each offence, there is a point at which the criticism is one of form rather than substance. As long as each sentence is within the range applicable for the criminal conduct and the level of accumulation and concurrency is such that there is no error in totality, it is imposing too strict a regime on sentencing judges to require them to fix a different sentence for each offence charged. Ultimately, as the High Court has made clear in *Pearce*, the task is one of fixing an appropriate sentence duration for each offence and thereafter considering the degree of concurrence or accumulation that reflects the totality of criminal conduct.

See also *KC v Western Australia* [2008] WASCA 216, [31]; *Warner (AKA Jeremy Pachenko) v The Queen* [2013] NSWCCA 10, [46].

22 (1988) 166 CLR 59, 66–7 [16]. This approach is appropriate despite the seemingly prescriptive preference for the first approach by the High Court in *Pearce*. The supposed tension between the approaches in *Mill* and *Pearce* was reconciled by Gummow, Callinan and Heydon JJ in *Johnson* (2004) 78 ALJR 616, 624 [26], as follows:

[The joint judgment in *Pearce* recognises the currency of *Mill* by referring to the principle of totality which it reiterates. The joint judgment in *Mill* expresses a preference for what should be regarded as the orthodox, but not necessarily immutable, practice of fixing a sentence for each offence and aggregating them before taking the next step of determining concurrency. *Pearce* does not decree that a sentencing judge may never lower each sentence and then aggregate them for determining the time to be served.

23 See *Mill* (1988) 166 CLR 59, 66–7 [18].

24 This approach was endorsed in *R v Lizard* (2003) 7 VR 480, 485–6 [21]–[23].


26 See *DHC v The Queen* [2012] VSCA 52, [98] (Weinberg JA).
involve a different mathematical computation to the first approach. This can be a difference in substance, as opposed to merely form. If an offender is acquitted on appeal on some charges but not others, the first approach is likely to attract a higher remaining sentence – although it could then be adjusted on appeal.

The fourth technique to give effect to proportionality is not to specify the sentence for each offence, but to impose an aggregate sentence. In DHC v The Queen, it was noted that where there is a large number of individual offences, it is appropriate to confer an aggregate sentence.\(^{27}\) As noted below, statutory provisions in several jurisdictions expressly permit sentence aggregation. The final method by which the totality principle is applied is by manipulation of the commencement time for sentences.\(^{28}\)

### C Statutory Recognition of the Principle

Aspects of the totality principle or the mechanics by which totality can be given effect have a statutory foundation in most Australian jurisdictions. However, the totality principle per se has not been systematically developed or enshrined in any of the relevant statutory schemes. The complexities and nuances associated with the principle are not addressed in the sentencing legislation and, hence, prior to considering the detail of the principle, it is appropriate to briefly discuss the relevant legislative provisions.

The only jurisdiction to expressly endorse the totality principle is Western Australia. Section 6(3)(b) of the Sentencing Act 1995 (WA) provides that a sentence can be reduced because of ‘any rule of law as to the totality of sentences.’ This is complemented by section 88 which creates a presumption of concurrency.

In the Commonwealth jurisdiction, the totality principle is recognised by section 16B of the Crimes Act 1914 (Cth) which requires a court sentencing an offender to have regard to any other sentence yet to be served for any other state or federal offence.\(^{29}\) Further, pursuant to section 19AD of the Crimes Act 1914 (Cth), a court, when sentencing an offender for a federal offence who is already the subject of a non-parole period for a federal offence, is to have regard to a number of factors in deciding whether to impose a new parole period and, if so, the length of the period. The relevant factors are the existing non-parole period, the prior criminal history of the offender and the nature and circumstances of the offence.

Sections 9(2)(k)–(m) of the Penalties and Sentences Act 1992 (Qld) incorporate the totality principle by prescribing that in sentencing an offender a court is to have regard to:

\(^{27}\) [2012] VSCA 52, [77], [85]–[88], [98]. See also Bagnato (2011) 112 SASR 39, [56]–[60] (Gray and Sulan JJ).

\(^{28}\) See, eg, Baghdadi [2012] NSWCCA 212.

\(^{29}\) See Postiglione (1997) 189 CLR 295.
(k) sentences imposed on, and served by, the offender in another State or a Territory for an offence committed at, or about the same time, as the offence with which the court is dealing; and

(l) sentences already imposed on the offender that have not been served; and

(m) sentences that the offender is liable to serve because of the revocation of orders made under this or another Act for contraventions of conditions by the offender …

Section 155 of the Penalties and Sentences Act 1992 (Qld) creates a presumption of concurrency when an offender is sentenced to imprisonment for more than one offence or is already undergoing a sentence of imprisonment, however, discretion is provided in section 156 to order cumulative sentences in such circumstances.

In New South Wales, section 55(1) of the Crimes (Sentencing Procedure) Act 1999 (NSW) creates a presumption of concurrency when an offender is sentenced to imprisonment for more than one offence or is already undergoing a sentence of imprisonment. However, this is displaced in relation to certain offences committed while in custody. Section 53A of the Crimes (Sentencing Procedure) Act 1999 (NSW) provides for aggregate sentences in certain circumstances, which (as we have seen above) can be used to facilitate the totality principle.

In the Northern Territory, section 50 of the Sentencing Act 1995 (NT) creates a presumption of concurrency when an offender is sentenced to imprisonment for more than one offence or is already undergoing a sentence of imprisonment. However, section 51 also expressly permits discretion to accumulate sentences in such circumstances. Section 52 allows for aggregate sentences to be imposed where two or more sentences are handed down at the one time, thereby facilitating the totality principle.

Section 18A of the Criminal Law (Sentencing) Act 1988 (SA) is similar to section 52 of the Sentencing Act 1995 (NT). It expressly permits aggregate offences, stating:

If a person is found guilty by a court of a number of offences, the court may sentence the person to the one penalty for all or some of those offences, but the sentence cannot exceed the total of the maximum penalties that could be imposed in respect of each of the offences to which the sentence relates.

To similar effect are section 57(3) of the Crimes (Sentencing) Act 2005 (ACT) and section 11(2) of the Sentencing Act 1997 (Tas).

In Victoria, section 9(2) of the Sentencing Act 1991 (Vic) provides that if an aggregate sentence is imposed by a court for one or more offences, the sentence cannot exceed that which would have been imposed if a separate sentence was imposed for each offence. Section 16(1) creates a presumption in favour of all sentences being concurrent, but this is displaced in relation to certain offences and forms of offending, including where the offence is a prison or escape offence, the offender is a serious offender, or the offence is committed while

30 Sentencing Act 1991 (Vic) ss 16(1A)(b), 16(3).
the offender is on parole\textsuperscript{32} or while on bail.\textsuperscript{33} Thus, a number of circumstances are set out where the principle is displaced, and concurrency is only permitted in cases where exceptional circumstances exist. The importance of the totality doctrine is underlined by the preparedness of the courts to find exceptional circumstances and their willingness to reduce the total effective sentence (by applying the totality principle), even in the absence of such circumstances.\textsuperscript{34}

Justice of Appeal Redlich in \textit{Director of Public Prosecutions (Vic) v Johnson} stated that in situations where the legislature has indicated a preference for cumulative sentences, the totality principle can still apply by adopting the second technique for lowering the overall sentence (ie, by lowering the individual sentences). His Honour indicated that:

\begin{quote}
while some approaches to applying the principle of totality may be inconsistent with the requirements of s 16(3B) of the \textit{Sentencing Act 1991}, others may not. A sentencing court is not entitled to set its face against the clear wording of s 16(3B) and pursue an application of the principle of totality that may call for orders of concurrency or only partial cumulation in developing a head sentence that reflects the total criminality of the accused. However, a sentencing court may be entitled to tailor the application of the principle to avoid contravening the section … Nothing in the language of s 16(3B) suggests, in terms, that it is intended to diminish the totality principle.\textsuperscript{35}
\end{quote}

\section*{D Circumstances in Which Totality Operates}

The most straightforward situation where totality applies is when an offender is sentenced for a number of similar offences committed within a relatively short period of time. In such circumstances, concurrent sentences are normally imposed.\textsuperscript{36} However there is no strict rule to this effect. In \textit{Koncurat v Western Sentencing Act 1991 (Vic) s 16(1A)(c)}. For comments on this see McI v The Queen (2000) 203 CLR 452, where McHugh, Gummow and Hayne JJ stated at 476–7 [76]:

\begin{quote}
The need for judges not to compress sentences is especially important where the accused person is a ‘serious sexual offender’ within the meaning of s 16(3A) of the \textit{Sentencing Act}, and similar provisions. Section 16(3A) gives effect to a legislative policy that serious offenders are to be treated differently from other offenders. It was plainly intended to have more than a formal effect, which is the effect it would frequently have if its operation was subject to the full effect of the totality principle. Given the terms of s 16(3A), the scope for applying the totality principle must be more limited than in cases not falling within that section. The evident object of the section is to make sentences to which it applies operate cumulatively rather than concurrently. The section gives the judge discretion to direct otherwise. But the object of the section would be compromised and probably defeated in most cases if the ordinary application of the totality principle was a sufficient ground to liven the discretion. Since the relationship between s 16(3A) and the totality principle does not arise in this appeal, it is enough to say that sentencing judges need to be astute not to undermine the legislative policy inherent in s 16(3A) by applying the totality principle to the sentences as if that section (or s 6E which replaced it) was not on the statute book.
\end{quote}

\begin{thebibliography}{99}
\bibitem{Sentencing Act 1991 (Vic) s 16(1A)(d), 16(3B).} The principle is applied even when there are no exceptional circumstances: \textit{R v Warwick (Sentence)} [2012] VSC 382.
\bibitem{Sentencing Act 1991 (Vic) ss 16(1A)(e), 16(3C).} \textit{Arnautovic v The Queen} [2012] VSCA 112.
\bibitem{Sentencing Act 1991 (Vic) ss 16(1A)(c).} For comments on this see \textit{McI v The Queen} (2000) 203 CLR 452, where McHugh, Gummow and Hayne JJ stated at 476–7 [76].
\end{thebibliography}
The court noted that the ‘so-called “one transaction rule” or “continuing episode rule”’ is ‘not a rule at all. It is merely a guideline.’ A degree of cumulation may be ordered in relation to offences committed over a similar period where the offences violate different interests or cannot be regarded as part of the single criminal enterprise, or where concurrency would not reflect the gravity of the overall offending.

The totality principle becomes more complicated where the offences are committed over a longer period of time, are committed in different jurisdictions, where the offender has served part of a sentence or the offender commits offences of a different nature.

Several complexities associated with the principle were clarified in the seminal High Court decision dealing with totality. Mill concerned a situation where the offender committed two armed robberies in Victoria and one in Queensland within the space of about six weeks over the period 8 or 9 December 1979 to 19 January 1980. On 1 September 1980 he was sentenced in Victoria for armed robberies committed in Victoria to an effective term of ten years’ imprisonment, with a non-parole period of eight years. On his release, he was returned to Queensland and in March 1988 he was sentenced to eight years imprisonment with a recommendation that he be eligible for parole after three years, in light of the sentence he had completed in Victoria. The High Court, in allowing the appeal, made several important points about the scope of the totality principle.

First, it applies when the offences are committed in different jurisdictions. Secondly, it applies not only to setting the non-parole period, but also the head sentence. Thirdly, the principle also applies in relation to offences where the sentence has been partially or totally served. This last point was emphasised by McHugh J in the subsequent High Court decision of Postiglione, where his Honour stated that: ‘in order to comply with the totality principle, a sentencing judge must consider the total criminality involved not only in the offences for which the offender is being sentenced, but also in any offences for which the offender is currently serving a sentence.’

In the circumstances, the High Court in Mill held that the proper approach that should have been taken to the Queensland sentence is: ‘to ask what would be likely to have been the effective head sentence imposed if the applicant had committed all three offences of armed robbery in one jurisdiction and had been sentenced at one time.’

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37 [2010] WASCA 184, [40], citing Steytler P in State of Western Australia v Miller (2005) 30 WAR 38, [14]-[17].
41 See also R v Suckling (1983) 33 SASR 133.
43 (1988) 166 CLR 59, 66 [16].
Thus, when an offender already under sentence is being sentenced for other offences, the guiding principle for the judge or magistrate is to ascertain the sentence that would have been imposed if the offender was sentenced for all of the offences at the one time.

More complicated is where the offences are committed over a long period of time. This issue has been considered in a number of cases and it is now clear that even where the offences are committed over a very long period of time, the principle of totality applies where the offences are of a similar nature. The principle also applies where the offences are committed over a short period of time, but the sentencing occurs much later for reasons not related to the operation of the criminal justice system, for example, where the offender remains silent and evidence of his or her involvement in the offence comes to light several years later.

Where an offender is reimprisoned for breaching parole, and the new offences are similar to those which resulted in the original jail term, it is unclear whether the totality principle applies to the entire time spent in custody for the original offence, or merely the additional period that the offender is sentenced to serve as a result of breaching parole. In Contin v The Queen, the Victorian Court of Criminal Appeal expressly refused to resolve the matter, noting that there are authorities supporting either approach. A stricter approach was adopted in the more recent decision of McCartney v The Queen, where it was held that where an offender is sentenced for offences committed while he or she is on parole, the sentencer, in applying the totality principle, is required to have regard only to the additional period of imprisonment to be served as a result of the breach of parole.

The application of the totality doctrine to offences of a different nature remains uncertain. It is well established that the principle can apply to offences between indictments or within the same indictment. Earlier, authorities confined the principle to offences that were of a similar nature or in some way connected. However, the trend of recent decisions is to abolish the need for the offences to be similar. Authorities suggest that in some instances, total concurrency for distinct offences is appropriate. In R v King, the Court noted that ‘complete concurrency for separate crimes may be appropriate at times’ but then approved Justice Hidden’s comment in R v Cutrale that ‘it is more likely that, where the offences are discrete and independent criminal acts, the sentence for one offence can not comprehend the criminality of the other.’

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44 See, eg, R v Wright [2009] VSCA 27, where the offender sexually abused a number of boys over a period spanning nearly a decade.
45 RLS v The Queen [2012] NSWCCA 236.
46 [2012] VSCA 247, [71].
47 [2012] VSCA 268, [100]. A broad approach is taken in Waugh v The Queen [2013] VSCA 36, [26].
48 DPP (Vic) v Marino [2011] VSCA 133, [53].
51 [2011] NSWCCA 274, [20].
52 Ibid.
The application of the totality principle is generally not contingent upon the nature of the offence in question, thus, the principle transcends all offence types. There is one qualification to this – offences against the person. In most circumstances where the offences have caused harm to more than one victim (even if they are committed as part of the single transaction, for example, dangerous driving causing multiple deaths), total concurrency is not appropriate.\textsuperscript{53} This is justified by the need to recognise the importance of separateness of victims and the loss and trauma experienced by them.\textsuperscript{54} However, even this principle is not absolute. In \textit{Director of Public Prosecutions (Vic) v Marino} the Court stated:

> It is understandable that, in relation to death and serious injury involving multiple victims, ordinarily, some cumulation is required in respect of the offences relating to each victim. The cases, however, are not authority for the proposition that, where the offending results in any injury to more than one victim, a sentencing judge must provide for some cumulation in respect of the offences relating to each victim. Cumulation may well be appropriate in many such cases. However, as I have already stated, cumulation must be applied in the light of the principle of totality.\textsuperscript{55}

Where the offences relate to one victim, total concurrency will also often not be appropriate where the criminality relates to different forms of harm.\textsuperscript{56}

The area where totality is most obscure is the extent to which it can operate to reduce a sentence. Apart from the fact that in some instances total concurrency is appropriate, there is no settled principle regarding this issue. As discussed below, this is partly due to the unclear nature of the rationales supposedly underpinning the doctrine. It is also largely a manifestation of the general approach to sentencing decisions, which by its very nature is open-ended.

The overarching methodology and conceptual approach that sentencing judges undertake is known as ‘instinctive synthesis’. The term originates from the Full Court of the Supreme Court of Victoria decision of \textit{R v Williscroft}, where Adam and Crockett JJ stated that ‘ultimately every sentence imposed represents the sentencing judge’s instinctive synthesis of all the various aspects involved in the punitive process.’\textsuperscript{57}

The general methodology for reaching sentencing decisions has been considered by the High Court on several occasions, and the Court has consistently adopted the instinctive synthesis approach and rejected the alternative, which is normally referred to as the two step approach.\textsuperscript{58} The alternative approach involves a court setting an appropriate sentence

\textsuperscript{53} Similar comments have been made in relation to burglary offences: \textit{R v Harris} (2007) 171 A Crim R 267.
\textsuperscript{55} [2011] VSCA 133, [53] (citation omitted). See also \textit{R v KM} [2004] NSWCCA 65.
\textsuperscript{56} \textit{Nguyen v The Queen} [2007] NSWCCA 14; \textit{R v BWS} [2007] NSWCCA 59.
\textsuperscript{57} [1975] VR 292, 300 (Adams and Crockett JJ).
\textsuperscript{58} \textit{Markarian v The Queen} (2005) 228 CLR 357, 375 [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ) (‘Markarian’); \textit{Hili v The Queen} (2010) 242 CLR 520, 527 [18], 528 [25], 534 [44].
commensurate with the severity of the offence, then making allowances up and
down in light of relevant aggravating and mitigating circumstances.59

In Wong v The Queen (‘Wong’), most members of the High Court saw the
process of sentencing as an exceptionally difficult task with a high degree of
‘complexity’.60 Exactness is supposedly not possible because of the inherently
multifaceted nature of that activity.61

Despite the uncertainty of outcome that is produced by the instinctive
synthesis approach, this methodology was confirmed by the majority in
Markarian, where it was noted that ‘[f]ollowing the decision of this Court in
Wong it cannot now be doubted that sentencing courts may not add and subtract
item by item from some apparently subliminally derived figure, passages of time
in order to fix the time which an offender must serve in prison.’62

Thus, the general approach to sentencing decisions militates against a high
level of clarity regarding the precise operation of the totality principle.63

However, as noted above, it is clear that the principle is capable of weighing
heavily in the sentencing decisions, to the point where, in some cases, total
concurrency is available even in relation to serious offences.

E The Concept of a Crushing Sentence as Guiding the Principle

The concept of a crushing sentence is integral to the totality principle. A
crushing sentence is commonly defined as one that destroys an expectation of a
meaningful life after release.64 In R v Beck the Court described a crushing
sentence (of nine and a half years imprisonment) as one which risked ‘provoking
within the applicant a feeling of helplessness and the destruction of any
reasonable expectation of a useful life after release.’65

Whether a sentence is crushing is not solely determined by a numerical
figure, although the length of the sentence is a cardinal consideration in
evaluating whether a sentence is crushing. The age of the offender is another
important consideration.

In Haines v The Queen, it was noted that in considering whether a sentence is
crushing, other relevant considerations include ‘maximum penalties, any standard
non-parole periods, the objective and subjective factors’.66

59 This approach is described (but not endorsed) by McHugh J in Markarian (2005) 228 CLR 357, 377–9
[51]–[54].
60 (2001) 207 CLR 584, 612 [77] (Gaudron J, Gummow and Hayne JJ).
61 See the dicta of McHugh J who notes the difficulties of any ‘attempts to give the process of sentencing a
degree of exactness which the subject matter can rarely bear’: AB v The Queen (1999) 198 CLR 111, 120
[13].
62 (2005) 228 CLR 357, 375 [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ); see also Hili v The
Queen; Jones v The Queen (2010) 242 CLR 520.
63 For criticism of the instinctive synthesis approach to sentencing, see Mirko Bagaric, ‘Sentencing: The
64 Azzopardi v The Queen [2011] VSCA 372, [56]–[59].
65 [2005] VSCA 11, [22].
66 [2012] NSWCCA 238, [57].
Ultimately, the notion of a ‘crushing’ sentence remains impressionistic. In \textit{R v Vaitos}, Young CJ stated:

Is the effective sentence to be regarded as crushing? This question can only be answered in relation to the facts of the case. The answer cannot be arrived at mathematically by reference to the offender’s age and the length of sentence to be served. In the particular case of this applicant, having regard to the very large number of very serious offences, and notwithstanding the severity of the effective sentence, I have come to the conclusion that the point has not been reached at which this Court is required to set aside the sentence as crushing.\textsuperscript{67}

It is not clear whether the desire to avoid a crushing sentence is part of or incidental to the totality principle. In \textit{R v Piacentino}, Eames JA (with whom Buchanan and Vincent JA agreed) observed that the concept of a crushing sentence is distinct from the principle of totality, and, in particular, that totality applies even when the sentence is not crushing. Justice of Appeal Eames noted:

As Callaway JA observed in \textit{R v Barnes}, there is a difference between the principle of totality and the avoidance of a ‘crushing’ sentence – because a sentence of three years, for example, might offend totality principles and yet not be so long as to crush the offender – and the requirement to ‘stand back’ and assess the overall criminality applies even where the sentence would not be described as crushing.\textsuperscript{68}

A different view is taken in Western Australia, where the desire not to impose a crushing sentence is regarded as the second limb of the totality requirement. In \textit{Roffey v The State of Western Australia},\textsuperscript{69} McLure JA stated:

The appellant relies on the totality principle which comprises two limbs. The first limb is that the total effective sentence must bear a proper relationship to the overall criminality involved in all the offences. … The second limb is that the court should not impose a ‘crushing’ sentence.\textsuperscript{70}

Pragmatically, the issue of whether the desire to avoid a crushing sentence is core to the totality principle or an external check to its application is moot. There are three reasons for this. First, as noted above, the meaning of a crushing sentence is unclear and hence, at its highest, it only provides a slight qualification to the principle. Secondly, both approaches recognise that the totality principle can apply even when the sentence is not crushing. Thirdly, there is no question that in some instances a crushing sentence is appropriate and, in fact, must be imposed.\textsuperscript{71}

The avoidance of crushing sentences is at best an aspirational aim of sentencing as opposed to a firm requirement. The fact that tariffs for certain

\textsuperscript{67} (1981) 4 A Crim R 238, 257.
\textsuperscript{68} (2007) 15 VR 501, 507 [33] (citation omitted).
\textsuperscript{69} [2007] WASCA 246.
\textsuperscript{70} \textit{Roffey v The State of Western Australia} [2007] WASCA 246, [24]–[25]. This has been expressly approved in a number of cases, see, eg, \textit{Koncurat v Western Australia} [2010] WASCA 184. See also \textit{Bagnato} (2011) 112 SASR 39; \textit{Narrier v Western Australia} [2011] WASCA 193.
\textsuperscript{71} Also, it is clear that totality does not only apply in the case of potentially crushing sentences. In \textit{Johnson} (2004) 78 ALJR 616, 624 [22] Gummow, Callinan and Heydon JJ stated: ‘We would with respect doubt that it is only in a case of an otherwise crushing burden of an aggregation of sentences that the totality principle may be applied.’
categories of offences have increased considerably in recent years.72 indicates a dilution of the desire to avoid crushing sentences. In *R v E*, Doyle CJ stated: ‘[c]are must be taken in using the concept of a crushing sentence. Not uncommonly, for particularly serious crimes, a sentence that is crushing in its effect must be imposed.’73

The lack of weight given to a crushing sentence is highlighted in *Paxton v The Queen* (‘*Paxton*’) where Johnson J (Tobias AJA and Hall J agreeing) stated that ‘[c]ourts are not unfamiliar with descriptions of sentences as “crushing” but that does not articulate some applicable test. A life sentence would presumably fall within the ambit of that description but the legitimacy of availability of a life sentence is not open to challenge.’74

Logically, sentences of life imprisonment are crushing. Nevertheless, they are often imposed in relation to single offences, such as murder.75 The desire not to impose crushing sentences does not apply a meaningful fetter to the imposition of such penalties in relation to single offences. It follows that it must impose even less of a restraint in cases of multiple offences, given that, all things being equal, they are more serious single offences. Accordingly, at best, the concept of a crushing sentence is a weak consideration in the context of the application of the totality principle.

**F Summary: Scope and Application**

Thus, the totality principle is unclear at the margins, but the following rules emerge regarding its scope and application:

- The principle of totality applies to guide sentencing regarding the appropriate penalty in cases of multiple offending;
- The effect of the principle is to reduce the overall penalty, compared to a linear cumulation of the sentence for each offence;
- It applies to all situations where multiple offending is considered by the courts, including when an offender is being sentenced for more than one offence, when an offender is already undergoing a sentence and is being sentenced for separate offences, and when an offender has completed a sentence and is being sentenced for an offence which was committed before or during the period of the initial sentence;
- The main technique for achieving totality is to make sentences totally or partially concurrent. Where this is not feasible, the sentence for each offence is reduced;

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72 This is especially the case in relation to drug offences and offences against the person. See Mirko Bagaric and Richard Edney, *Australian Sentencing* (Thomson Reuters, 2011).
73 (2005) 93 SASR 20, 30 [38]. This was approved in *R v Walkuski* [2010] SASC 146, [5].
75 The principle of totality has limited application in such instances: see *Roberts v The Queen* [2012] VSCA 313, [105].
Totality applies even when the offences are committed over a longer period and are of a different nature, although the longer the time period between offences and the more disparate they are in nature, the less concurrency will apply;

Offences against the person will rarely result in total concurrency, even when the harm is caused by the single act;

The totality principle is informed by the desire to avoid crushing sentences. While the concept of crushing is unclear, it generally applies where, given the length of the sentence and the age of the offender, it would engender a feeling of hopelessness;

In relation to serious crimes, a crushing sentence may be necessary;

A sentence does not need to be crushing to attract the operation of the totality principle;

There is no standard formula for giving effect to concurrency. The reduction in penalty, as compared to a linear cumulation of each sentence, is a matter for the sentencing judge or magistrate whose choice is close to an unfettered discretion; and

The principle (as discussed below) has two rationales: proportionality and mercy. Both are vague, hence totality remains obscure.76

III RATIONALE FOR THE TOTALITY PRINCIPLE: PROPORTIONALITY AND MERCY

A Judicial Comments

There is scant discussion regarding the justification for the totality principle. The most succinct and clear rationale is in R v Walkuski, where Doyle CJ stated that ‘[i]t can also be said that the concept of totality reflects two particular considerations. One of them is proportionality. The sentence must bear an appropriate proportion to the overall criminality involved. The other is mercy.’77 Thus, the concerns that underpin totality are proportionality and mercy, which themselves are discrete sentencing considerations.

More extensive analysis of the rationale for totality has occurred, but it has not clarified the underpinnings of the doctrine. In Bogdanovich v The Queen,78 Ashley and Weinberg JJA stated:

The totality principle is said to ‘defy precision either of description or implementation’. Sometimes it is described as a requirement of ‘just deserts’, and whether the total effective sentence offends that principle is often a ‘matter of impression’. … The problem [of application] is exacerbated, however, when the sentencing judge must have regard not merely to totality in relation to the offences

76 See also R v XX (2009) 195 A Crim R 38, 48 [52] for an overview of the totality principle.
77 R v Walkuski [2010] SASC 146, [6].
for which the offender is being sentenced, but also other periods of incarceration in respect of earlier and unrelated offending.79

The concept of ‘just deserts’ articulated in the above passage is not a separate justification but seems to be a reference to the proportionality principle, which is commonly interchanged with the just deserts concept.80 An illuminating aspect of the above passage is the recognition that totality is an obscure principle and, in fact, so obscure that courts have recognised it as being impressionistic.

We now consider whether proportionality and mercy can underpin the totality principle.

B Proportionality: Too Vague to be Instructive

As the High Court stated in *Hoare v The Queen*, ‘a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances’.81

The principle of proportionality (at least in theory) operates to ‘restrain excessive, arbitrary and capricious punishment’82 by requiring that punishment must not exceed the gravity of the offence, even where it seems certain that the offender will immediately re-offend.83

The key aspect of the principle is that it has two limbs. The first is the seriousness of the crime and the second is the harshness of the sanction. Further, the principle has a quantitative component — the two limbs must be matched. In order for the principle to be satisfied, the seriousness of the crime must be equal to the harshness of the penalty.

Proportionality is one of the main objectives of sentencing.84 In *Veen v The Queen (No 1)*85 and *Veen v The Queen (No 2)*,86 the High Court stated that proportionality is the primary aim of sentencing. It is considered so important that it cannot be trumped even by the goal of community protection, which at various times has also been declared as the most important aim of sentencing.87 Thus, in the case of dangerous offenders, while community protection remains an

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79 Bogdanovich v The Queen [2011] VSCA 388, [63]–[66] (citations omitted). This was approved in Contin v The Queen [2012] VSCA 247.


83 See, eg, *R v Jenner* [1956] Crim L R 495, in which the court reduced a term of imprisonment despite believing that ‘it appeared likely that [the offender] would commit a crime as soon as he was released from prison’.


85 (1979) 143 CLR 458, 467.


87 See, eg, Channon v The Queen (1978) 33 FLR 433.
important objective, at common law it cannot override the principle of proportionality. It is for this reason that preventive detention is not sanctioned by the common law.\textsuperscript{88} Proportionality has also been given statutory recognition in all Australian jurisdictions.\textsuperscript{89}

There has been no systematic, doctrinally sound approach to defining the factors that are relevant to proportionality. Rather than positively defining the factors that are relevant to offence severity, it has proved easier to dismiss some considerations as being irrelevant. Factors such as ‘good character, … repentance, restitution, possible rehabilitation and intransigence’\textsuperscript{90} have been excluded.\textsuperscript{91} However, some factors have been positively identified as relevant to offence seriousness. These include: the consequences of the offence, as well as the level of harm; the victim’s vulnerability and the method of the offence,\textsuperscript{92} the offender’s culpability, which turns on such factors as the offender’s mental state\textsuperscript{93} and his or her level of intelligence; the level of sophistication involved;\textsuperscript{94} the protection of society,\textsuperscript{95} and even the offender’s previous criminal history.\textsuperscript{96}

The problem with such a list is that despite its non-exhaustive character, it is too particular, and is no more than a non-exhaustive list of common aggravating factors. Once considerations such as the method of the offence and the victim’s vulnerability are included, there appears to be no logical basis for not including other considerations that are typically thought to increase the severity of an offence such as breach of trust, the prevalence of the offence, profits derived from the offence, and an offender’s degree of participation. Such an approach is devoid of an overarching justification and is, ultimately, baseless.

\textsuperscript{88} Chester v The Queen (1988) 165 CLR 611, 618. See also R v Chivers [1993] 1 Qd R 432, 437–8.
\textsuperscript{89} The Sentencing Act 1991 (Vic) s 5(1)(a) provides that one of the purposes of sentencing is to impose just punishment (s 5(1)(a)), and that in sentencing an offender the court must have regard to the gravity of the offence (s 5(2)(c)) and the offender's culpability and degree of responsibility (s 5(2)(d)). The Sentencing Act 1995 (WA) states that the sentence must be ‘commensurate with the seriousness of the offence’ (s 6(1)) and the Crimes (Sentencing) Act 2005 (ACT), s 7(1)(a) provides that the sentence must be ‘just and appropriate’. In the Northern Territory and Queensland, the relevant sentencing statute provides that the punishment imposed on the offender must be just in all the circumstances (Sentencing Act 1995 (NT) s 5(1)(a); Penalties and Sentences Act 1992 (Qld) s 9(1)(a)), while in South Australia the emphasis is upon ensuring that ‘the defendant is adequately punished for the offence’ (Criminal Law (Sentencing) Act 1988 (SA) s 10 (1)(g)). The need for a sentencing court to ‘adequately punish’ the offender is also fundamental to the sentencing of offenders for Commonwealth matters (Crimes Act 1914 (Cth) s 16A(2)(k)). The same phrase is used in the New South Wales Crimes (Sentencing Procedure) Act 1999, s 3A(a).
\textsuperscript{90} Veen v The Queen (No 2) (1988) 164 CLR 465, 491.
\textsuperscript{91} See also Hoare v The Queen (1989) 167 CLR 348, 363.
\textsuperscript{92} This includes the matters such as use of weapons and whether there was a breach of trust: see Richard G Fox, ‘The Meaning of Proportion in Sentencing’ (1994) 19 Melbourne University Law Review 489, 499–500.
\textsuperscript{93} For example, whether it was intentional, reckless or negligent.
\textsuperscript{95} Veen v The Queen (No 2) (1988) 164 CLR 465, 474.
\textsuperscript{96} R v Mulholland (1991) 1 NTLR 1, 13 where prior convictions were treated as part of the objective circumstances of the offence on the basis that they are relevant to the mens rea of the offender in committing the offence. This view was rejected in R v McNaughton (2006) 66 NSWLR 566.
It is for this reason that despite the widespread recognition of the principle, there is no convergence in sentences either within or across jurisdictions – even those that ostensibly place cardinal emphasis on proportionality in sentencing determinations. The vagaries are so pronounced that it is verging on doctrinal and intellectual fiction to suggest that an objective answer can be given to common sentencing dilemmas, such as how many years of imprisonment is equivalent to the pain felt by an assault victim, or whether a burglar should be dealt with by way of imprisonment or fine, or the appropriate sanction for a drug trafficker. Certainly, there is no demonstrable violation of proportionality if a mugger, robber or drug trafficker is sentenced to either 12 months or 12 years imprisonment.

Some commentators have argued that proportionality is so vague as to be meaningless, in light of the fact that there is no stable and clear manner in which the punishment can be matched to the crime. Jesper Ryberg notes that one of the key and damaging criticisms of proportionality is that it ‘presupposes something which is not there, namely, some objective measure of appropriateness between crime and punishment.’ The most obscure and unsatisfactory aspect of proportionality is that there is no stable and clear manner in which the punishment can be matched to the crime. Jesper Ryberg further notes that to give

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98 Just deserts (or retributive) theorists contend that proportionality is capable of providing clear guidance regarding choice of punishment: see also Andrew von Hirsch, Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals (Rutgers University Press, 1985); Andrew von Hirsch and Andrew Ashworth, Proportionate Sentencing: Exploring the Principles (Oxford University Press, 2005); Andrew von Hirsch and Nils Jareborg, ‘Gauging Criminal Harm: A Living-Standard Analysis’ (1991) 11 Oxford Journal of Legal Studies 1. In our view, just deserts theory is doctrinally flawed. The main reason for this is that it cannot justify the need for punitive measures without resort to consequential considerations. The consequentialist considerations they normally invoke are said to come in the form of deterrence or victim (or community) satisfaction that is supposedly achieved by imposing hardships on wrongdoers. But reliance on such matters makes these theories incoherent. It means that punishment is not desirable in itself. Instead, it is only a worthwhile objective to the extent that it actually achieves such outcomes. In the end, this makes these theories simply a species of utilitarianism. Ultimately, the reliance on consequences undercut the stability of many retributive theories. Without advertising to consequentialist considerations, it is impossible to justify the link between crime and punishment. See Stanley I Benn and Richard Stanley Peters, Social Principles and the Democratic State (Allen & Unwin, 1959):

We can justify rules and institutions only by showing that they yield advantages. Consequently, retributivist answers to the problem can be shown, on analysis, to be either mere affirmations of the desirability of punishment or utilitarian reasons in disguise …. To say, with Kant, that punishment is a good in itself, is to deny the necessity for justification; for to justify is to provide reasons in terms of something else accepted as valuable’: at 175–6.


99 As noted in section II of this article, the courts have not attempted to exhaustively define the factors that are relevant to proportionality.
100 Ryberg, above n 97, 184.
content to the theory it is necessary to rank crimes, rank punishments and ‘anchor the scales’.  

Thus, even when it comes to matching the punishment for one offence, there is considerable speculation about whether it can be done with any degree of objectivity or precision. This uncertainty is necessarily compounded when an offender is sentenced for more than one offence.

What is clear, however, is that the first limb of the proportionality principle, in fact, directly contradicts the totality thesis. The harm caused by a number of offences is no less when it is committed by one offender. The total harm caused by five rapes (on five different victims) is identical whether they are committed by five different offenders or the one offender. Thus, on the basis of this limb, proportionality does not in fact support, let alone justify, the totality principle.

However, proportionality may go some way to justifying totality if one focuses on the impact of the severity of punishment on an offender. It has been suggested that the hardship inflicted by a term of imprisonment increases at a higher rate than the duration of a sentence. In Paxton v The Queen, Johnson J (Tobias AJA and Hall J agreeing) adopted the earlier remarks by Malcolm CJ in R v Clinch, stating:

> the severity of a sentence increases at a greater rate than any increase in the length of the sentence. Thus, a sentence of five years is more than five times as severe as a sentence of one year. Similarly, while a sentence of seven years may be appropriate for one set of offences and a sentence of eight years may be appropriate for another set of offences, each looked at in isolation. Where both sets were committed by the one offender a sentence of 15 years may be out of proportion to the degree of criminality involved because of the compounding effect on the severity of the total sentence of simply aggregating the two sets of sentences.

This involves a degree of speculation. In fact the converse could equally be argued: a sentence of, say, one year, is more than one quarter as onerous as a sentence of four years imprisonment. This is especially the case because the principal dichotomy between sentencing options is imprisonment or no imprisonment. Even a short jail term results in the potentially severe incidental harm in the form of the stigma associated with a jail term and other social, economic and employment deprivations and limitations. Arguably, these incidental deprivations are not made meaningfully worse by a longer term of imprisonment.

Thus, intuitively, there is some appeal to the argument that the impact of sentences compounds at a greater rate than their linear length, but this is by no means incontestable. There is at best a weak argument in support of the contention that proportionality can justify totality. And, to the extent that it can

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101 Ibid 185. Even retributivists have been unable to invoke the proportionality principle in a manner which provides firm guidance regarding appropriate sentencing ranges: see, eg, von Hirsch and Ashworth, above n 98; von Hirsch and Jareborg, above n 98.


underpin the totality principle, the utility of this is limited given the vague nature of the proportionality principle.

### C Mercy: A Feeling Rather Than a Legal Construct

The other purported justification for the totality principle is the principle of mercy. However, mercy itself is a fragile construct. It is devoid of any recognisable legal foundation and is unpredictable in its application. Its application appears to be grounded in the capacity of the offender’s subjective circumstances to enliven judicial sympathy. Further, there is no guidance regarding the extent to which it operates to reduce a sentence.

The nexus between mercy and sympathy was noted by King CJ in *R v Osenkowski*:

> There must always be a place for the exercise of mercy where a judge’s sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which has traditionally been extended, even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender’s life might lead to reform.105

Comments in *R v Kane* also endorse the sympathy rationale but attempt to inject an aspect of principle. The Court stated that:

> mercy must be exercised upon considerations which are supported by the evidence and which make an appeal not only to sympathy but also to well-balanced judgment. … If a court permits sympathy to preclude it from attaching due weight to the other recognized elements of punishment, it has failed to discharge its duty.106

However, there is no indication of what is meant by ‘a well-balanced judgment’. The term cannot relate to established mitigating factors because mercy operates outside them. The operation of the principle of mercy was most recently considered at length by the full bench of the Victorian Court of Appeal in *Markovic v The Queen; Pantelic v The Queen*. The Court noted that hardship faced by a family as a result of an offender’s imprisonment is grounds for the exercise of mercy in exceptional circumstances, but that the principle of

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104 Judges and magistrates do not possess the prerogative of mercy: *Johanson v Dixon (No 3)* [1978] VR 377. The concept is part of the sentencing discretion. A related concept to mercy is parsimony, which is the view that a sentence should not be harsher than that required to fulfil its social purpose: *NOM v DPP & Ors* [2012] VSCA 198, [68]. It has been expressly noted that parsimony is probably not part of sentencing law: see *Blundell v The Queen* (2008) 70 NSWLR 660, 665–6 [39]–[47]; *Foster v The Queen* [2011] NSWCCA 285, [50]–[53](Adams J). If the principle is part of sentencing law, its inexactness is incapable of shoring up other principles, such as totality.


hardship only applies when recognised mitigating circumstances are exhausted.\textsuperscript{108}

Thus, as mercy is grounded in sympathy and, is by its nature an emotional response, it is difficult, if not impossible, to demarcate its bounds.\textsuperscript{109} Arguably, it has no role in a system of law that purports to comply with the virtues of the rule of law, which minimally commands that the law must consist of predetermined rules and principles,\textsuperscript{110} such that it is knowable and predictable.\textsuperscript{111} The fragility of the concept of mercy as an appropriate legal principle undermines its capacity to explain and justify subordinate principles, such as totality.

A further conceptual difficulty with mercy in the context of totality is that it is superfluous. As we saw above, a key aspect of the proportionality principle is that it is meant to guard against excessive punishment. It is unclear why this objective should be advanced by two independent rationales in the context of the principle of totality.\textsuperscript{112}

Even if mercy can underpin totality, the boundless nature of mercy means that it is incapable of providing any guidance regarding the extent to which totality should moderate sentences.

IV  REFORM RECOMMENDATIONS

A  Overview of Other Potential Rationales for Totality

The totality principle is vague in its scope and operation because the ideas supposedly underpinning it are themselves obscure. Proportionality is unable to match with any degree of precision the competing limbs of the doctrine, while mercy is more akin to an emotional retort than a justifiable legal standard.

However, it may yet be that totality is justifiable. Offenders who are sentenced for multiple offences at the same time can be distinguished from offenders sentenced to the same offences separately, following the expiration of

\textsuperscript{108} For a recent application of this principle, see El-Hage v The Queen [2012] VSCA 309, where a sentence was reduced on account of hardship to the family caused by the imprisonment of the offender.

\textsuperscript{109} The suggestion that there is a concept of ‘rational mercy’ is debunked by David Hume’s theory of human motivation, which distinguishes between two states of mind: beliefs and desires. For a fuller account of Hume’s theory of motivation see Michael Smith, ‘Valuing: Desiring or Believing?’ in David Charles and Kathleen Lennon (eds), Reduction, Explanation and Realism (Oxford University Press, 1992) 323; Michael Smith, ‘Realism’, in Peter Singer (ed), A Companion to Ethics (Basil Blackwell, 1991) 399, 400–2. According to Hume, there are two broad mental states. Beliefs are copies or replicas of the way we believe the world to be. Desires (which is the realm in which emotions reside) are our wants; the states that move us to act. Beliefs are capable of being right or wrong and hence are rational. Desires on the other hand are not amenable to reason and hence it is flawed to place them within a logical construct.

\textsuperscript{110} For a discussion on the distinction between rules and principles, see Ronald Dworkin, Taking Rights Seriously (Duckworth, 4th ed, 1977) 22–8, 76–7.


\textsuperscript{112} Potentially, mercy could still be relevant to the extent that proportionality sets the lower limit for an appropriate penalty. However, in reality, the need for merciful intervention in relation to sentences that are as lenient as possible within the bounds of proportionality is questionable.
each sentence. While sentencing is, essentially, a punitive exercise, some of its objectives are designed to either assist the offender or at least reduce the prospect that he or she will reoffend. Thus, sentencing has a positive aspect from the perspective of the offender. Offenders who have been sentenced for multiple offences separately, following the expiration of each sentence, have had the benefit of interventions with the potential to curtail their criminality. Those sentenced for multiple offences at the same time have not benefitted from this positive aspect of sentencing. Arguably, their culpability is less than offenders who have completed their sentencing and then re-offended.

The two main sentencing objectives designed to discourage reoffending by particular offenders (as opposed to potential offenders) are specific deterrence and rehabilitation. Specific deterrence aims to discourage crime by punishing individual offenders for their transgressions and, thereby, convincing them that crime does not pay. In effect, it attempts to dissuade offenders from reoffending by inflicting an unpleasant experience (normally imprisonment) which they will seek to avoid in the future.\footnote{Specific deterrence is a central common law sentencing objective and is given express statutory recognition in all Australian jurisdictions. Specific deterrence applies most acutely in relation to serious offences and offenders with significant prior convictions since it is assumed that previous sanctions have failed to stop their criminal behaviour. Conversely, it has little application where an offender has voluntarily desisted from further offending or where the offender was suffering from impaired intellectual or mental functioning at the time of the offence.}

Specific deterrence focuses on frightening an offender into not reoffending. Rehabilitation, by contrast, seeks to alter the values of the offender so that he or she no longer desires to commit criminal acts – it involves the renunciation of wrongdoing by the offender and the re-establishment of the offender as an honourable, law-abiding citizen. It is achieved by ‘reducing or eliminating the factors which contributed to the conduct

\footnote{See, eg, Vartzokas v Zanker (1989) 51 SASR 277.}
for which [the offender] is sentenced'. Thus, it works through a process of positive, internal attitudinal reform.

Offenders who are sentenced and then reoffend have not had the advantage that these sentencing aims seek to achieve. However, this is only an actual detriment if, in fact, it is likely that specific deterrence or rehabilitation would have diminished the likelihood of subsequent offending.

We now analyse the efficacy of the sentencing process in achieving the goals of specific deterrence and rehabilitation. There have been hundreds of relevant empirical studies. Hence, it is not feasible to summarise them all here. However, as now discussed, the trend of the evidence is now relatively settled and it is tenable to provide an overview of the current state of knowledge regarding these topics.

B Specific Deterrence Does Not Work

The available empirical data suggest that specific deterrence does not work. The evidence suggests that inflicting harsh sanctions on individuals does not make them less likely to re-offend in the future. The level of certainty of this conclusion is very high – so high that specific deterrence should be abolished as a sentencing consideration.

There have been numerous studies across a wide range of jurisdictions and different time periods which come to this conclusion. Daniel Nagin, Francis T Cullen and Cheryl L Jonson provide the most recent extensive literature review regarding specific deterrence. They reviewed the impact of custodial sanctions versus non-custodial sanctions and the effect of sentence length on reoffending. The review examined six experimental studies where custodial versus non-custodial sentences were randomly assigned; 11 studies which involved matched pairs; 31 studies which were regression based and seven other studies which did not neatly fit into any of those three categories, and included naturally occurring social experiments which allowed inferences to be drawn regarding the capacity of imprisonment to deter offenders.

120 Channon v The Queen (1978) 33 FLR 433, 438.
121 See also C L Ten, Crime, Guilt and Punishment: A Philosophical Introduction (Oxford University Press, 1987) 7–8.
125 Ibid 145–54.
127 Ibid.
The last category included a study based on clemency granted to over 20,000 prisoners in Italy in 2006. A condition of release was that if those who were released reoffended within five years they would be required to serve the remaining (residual) sentence plus the sentence for the new offence. It was noted that there was a 1.24 per cent reduction in reoffending for each month of the residual sentence. This observation can be explained on the basis that the threat of future imprisonment discouraged reoffending. However, it was also noted that offenders who had served longer sentences prior to being released had higher rates of reoffending, supporting the view that longer prison terms reduce the capacity for future imprisonment to shape behaviour.\(^{128}\)

Nagin et al suggest that offenders who are sentenced to imprisonment do not have a lower rate of recidivism than those who receive a non-custodial penalty and, in fact, that some studies show that the rate of recidivism among offenders sentenced to imprisonment to be higher. They conclude that:

> Taken as a whole, it is our judgment that the experimental studies point more toward a criminogenic [that is, the possible corrupting effects of punishment] rather than preventive effect of custodial sanctions. The evidence for this conclusion, however, is weak because it is based on only a small number of studies, and many of the point estimates are not statistically significant.\(^{129}\)

The review suggests that not only do longer jail terms not deter, but neither do tougher jail conditions. Studies also show that offenders who are sentenced to maximum security prisons as opposed to minimum security conditions do not reoffend less.\(^{130}\)

These general findings are supported by a more recent experimental study by Donald Green and Daniel Winik.\(^{131}\) They observed the reoffending of 1,003 offenders who were initially sentenced for drug-related offences between June 2002 and May 2003 by a number of different judges whose sentencing approaches varied significantly (some were described as ‘punitive’, others as ‘lenient’), resulting in differing terms of imprisonment and probation. The study concluded that neither the length of imprisonment nor probation had an effect on the rate of reoffending during the four year follow-up period.\(^{132}\)

Accordingly, the weight of evidence supports the view that subjecting offenders to harsh punishment is unlikely to increase the prospect that they will become law-abiding citizens in the future.

It seems that specific deterrence embedded in an earlier sanction would not have reduced the likelihood of reoffending. It follows that there is no basis for treating offenders sentenced for multiple offences at the same time differently from offenders sentenced consecutively. Thus, the fact that offenders who are sentenced for multiple offences at the same time have been denied the specific

128 Ibid 155.
129 Ibid 145.
130 Ibid 124.
132 Ibid.
deterrent aspect of an earlier sanction cannot justify their overall penalty being reduced on account of the totality principle.

C Rehabilitation Probably Does Work

The evidence about rehabilitation is less conclusive but more promising – on balance, it seems that specific forms of intervention may be able to reduce recidivism. The effectiveness of rehabilitation in reducing repeat offending has been the subject of a large number of studies. Following extensive research conducted between 1960 and 1974, Robert Martinson, in an influential paper, concluded that empirical studies had not established that any rehabilitative programs had worked in reducing recidivism.\textsuperscript{133} The Panel of the National Research Council in the United States, several years after this work, also noted that there were no significant differences between the subsequent recidivism rates of offenders regardless of the form of punishment. As they stated, ‘[t]his suggests that neither rehabilitative nor criminogenic effects operate very strongly’.\textsuperscript{134}

In recent years, the research has taken on a more optimistic note. Most Australian jurisdictions have devoted increasing resources to rehabilitation over the past decade. The most recent wide-ranging Australian study regarding the effectiveness of rehabilitation is a report by Karen Heseltine, Andrew Day and Rick Sarre for the Australian Institute of Criminology, published in 2011.\textsuperscript{135} The report focused on changes and improvements to prison based correction rehabilitation programs in the custodial environment since 2004, when the previous report was issued.\textsuperscript{136}

The report by Heseltine et al, while unable to evaluate the effectiveness of rehabilitation programs currently operating in Australian prisons, summarised recent studies into the effectiveness of certain rehabilitation programs. It noted that while there were mixed results, there were some programs that reported positive outcomes.

This was especially the case in relation to sexual offender programs, where some studies showed that the recidivism rate of offenders completing the program was less than half of that of other offenders.\textsuperscript{137} The results of programs directed towards violent offenders were less positive, but a wide-ranging review of studies focusing on United Kingdom programs noted that reductions in offending for violent offences by around seven to eight per cent had occurred. Overseas studies reported some success with anger management programs, but

\begin{itemize}
  \item Ibid 2.
  \item Ibid 14.
\end{itemize}
an Australian study (of a shorter 20 hour program) showed no positive outcomes related to program completion. There is no cogent evidence supporting the effectiveness of domestic violence or victim awareness programs. However, drug and alcohol programs have been shown to be effective at reducing substance abuse and reoffending.  

This assessment is consistent with the findings of Mitchell, Wilson and MacKenzie who undertook a major analysis of studies into the effectiveness of drug treatment programs in prison. The studies they focused on related to drug users and compared reoffending patterns of offenders who completed a drug rehabilitation program with those who did not complete a program, or completed only a minimum program between the years 1980 and 2004. They analysed 66 studies in total. The report concluded that ‘[o]verall, this meta-analytic synthesis of evaluations of incarceration based drug treatment programs found that such programs are modestly effective in reducing recidivism.’

Moreover, it was noted that programs that dealt with the multiple problems of drug users (termed therapeutic communities) were the most successful, whereas there was no evidence to support good outcomes associated with ‘boot camp’ programs.

Thus, there is some support for the view that criminal punishment can assist to reform certain categories of offenders; although there is no firm evidence showing that it cannot work for the majority of offenders.

Therefore, offenders who have not been subject to the rehabilitative aspects of sentencing may indeed be at a disadvantage compared with those who have previously been sentenced. Accordingly, it can be tenably asserted that offenders who are sentenced for multiple offences are disadvantaged compared to those sentenced consecutively.

D Implications for Totality

The current rationales for totality are flawed. The only tenable basis for conferring a sentencing discount to offenders who are sentenced for more than one offence is that they were deprived of the opportunity for internal attitudinal reform that would probably have been a part of the sentence if they were sentenced for one offence initially. Being deprived of this opportunity potentially increases their likelihood of reoffending, hence, they are less culpable than

138 Ibid 27.
140 Ibid 17.
141 Ibid.
offenders who reoffend consecutively, despite being subjected to the rehabilitative aspects of the sentencing process.\textsuperscript{142}

While this provides a justification for the totality principle, it entails that there should be a number of changes to its application.

First, it should be irrelevant whether the offences are of a similar nature – the same discount should apply for similar or different offence types. The length of time between offences should not be an important consideration. However, where an offender has already been subjected to a sentence and reoffends while on parole, the application of the totality principle is greatly diluted, given that he or she has been subjected to a significant part of the rehabilitative aspect of the sanction and has still reoffended.

The extent of the discount remains obscure given that the impact of rehabilitation is speculative and the instinctive synthesis approach to sentencing does not readily permit numerical computations. However, consistent with current sentencing orthodoxy, it would seem that totality should not significantly reduce the total effective sentence. While rehabilitation is an established sentencing consideration, it is not a particularly important variable. There are dozens of other mitigating and aggravating considerations\textsuperscript{143} and, in principle, rehabilitation is seemingly no more powerful than most others. This statement cannot be conclusively proven because the instinctive synthesis approach to sentencing does not generally permit mathematical comparisons to be made of the respective importance of sentencing considerations.\textsuperscript{144} However, this uncertainty cuts both ways – unless there is a demonstrable reason to assert that rehabilitation is a cardinal consideration, the default position is that it ranks approximately equal to other established sentencing variables. In light of this, to then suggest that totality should operate generally to greatly reduce penalties is flawed because it is a case of a stream rising higher than its source.

V CONCLUSION

Totality is a well-established sentencing principle. The circumstances in which it applies are also relatively well settled, although there remains some

\begin{itemize}
\item \textsuperscript{142} The argument for a discount in these circumstances applies with less force in relation to offenders who have previously been sentenced and have again reoffended. Where an offender has been, for example, convicted and sentenced 10 years earlier and is now being sentenced for multiple offences, the first sentence obviously did not succeed in totally rehabilitating the offender. However, he or she is not thereafter precluded from attempts at rehabilitation by other sentences and hence a totality discount is still appropriate in these circumstances.
\item \textsuperscript{143} Joanna Shapland identified 229 factors: J Shapland, \textit{Between Conviction and Sentence: The Process of Mitigation} (Routledge, 1981) 55; Roger Douglas identified 292 relevant sentencing factors: R Douglas, \textit{Guilty Your Worship: A Study of Victoria’s Magistrates’ Courts} (La Trobe University, 1980).
\item \textsuperscript{144} There are, in fact, two sentencing considerations that carry quantifiable reductions. They are pleading guilty (generally up to 25 per cent) and assisting authorities (generally up to 50 per cent). Both of these reductions are obviously considerable. Notably, rehabilitation is not treated similarly which suggests it is not as weighty as these considerations. For a further discussion regarding the operation of these mitigating factors, see Bagaric and Edney, above n 72.
\end{itemize}
uncertainty regarding its operation when parole is violated and its application to
offences of a completely different nature. However, the manner in which it
applies, in the form of the size of the sentence reduction that it should confer, is
obscure. This is a matter of ongoing concern. It is also unclear at what point the
offending is so serious that the principle of totality ceases to have a meaningful
operation. Crushing sentences are appropriate in some circumstances, however,
they have not been defined with any degree of precision.

Thus, aspects of totality are obscure, leading to impressions of arbitrariness.
This is regrettable given that imprisonment is the harshest penalty that the
community imposes on individuals. The totality principle will remain unclear
because the underpinning rationales are themselves uncertain.

While proportionality is relatively coherent and grounded, numerous
definitional and pragmatic aspects remain unresolved, meaning that it is
incapable of providing clear guidance regarding the appropriate sentence.

Mercy is the most unstable rationale because it has no role in a system of law
given that it is principally based on stimulating the ‘feelings’ as opposed to
engaging with the rationality of the sentencer. Moreover, the weight mercy
should be accorded in the sentencing calculus is indeterminate.

The most tenable justification for the principle of totality stems from the goal
of rehabilitation. Offenders who are sentenced for multiple offences and did not
undergo the rehabilitative effect of an earlier sentence are disadvantaged
compared to those who had the opportunity to rehabilitate from an early
sentence, but failed to do so. Hence, totality is a justifiable principle, but the
extent to which it moderates sentencing is probably overstated. The weight that
any considerations relating to rehabilitation should be accorded in the sentencing
determination is modest given the lack of empirical clarity regarding its
effectiveness – it seems, at this point, to work for some offenders but not all and,
of course, it is not possible to determine which offenders would have benefited
from a rehabilitative intervention and which would not. However, it does follow
from this rationale that the totality principle is not contingent upon the offences
being of a similar nature nor having being committed over a short timeframe.

Further developments in totality theory and application are contingent upon a
fuller understanding of the principle of proportionality and, in particular, whether
longer sentences are disproportionately harsher than their linear increase would
suggest. If this is the case, potentially, there is a basis for strong application of
the totality principle, such that offenders who are sentenced for multiple offences
are entitled to a significant sentence reduction, as is currently the situation.
However, this is undermined significantly by a clear minded assessment of the
other limb of the proportionality thesis – the level of harm caused by a number of
criminal acts is the same, whether it is by the one offender or multiple offenders.
FIRST-TIME OFFENDER, PRODUCTIVE OFFENDER, OFFENDER WITH DEPENDENTS: WHY THE PROFILE OF OFFENDERS (SOMETIMES) MATTERS IN SENTENCING

Mirko Bagaric* & Theo Alexander**

ABSTRACT

Should a single mother of four young children who commits theft be sentenced to a lesser sanction than a woman who commits the same crime but has no dependents? Should a billionaire philanthropist be sentenced to a lesser penalty than the average citizen for assaulting a random bystander? Should a first-time thief receive a lighter sanction than a career thief for the same theft? The relevance of an offender’s profile to sentencing is unclear and is one of the most under-researched and least coherent areas of sentencing law. Intuitively, there is some appeal in treating offenders without a criminal record, those who have made a positive contribution to society, or who have dependents more leniently than other offenders. However, to allow these considerations to mitigate penalty potentially licenses offenders to commit crime and decouples the sanction from the severity of the offense, thereby undermining the proportionality principle. This article analyzes the relevance that an offender’s profile should have in sentencing. We conclude that a lack of prior convictions should generally reduce penalty because the empirical data shows that, in relation to most offenses, first-time offenders are less likely to reoffend than recidivist offenders. The situation is more complex in relation to offenders who have made worthy social contributions. They should not be given sentencing credit for past achievements given that past good acts have no relevance to the proper objectives of sentencing and it is normally not tenable, even in a crude sense, to make an informed assessment of an individual’s overall societal contribution. However, offenders should be accorded a sentencing reduction if they have financial or physical dependents and if imprisoning them

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is likely to cause harm to their dependents. Conferring a sentencing discount to first-time offenders and those with dependents does not license them to commit crime or unjustifiably encroach on the proportionality principle. Rather, it recognizes the different layers of the legal system and the reality that sentencing law should not reflexively overwhelm broader maxims of justice, including the principle that innocent people should not suffer. This article argues that fundamental legislative reform is necessary to properly reflect the role that the profile of offenders should have in the sentencing regime.

I. INTRODUCTION

The impact that the past criminal history and achievements of offenders and their family ties should have on sentencing outcomes is one of the most unsettled and doctrinally complex areas of sentencing law. The main overarching guiding sentencing principle is the proportionality doctrine, which in its most basic form requires that the punishment should fit the crime.\(^1\) Thus, a key focus of the sentencing inquiry is on the harshness of the sanction and the seriousness of the offense.\(^2\) The offender’s profile, at least ostensibly, stands outside this perspective.

However, on closer analysis considerations personal to the offender are inextricably bound up in the sentencing inquiry. Thus, in most sentencing systems the key consideration affecting the penalty (apart from the circumstances of the offense) is the prior criminal history of the offender.\(^3\) Moreover, the proportionality principle does not exhaust the range of considerations that properly inform the correct sentence and its duration. Other sentencing considerations, such as rehabilitation, may be capable of accommodating factors relating to the offender into the sentencing inquiry.

In this article, we examine the relevance that three considerations that relate to the profile of many offenders should have in the sentencing calculus: the absence of prior convictions; the offender’s past positive good acts; and the offender’s family ties,

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\(^1\) See infra Part II.
\(^2\) See infra text accompanying notes 26.
particular where other individuals are financially or physically dependent on the offender.

The complexity of the inquiry regarding the profile of the offender has resulted in an incoherent and unsatisfactory jurisprudence. The general trend of the sentencing landscape is that the absence of prior convictions is a mitigating sentencing consideration, except in relation to certain defined offenses. However, there has been no considered attempt by the courts to justify the rationale for this discount, nor to identify the circumstances in which the sentencing reduction does not apply. Past good acts do not normally mitigate penalty. Family ties can, in some situations, mitigate penalty, but these circumstances (on their face) are rare.

We conclude that the current state of the law in this area is fundamentally normatively and empirically flawed. The absence of prior convictions should mitigate more significantly than is currently the case, given that the empirical data shows that in relation to most offense types, first offenders are statistically less likely to reoffend than recidivists. Offenders who have made significant social contributions should not receive a discount. However, offenders who have dependents should be treated more leniently than other offenders. The interests of the dependents should not be totally ignored in the sentencing calculus. They are innocent parties whose flourishing will necessarily be diminished by imprisonment of the offender. The objectives of sentencing law are important, but sentencing law does not overwhelm, and is not superior to, other legal imperatives such as the prohibition against punishing the innocent. The interest of blameless dependents should not be totally subordinated to the need to thoroughly punish offenders. First-time offenders and offenders with financial or physical dependents should receive a penalty reduction in the order of twenty-five percent. For considerations of clarity, the nature and quantum of the penalty adjustments in this article are examined from the perspective of a reduction to a term of imprisonment. However, in principle, in relation to proposed short terms of imprisonment, the mitigation that should be provided to first-time offenders and those with defendants could result in a penalty

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4 See infra text accompanying notes 52–54, 85, 106–13.
6 See infra text accompanying notes 65–67, 120–21, 128.
substitution, such that a term of imprisonment is avoided altogether in favor of, say, probation or a fine.

The manner in which the profile of the offender should be accommodated in the sentencing calculus is discussed in the context of the sentencing systems operating in the United States and Australia. The sentencing regimes in these jurisdictions have many commonalities (principally because they have the same overarching goals in the form of community protection, deterrence, and rehabilitation), however, the means invoked to pursue these objectives are strikingly different. The contrasting manner in which these respective sentencing systems deal with an offender’s profile illustrates possible approaches to the issue. It is argued, however, that ultimately both sentencing systems are flawed when it comes to incorporating the profile of offenders into sentencing determinations.

In Part II of this article, we examine the manner in which sentencing law currently deals with the offender’s profile. The remaining part of the article makes reform recommendations regarding the manner in which the profile of the offender should be factored into the sentencing inquiry. Part III argues that first offenders should receive a discount for all offense types, with the possible exception of property offenses. This is followed in Part IV by an explanation of the reasons that past good acts should not mitigate penalty. In Part V, we argue that offender dependency should reduce penalty. This is a particularly complex, multilayered issue which requires consideration of a number of multidisciplinary principles and ideals, including the right to a family, the proscription against punishing the innocent, and the doctrine of double effect. Part VI of the paper provides an overview of the main rationales of sentencing and notes that implementation of the recommendations will not undermine any of the key sentencing objectives so long as the recidivist premium for serious sexual and violent offenders is maintained even in relation to offenders with

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8 See infra Part II.
dependents. The concluding remarks, in Part VII, set out the reforms that should occur to accommodate the analysis in this article.

II. THE CURRENT STATE OF THE LAW

A. The United States

The United States does not have uniform sentencing laws or procedures. Each state and the federal jurisdiction have their own sentencing system. The federal sentencing regime in particular is important given that approximately ten percent of all inmates have been sentenced for violating federal criminal laws and, as has been noted by Douglas A. Berman and Stephanos Bibas, this system “profoundly shapes American criminal justice.” There are a number of key similarities that mark sentencing law throughout the United States, notwithstanding the uniqueness of each sentencing system.

A defining feature of sentencing in the United States is the heavy reliance on standard or fixed penalties. Most jurisdictions in the United States have some form of standard or mandatory penalty provisions. These penalties are normally set out in grids which utilize two main variables in arriving at the set penalty: offense seriousness and criminal history. The penalties prescribed in the grids are generally severe and this has contributed to a steep increase in prison numbers over the past two decades. Currently, more than two million Americans are incarcerated. This equates

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9 Although, as is discussed infra, the loading that is currently accorded for prior offending should be significantly diminished.
11 See infra note 16.
12 Berman & Bibas, supra note 10, at 40.
14 See, e.g., FED. SENTENCING GUIDELINES MANUAL § 5A (2013).
15 See Charlie Savage, Dept. of Justice Seeks to Curtail Stiff Drug Terms, N.Y. TIMES, Aug. 12, 2013, at A1 (attributing the dramatic increase in the federal prison population to mandatory minimum sentences for drug offenses).
16 See LAUREN E. GLAZ & ERINN J. HERBERMAN, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 243936, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012, at 3 (2013). The exact number of prisoners is 2,228,400. Id. More than 200,000 inmates are in federal prisons. Total U.S. Correctional Population Declined in 2012 for Fourth Year,
to an imprisonment rate of over 900 people per 100,000 adults, and sets the United States apart from all other nations on the basis that it imprisons more of its citizens than any other country.

The Federal Sentencing Guidelines ("Federal Sentencing Guidelines" or "Guidelines") are perhaps the best known standard penalty laws and are typical of the manner in which such sentencing provisions operate. The Guidelines adopt two key variables which operate to determine the penalty level, which is prescribed in the form of a range. The variables are offense severity and an offender’s criminal history.

The penalty levels and ranges are precisely designated. There are forty-three levels in total, with the penalty range gradually increasing from the bottom level (one) to the highest level (forty-three). The incremental increase in the ranges is illustrated by the fact that the top of the range in one level overlaps with the bottom of the range in the next level. The objective of the Guidelines is to further the central objectives of sentencing, in the form of "deterrence, incapacitation, just punishment, and rehabilitation." In addition to this, the Guidelines seek to promote the principle of proportionality, which contends that the harshness of the sanction should be matched by gravity of the crime.

The principle of proportionality is, however, compromised by the fact that the offender’s criminal history has a cardinal impact in determining the appropriate penalty range. Each offense has six different penalty ranges correlating with designated criminal history points, which range from one to thirteen or more. The

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19 The Guidelines are promulgated by the U.S. Sentencing Commission and issued pursuant to 28 U.S.C. § 994(a). FED. SENTENCING GUIDELINES MANUAL § 1A1.1. For analysis and criticism of the Guidelines, see Baron-Evans & Coffin, supra note 5.
20 See FED. SENTENCING GUIDELINES MANUAL § 5A.
21 Correlating to zero to six months imprisonment. See id.
22 Correlating to life imprisonment. See id.
23 See id. § 1A1.4(b).
24 Id. § 1A1.2.
25 Id. § 1A1.3.
27 Criminal history points are principally determined by reference to the seriousness of the past offending and the time period since the past offenses. See FED. SENTENCING GUIDELINES MANUAL §§ 4A1.1, 4A1.2(a).
28 See id. § 5A.
first criminal history category incorporates zero to one criminal history points, while the sixth (and highest) category applies for thirteen or more criminal history points. The designated penalty level for the same offense varies markedly depending on an offender’s criminal history, so much so that the average penalty difference between a first offender and serious recidivist is approximately double. By way of example, the presumptive penalty for an offense at level twenty for an offender with a criminal history score of I is thirty-three to forty-one months. This escalates to seventy to eighty-seven months for an offender who commits the same offense but has a criminal history score of VI.

The U.S. Supreme Court has held that these Guidelines are advisory, instead of mandatory. Despite this, the courts are still required to take the Guidelines into account in sentencing offenders. As noted by the U.S. Sentencing Commission: “An advisory guideline . . . continues to promote certainty and predictability in sentencing, thereby enabling the parties to better anticipate the likely sentence based in the individualized facts of the case.” It is perhaps for reasons associated with this that more than half of federal sentences continue to be imposed within the range stipulated in the Guidelines.

As noted above, the main variables that determine the appropriate advisory penalty range are the seriousness of the offense and the prior criminal history of the offender; however these considerations are not exhaustive. There are also a large number of circumstances that are set out in the Guidelines which allow a court to deviate from the prescribed sentencing range. These come in two forms: “departures” and “adjustments.” Departures, strictly speaking, are designated aggravating and mitigating considerations prescribed in Chapter Five, Part K of the Guidelines and include factors such as assisting authorities and diminished capacity.

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29 See id.
30 See id.
31 See id.
32 See id.
35 FED. SENTENCING GUIDELINES MANUAL § 1A2.
37 See FED. SENTENCING GUIDELINES MANUAL §§ 3A1.1–.5, 3B1.1–.5, 3C1.1–.4, 3E1.1, 4A1.1, 4A1.3, 4B1.1, 4B1.3–.5, 5H1.1, 5H1.3–.4, 5H1.7–.9, 5H1.11, 5K2.1, 5K2.0–.24.
38 Id. §§ 5K1.1, 5K2.13.
Departures in fact also refer to atypical or unusual cases where the normal operation of an aggravating or mitigating factor would have an unwarranted result.\textsuperscript{39} Adjustments are aggravating and mitigating factors which, if applicable, result in a reduction or increase in penalty by a set amount.\textsuperscript{40} The Guidelines also expressly exclude certain considerations as relevant to penalty, such as race, religion, and economic status.\textsuperscript{41}

There are over forty aggravating and mitigating considerations set in the Guidelines, with the number of aggravating factors exceeding mitigating factors by a ratio of approximately two to one.\textsuperscript{42} The fact that there are more aggravating than mitigating considerations is in keeping with the approach in other states.\textsuperscript{43}

For the purpose of this article, the most important category of mitigation in the Federal Sentencing Guidelines is matters personal to the offender. To this end, the Guidelines stipulate that the following factors can reduce a penalty:

- prior clean record (i.e. “aberrant behavior”),\textsuperscript{44} except in relation to designated offenses, which are discussed further below,\textsuperscript{45} and
- military service (“[if it] is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines”).\textsuperscript{46}

The Guidelines also state that several factors personal to the offender cannot reduce penalty. They are:

- employment record;\textsuperscript{47}
- family ties and responsibilities;\textsuperscript{48}

\textsuperscript{39} See id. § 1A1.4(b).
\textsuperscript{40} See, e.g., id. §§ 3A1.1–5, 3B1.1–5, 3C1.1–4, 3E1.1.
\textsuperscript{41} Id. §§ 5H1.2, 5H1.4–6, 5H1.10–12, 5K1.2, 5K2.0(d).
\textsuperscript{42} Id. §§ 3A1.1–5, 3B1.1–5, 3C1.1–4, 3E1.1, 4A1.1, 4B1.3–5, 5H1.1, 5H1.3–4, 5H1.11, 5K1.1, 5K2.1–21, 5K2.24.
\textsuperscript{44} FED. SENTENCING GUIDELINES MANUAL § 5K2.20. This will only be satisfied if “the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life.” Id. § 5K2.20(b).
\textsuperscript{45} Id. § 5K2.20(c); see also BARON-EVANS & COFFIN, supra note 5, at 185–96 (discussing the background of the aberrant behavior provision). While over seventy-four percent of judges stated that aberrant behavior is “ordinarily relevant” to whether a penalty should be reduced, in 2010, this consideration was cited in only 1.7% of cases in which a below-Guideline penalty was imposed. Id. at 194.
\textsuperscript{46} FED. SENTENCING GUIDELINES MANUAL § 5H1.11.
\textsuperscript{47} Id. § 5H1.5; see also BARON-EVANS & COFFIN, supra note 5, at 106–09 (arguing that employment record should be mitigatory).
\textsuperscript{48} FED. SENTENCING GUIDELINES MANUAL § 5H1.6; see also BARON-EVANS & COFFIN, supra
civic, charitable, or public service or employment-related contributions; and
• record of prior good works.

The appropriateness of the above Guidelines was reconsidered in 2010 when the U.S. Sentencing Commission altered military service from being an irrelevant to a relevant factor but preserved the status of the other considerations detailed above as being normally irrelevant to penalty.

Thus, on their face the Guidelines prescribe that the absence of prior convictions can mitigate penalty. The policy statement greatly attenuates the circumstances where aberrant conduct mitigates penalty. It provides:

(a) IN GENERAL.—Except where a defendant is convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code, a downward departure may be warranted in an exceptional case if (1) the defendant’s criminal conduct meets the requirements of subsection (b); and (2) the departure is not prohibited under subsection (c).

(b) REQUIREMENTS.—The court may depart downward under this policy statement only if the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life.

(c) PROHIBITIONS BASED ON THE PRESENCE OF CERTAIN CIRCUMSTANCES.—The court may not depart downward pursuant to this policy statement if any of the following circumstances are present:

(1) The offense involved serious bodily injury or death.

(2) The defendant discharged a firearm or otherwise used a firearm or a dangerous weapon.

(3) The instant offense of conviction is a serious drug note 5, at 109–17 (arguing that family ties and responsibilities should be mitigatory).

FED. SENTENCING GUIDELINES MANUAL § 5H1.11; see also BARONS-EVANS & COFFIN, supra note 5, at 127–39 (discussing the background of this provision).

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See FED. SENTENCING GUIDELINES MANUAL § 5H1.11; BARON-EVANS & COFFIN, supra note 5, at 128–35 (discussing the backdrop to these changes).

FED. SENTENCING GUIDELINES MANUAL § 5K2.20.
trafficking offense.

(4) The defendant has either of the following: (A) more than one criminal history point, as determined under Chapter Four (Criminal History and Criminal Livelihood) before application of subsection (b) of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category); or (B) a prior federal or state felony conviction, or any other significant prior criminal behavior, regardless of whether the conviction or significant prior criminal behavior is countable under Chapter Four.

The impact of this is to limit the discount to first offenders who have not committed an offense against a minor, or an offense that involves serious harm to another person, or a firearm or a serious drug offense.

The Guidelines also state that prior good acts and family connections (including the dependency of others) are irrelevant to sentence. While the Guidelines stipulate that the latter two factors should not reduce penalty, as noted above, post-Booker this is not an obligatory stipulation and judges can mitigate penalty for these reasons. Further, the Guidelines expressly state: “The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly infrequent.”

And in fact, in some instances, courts have invoked good acts as a basis for penalty reduction—although at times the mitigating bar has been elevated to require the acts to be extraordinarily good.

Several state legislative schemes also expressly provide that good acts should mitigate. These typically state that the “character and attitudes” of an offender are mitigating. For example, in Idaho it is stipulated that where “[t]he character and attitudes of the defendant indicate that the commission of another crime is

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53 Id.

54 Id.

55 Id. §§ 5H1.6, 5H1.11.


57 FED. SENTENCING GUIDELINES MANUAL § 1A1.4(b).


59 See United States v. Repking, 467 F.3d 1091, 1095–96 (7th Cir. 2006) (per curiam); United States v. Serrata, 425 F.3d 886, 915 (10th Cir. 2005); United States v. Strange, 370 F. Supp. 2d 644, 649 n.6 (N.D. Ohio 2005); Hessick, supra note 43, at 1124.
unlikely."\(^60\) This weighs against a sentence of imprisonment.\(^61\) More broadly, in North Carolina it is prescribed that if an offender “has been a person of good character or has had a good reputation in the community” then this is a mitigating factor.\(^62\)

Good acts are also relevant to mitigation in capital cases.\(^63\) However this approach cannot be universalized to the sentencing for other offenses given that the individualized nature of sentencing in this domain stems from the Eighth Amendment.\(^64\)

In relation to family ties, section 5H1.6 of the Federal Sentencing Guidelines states: “In sentencing a defendant convicted of an offense other than an offense described in the following paragraph, family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted.”\(^65\)

The commentary to this provision elaborates on the circumstances when family obligations may warrant a departure. The commentary provides:

Circumstances to Consider.—

(A) In General.—In determining whether a departure is warranted under this policy statement, the court shall consider the following non-exhaustive list of circumstances:

(i) The seriousness of the offense.

(ii) The involvement in the offense, if any, of members of the defendant’s family.

(iii) The danger, if any, to members of the defendant’s family as a result of the offense.

(B) Departures Based on Loss of Caretaking or Financial Support.—A departure under this policy statement based on the loss of caretaking or financial support of the defendant’s family requires, in addition to the court’s consideration of the non-exhaustive list of circumstances in subdivision (A), the presence of the following circumstances:

(i) The defendant’s service of a sentence within the applicable guideline range will cause a substantial, direct, and specific loss of essential caretaking, or essential


\(^61\) Id.; see also Hessick, supra note 43, at 1117–18 & n.31 (stating that the other state legislative schemes that accord weight to good character include Hawaii, Idaho, Illinois, Indiana, North Dakota, and New Jersey).


\(^63\) Hessick, supra note 43, at 1118.

\(^64\) Id. at 1127.

financial support, to the defendant’s family.

(ii) The loss of caretaking or financial support substantially exceeds the harm ordinarily incident to incarceration for a similarly situated defendant. For example, the fact that the defendant’s family might incur some degree of financial hardship or suffer to some extent from the absence of a parent through incarceration is not in itself sufficient as a basis for departure because such hardship or suffering is of a sort ordinarily incident to incarceration.

(iii) The loss of caretaking or financial support is one for which no effective remedial or ameliorative programs reasonably are available, making the defendant’s caretaking or financial support irreplaceable to the defendant’s family.

(iv) The departure effectively will address the loss of caretaking or financial support.

Despite the narrow framework regarding the circumstances when family ties should reduce a sentence, the courts have, post-Booker, regularly invoked family ties and responsibility as a basis for imposing a sentence below the Guideline range—in fact, this is the most commonly employed mitigating factor in Chapter 5 of the Federal Sentencing Guidelines Manual for reducing penalty.

An example of family obligations reducing a sentence is the decision in United States v. Schroeder where the court stated that the sentencing court’s decision to ignore the illness of an adopted child as being relevant to sentence was an error. The offender in this case was a carer for his adopted daughter who was prone to illness as a result of having a compromised immune system. In reaching this decision, the court noted that in order for such family ties and responsibilities to reduce penalty below the Guideline level the situation must be extraordinary. The court stated:

A defendant’s extraordinary family circumstances can constitute a legitimate basis for imposing a below-guide-lines sentence. Sentencing Guideline 5H1.6 provides that “family ties and responsibilities are not ordinarily relevant in
determining whether a departure may be warranted,” but a district court may impose a below-guidelines sentence “once it finds that a defendant’s family ties and responsibilities . . . are so unusual that they may be characterized as extraordinary.”

The court’s observation that Schroeder’s criminal conduct was the cause of the alleged hardship to his daughter is an obvious and not dispositive one, since the culpability of a defendant who appears for sentencing is a given. When a defendant presents an argument for a lower sentence based on extraordinary family circumstances, the relevant inquiry is the effect of the defendant’s absence on his family members. The defendant’s responsibility for the adverse effects of his incarceration on his family is not the determinative issue. If it were, there would never be an occasion on which the court would be justified in invoking family circumstances to impose a below-guideline sentence. The court was required to consider Schroeder’s family circumstances argument and provide an adequate analysis of how much weight, if any, it should command. The fact that the consequences of incarceration are attributable to his own misconduct may be a factor in the analysis but it is not the sole factor nor is it dispositive. Thus, on remand the court should consider whether Schroeder’s family circumstances are a mitigating factor.71

Family considerations can also be mitigating pursuant to some state sentencing statutes.72 The most direct and clear expression of this is found in North Carolina, where section 15A-1340.16(e)(17) of the General Statutes of North Carolina states a mitigating factor

71 Id. at 755–56 (quoting United States v. Canoy, 38 F.3d 893, 906 (7th Cir. 1994)) (citing United States v. Johnson, 964 F.2d 124, 129 (2d Cir. 1992)); see United States v. Tiller, 549 F. App’x 795, 800 (10th Cir. 2013); United States v. Gutierrez-Sierra, 513 F. App’x 767, 770 (10th Cir. 2013); United States v. Loya-Castillo, 498 F. App’x 799, 802 (10th Cir. 2012); United States v. Barnes, 660 F.3d 1000, 1009 (7th Cir. 2011); United States v. O’Doherty, 643 F.3d 209, 215 n.3 (7th Cir. 2011); United States v. Runyan, 639 F.3d 382, 384 (7th Cir. 2011); United States v. Gary, 613 F.3d 706, 710–11 (7th Cir. 2010); United States v. Pape, 601 F.3d 743, 747 (7th Cir. 2010); United States v. Peetz, 582 F.3d 835, 838–39 (7th Cir. 2009); United States v. Munoz-Nava, 524 F.3d 1137, 1148 (10th Cir. 2008); United States v. Peña, 930 F.2d 1486, 1495 (10th Cir. 1991). For a strict application of the extraordinary circumstances test, see United States v. Culbertson, 406 F. App’x 56, 58–59 (7th Cir. 2010), and Gary, 613 F.3d at 709–11.

as: “[t]he defendant supports the defendant’s family.”

B. Australia

Like the situation in the United States, there is no uniform sentencing system in Australia. Each of the eight jurisdictions has its own sentencing law and process, which is prescribed by a combination of legislation and common law. In addition to this, the federal jurisdiction has its own discrete sentencing system. While there is divergence in terms of the finer details of each of the sentencing systems, the broad approach is similar.

The key sentencing objectives are community protection, deterrence, and rehabilitation. The proportionality principle is also a cardinal consideration in determining the nature of a sanction and its length or severity.

A key point of departure between the sentencing systems in Australia and the United States is that standard or mandatory penalties in Australia are rare. Instead sentencing in Australia is largely a discretionary process, whereby judges have considerable discretion to impose a penalty, so long as it does not exceed the maximum penalty for the relevant offense. This methodology is termed the “instinctive synthesis.”

In accordance with this approach, judges are required to identify all of the factors that are relevant to a particular sentence and arrive at a judgment regarding the precise penalty that is

75 Sentencing Guidelines: Australia, supra note 74.
79 See id. at 1–2.
80 R v Williscroft [1975] VR 292, ¶ 31 (Austl.); see also Barbaro v The Queen [2014] HCA 2, ¶ 41 (Austl.) (“[T]he synthesis of the ‘raw material’ which must be considered on sentencing, including material like sentencing statistics and information about the sentences imposed in comparable cases, is the task of the sentencing judge . . . .”).
appropriate in all of the circumstances.\footnote{81} However, judges are not required, nor permitted, to set out with particularity the precise weight that has been conferred to any particular sentencing factor.\footnote{82}

Another important contrast between the sentencing systems in the United States and Australia is that there are a far greater number of aggravating and mitigating considerations in Australia. One study identified nearly 300 such considerations in Australia.\footnote{83} The large number of factors that increase and decrease penalties in Australia combined with the instinctive synthesis approach to sentencing has resulted in the sentencing process being criticized for its obscurity, lack of transparency, and unpredictability.\footnote{84}

For the purposes of this article, the most important mitigating or aggravating factors are those relating to the profile of the offender. In Australia, at common law, the starting position regarding an offender’s character is that the absence of prior convictions is a mitigating factor.\footnote{85} So too is an offender’s character and past good acts.\footnote{86} At common law, the concept of character has not been explored with any degree of precision and, in particular, it has not been distinguished from simply the absence of prior convictions.\footnote{87} Some legislative provisions do, however, stipulate a distinction between the absence of prior convictions and good character. For example, in New South Wales, the Crimes (Sentencing Procedure) Act 1999 states the absence of significant prior convictions\footnote{88} and good character mitigate penalty.\footnote{89}

Section 16A of the Commonwealth’s Crimes Act 1914 provides that in determining the appropriate sentence the court is to consider the “character” and “antecedents” of the accused.\footnote{90} The


\footnote{82} See id. at 269.


\footnote{85} See, e.g., DPP (Cth) v D’Alessandro (2010) 26 VR 477, ¶ 26 (Austl.) (“It is true that the respondent has no prior convictions. He therefore comes to be sentenced as a person of good character.”).

\footnote{86} See R v Gent (2005) 162 A Crim R 29, ¶¶ 48–49 (Austl.).

\footnote{87} See, e.g., D’Alessandro, 26 VR 477, ¶ 26 (failing to distinguish the offender’s good character from his lack of prior convictions).

\footnote{88} Crimes (Sentencing Procedure) Act 1999 (NSW) s 21A(3)(e) (Austl.).

\footnote{89} Id. s 21A(3)(f).

\footnote{90} Crimes Act 1914 (Cth) s 16A(2)(m) (Austl.).
term “antecedents” is generally understood to mean the criminal history of the offender. 91 Section 8(1)(b) of Victoria’s Sentencing Act 1991 states that in determining whether to record a conviction, one of the considerations that a court is to consider is “the character and past history of the offender.” 92 Victoria is one of the few jurisdictions that defines character. Section 6 states:

In determining the character of an offender a court may consider (among other things):

(a) the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions of the offender; and

(b) the general reputation of the offender; and

(c) any significant contributions made by the offender to the community. 93

While these provisions distinguish between the absence of prior convictions and good character, 94 the courts in applying these provisions have not carefully analyzed them and the two concepts are typically fused, such that the absence of prior convictions is a proxy for good character. Thus, in Director of Public Prosecutions (Cth) v D’Alessandro, the court stated: “It is true that the respondent has no prior convictions. He therefore comes to be sentenced as a person of good character.” 95

In R v Gent, the court noted that there is a distinction between the lack of prior convictions and good character, but did not elaborate on how good character is ascertained in a concrete manner. The court stated:

It has been said that there is a certain ambiguity about the expression “good character” in the sentencing context. Sometimes, it refers only to an absence of prior convictions and has a rather negative significance, and sometimes it refers to something more of a positive nature involving or including a history of previous good works and contribution to the community. 96

Accordingly, the absence of prior convictions alone is mitigating. Further, it has been held that a penalty reduction may be

92 Sentencing Act 1991 (Vic) s 8(1)(b) (Austl.).
93 Id. s 6.
94 Id. ss 6, 8(1)(b).
95 DPP (Cth) v D’Alessandro (2010) 26 VR 477, ¶ 26 (Austl.).
warranted if there is simply a lack of prior convictions for the current offense type for which the offender is being sentenced.\textsuperscript{97} However, there is no evidence that the absence of prior convictions plus positive good deeds is more mitigating than the absence of prior convictions alone.

In establishing good character, one relatively settled principle is that the current offenses should normally be ignored. In \textit{Ryan v The Queen},\textsuperscript{98} Judge McHugh stated:

It is necessary to distinguish between the two logically distinct stages concerning the use of character in the sentencing process. First, it is necessary to determine whether the offender is of \textit{otherwise good character}. When considering \textit{this} issue, the sentencing judge must not consider the offences for which the prisoner is being sentenced. Because that is so, many sentencing judges refer to the offender’s “previous” or “otherwise” good character.\textsuperscript{99}

The willingness of courts to find good character simply on the basis of the absence of prior convictions is indicative of a broad approach to this trait as being mitigating, but this is largely negated by the large number of exclusions to the circumstances when good character is operative to mitigate penalty.\textsuperscript{100}

The courts have held that the good character is of far less significance (i.e. has little mitigatory operation) in four situations. The first situation is where the offense in question is normally committed by people without a criminal history.\textsuperscript{101} Secondly, no reduction is appropriate where the offender’s good character enabled him/her to occupy the position from which the offenses could be committed.\textsuperscript{102} Thirdly, good character does not reduce penalty where there is a powerful countervailing sentencing objective that typically applies to the offense in question.\textsuperscript{103} This is normally the case in relation to very serious offenses.\textsuperscript{104} Finally,
good character is of little relevance where the offender is sentenced for a number of offenses which are committed over a period of time.\footnote{See Kennedy, [2000] NSWCCA 527, ¶ 22.}

Broken down to offense type, good character is of less significance in relation to a number of offense types—often because more than one of the exceptions applies. Thus, driving offenses causing death or serious injury\footnote{In \textit{R v MacIntyre} (1988) 38 A Crim R 135 (Austl.), Chief Judge Lee at CL stated in relation to the offense of culpable driving that:

His Honour took into account, of course, the good character of the respondent, and properly so. But it must be said that this class of offence is one which in many, perhaps even in most, cases is committed by persons who are not in any sense members of the criminal class or who even have criminal convictions against them, and for that reason the courts need to tread warily in showing leniency for good character to avoid giving the impression that persons of good character may, by their irresponsible actions at the time, take the lives of others and yet receive lenient treatment. \textit{Id.} at 139; see also Paszynk v \textit{The Queen} [2014] VSCA 87, ¶ 67 (Austl.) ("Culpable driving is an offence frequently committed by people of otherwise good character, so that the offending in such cases truly might be described as an aberration." (footnote omitted)).} and child pornography\footnote{See \textit{Mouscas v The Queen} [2008] NSWCCA 181, ¶ 37 (Austl.) ("For the offence of possession of child pornography where general deterrence is necessarily of importance and is frequently committed by persons of prior good character, it is legitimate for a court to give less weight to prior good character as a mitigating factor."); see also \textit{R v Gent} (2005) 162 A Crim R 29, ¶¶ 62–64 (Austl.) (discussing the approach of giving less weight to prior good character in child pornography cases); \textit{Heathcote v The Queen} [2014] VSCA 37, ¶ 46 (Austl.) (holding that the sentencing judge correctly assigned minimal weight to the offender's prior good character in case involving child pornography offenses).} do not attract a significant first-time offender discount because they are often committed by people with this profile.\footnote{See \textit{Gent}, 162 A Crim R 29, ¶¶ 63–64 (noting that child pornography offenses are often committed by persons of prior good character); Paszynk, [2014] VSCA 87, ¶ 67 (Austl.) (noting that culpable driving offenses are often committed by persons of prior good character).} Good character is not a significant consideration for white collar financial offenses\footnote{See \textit{R v Coukoulis} (2003) 138 A Crim R 520, ¶ 42 (Austl.).} or child sexual offenses\footnote{See \textit{Ryan v The Queen} (2001) 206 CLR 267, ¶¶ 33–35 (Austl.).} because it is often the good character of the offender that enabled him/her to occupy a position enabling him/her to commit the offense, and these offenses are normally committed by people of good character.\footnote{See \textit{T v The Queen} (1990) 47 A Crim R 39, 39 (Austl.) ("[I]t lamentably is all too common for the perpetrators of these [child sexual abuse] offences to be men who in other respects have led exemplary lives and have commanded the respect of others."); \textit{R v Swift} (2007) 169 A Crim R 73, ¶ 46 (Austl.) (noting that white collar offenders are usually first-time offenders who generally lead “blameless lives” otherwise).}

First-time offenders who commit drug distribution offenses also do not get a considerable discount, because general deterrence is a strong consideration in relation to this offense type and it, too, is
supposedly often committed by offenders without prior convictions.\textsuperscript{112} Armed robbery is another serious offense for which the weight accorded to the good character discount is reduced.\textsuperscript{113}

In some circumstances, a first-time offender is charged with a number of offenses. This often occurs in relation to child sexual offenses and child pornography offenses,\textsuperscript{114} and in these circumstances little weight is accorded to previous good character. In \textit{R v Kennedy}, the court stated:

\begin{quote}
Less weight might also be given to prior good character in a case where there is a pattern of repeat offending over a significant period of time. That will frequently be the case in child sexual assault offences because such offences are often committed during a period of an ongoing relationship between the offender and the complainant.\textsuperscript{115}
\end{quote}

Thus, while the good character is a mitigating factor, the significance of this consideration is undermined by the large number of exceptions relating to when it can reduce penalty.

In Australia, hardship to family members\textsuperscript{116} can mitigate penalty.\textsuperscript{117} This is a common law principle, which has also been

\begin{footnotesize}
\textsuperscript{112} In \textit{Gent}, the court stated:

The rationale for extending less weight to prior good character may vary depending upon the class of offence. With respect to drug couriers, Street CJ (Glass JA and Yeldham J agreeing) said: “This Court and other criminal courts have said on many occasions that, in the drug traffic in particular, the circumstances that the accused person has a clear earlier record will have less significance than in other fields of crime.

Very frequently, those selected to play some part in the chain of drug trafficking, as the appellant plainly enough was, are selected because their records, their past and their lifestyles are not such as to attract suspicion. It is this in particular which has led the courts to take in the case of drug trafficking a view which does not involve the same degree of leniency being extended to first offenders.” \textit{Gent}, 162 A Crim R 28, ¶ 55 (citation omitted) (quoting \textit{R v Leroy} (1984) 55 ALR 338, ¶ 25 (Austl.)); see also \textit{DPP (Cth) v Thai} [2014] VSCA 122, ¶ 14 (Austl.) (“[I]n cases of sentencing for the importation of drugs, previous good character ordinarily has less significance than it may have in other cases.”); \textit{Dao v The Queen} [2014] VSCA 93, ¶ 9 (Austl.) (footnote omitted) (“[P]ast good character is of lesser weight in sentencing for large scale drug trafficking offences. General deterrence is at the forefront of sentencing considerations, and that applies to persons of past good character as much as to inveterate criminals.”).

\textsuperscript{113} See \textit{R v Knell} [2001] VSCA 82, ¶ 9 (Austl.).

\textsuperscript{114} See \textit{Gent}, 162 A Crim R 29, ¶ 54 (citing \textit{Ryan}, 206 CLR 267, ¶ 34).

\textsuperscript{115} \textit{R v Kennedy} [2000] NSWCCA 527, ¶ 22 (Austl.); see also \textit{Versi v The Queen} [2013] NSWCCA 206, ¶¶ 179–81 (Austl.) (noting that if the offense is not an isolated one, good character should be given less mitigating weight (citing \textit{Kennedy}, [2000] NSWCCA 527, ¶¶ 21–22; \textit{R v Hermann} (1988) 37 A Crim R 440, 448 (Austl.))).

\textsuperscript{116} In \textit{R v MacLeod} the court held that, in principle, hardship to nonfamily members (in this instance employees of the offender) could mitigate a penalty. \textit{R v MacLeod} [2013] NSWCCA 108, ¶¶ 42–44 (Austl.). However, on the facts of the case, the hardship was not sufficiently severe. \textit{Id.} ¶¶ 51–55.

\end{footnotesize}
adopted in a number of statutory regimes. Section 10(1)(n) of South Australia’s Criminal Law (Sentencing) Act 1988 provides that when a court is sentencing an offender, it must have regard to “the probable effect any sentence under consideration would have on dependants of the defendant.”

In a similar vein, in the Commonwealth sphere, section 16(A)(p) of the Crimes Act 1914 provides that in sentencing an offender, the court must take into account “the probable effect that any sentence or order under consideration would have on any of the person’s family or dependants.”

While hardship to others can mitigate penalty, the courts have applied this test with a degree of reluctance and have demanded that the hardship reach extreme levels before it can moderate penalty: exceptional hardship must be demonstrated. The reasons for this are set out in Markovic v The Queen as follows:

The case law reveals that the “exceptional circumstances”

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118 Criminal Law Sentencing Act 1988 (SA) s 10(1)(n) (Austl.).
119 Crimes Act 1914 (Cth) s 16A(p) (Austl.).
120 In some instances, the test for hardship to others to be taken into account has been held to be at the level of the “truly exceptional.” See R v Day (1998) 100 A Crim R 275, 277–78 (Austl.) (Wood, J.) (quoting R v Edwards (1996) 90 A Crim R 510, 516 (Austl.).) Another manner in which this test has been expressed has been to confine the relevance of hardship to others for the purpose of sentence to what have been termed “extreme cases,” which would justify a departure from the general prohibition precluding consideration of matters of hardship to others. See T v The Queen (1990) 47 A Crim R 29, 40 (Austl.) (quoting Boyle v The Queen (1987) 34 A Crim R 202, 206 (Austl.)); R v Adami (1989) 42 A Crim R 88, paras. 20–22 (Austl.) (citing R v Amuso (1987) 32 A Crim R 308 (Austl.)); R v Moffa (No. 2) (1977) 16 SASR 155 (Austl.); R v Wirth (1976) 14 SASR 291 (Austl.); Boyle, 34 A Crim R at 204–05, 206 (Burt, C.J.) (quoting Wirth, 14 SASR at 294). The reference to “extreme” cases may also include what may be termed “unusual” situations that may arise in the context of hardship to others. This was evident in the case of R v Le, where an appeal was allowed. Le, 107 A Crim R at 355. In the period between the date of sentence and the hearing of the appeal the appellant’s husband, who had been caring for the couple’s two young children, died and Justice Grove noted that the “unusual circumstances of the case would permit the release of the appellant so she could take care of her children. Id. at 356–57; see also R v Richards (2006) 160 A Crim R 120, ¶¶ 43–44, 49, 51 (Austl.) (holding that the impact of an immediate prison sentence on the defendant’s son, who had psychological problems and for whom the defendant was the primary caregiver, was relevant to the defendant’s sentencing, and that the sentence imposed on the defendant was “manifestly excessive” and should be reduced); Hull v Western Australia (2005) 156 A Crim R 414, ¶ 19 (Austl.) (“In extreme cases, a sentencing court may take into account serious illness suffered by a member of the offender’s family where that family member will be subjected to an unusual measure of hardship as a result of the offender’s imprisonment and where the offender will therefore be subjected to an unusual measure of hardship as a result of their imprisonment.” (citing Anderson v The Queen (1997) 92 A Crim R 348 (Austl.).)
121 See Markovic v The Queen [2010] VSCA 105, ¶3 (Austl.). In this case, the court held that there is no “residual discretion of mercy” that can mitigate penalty for hardship if the exceptional circumstances test is not satisfied. Id. ¶¶ 15–16 (internal quotation marks omitted).
test was developed in response to several considerations, as follows. First, it is almost inevitable that imprisoning a person will have an adverse effect on the person’s dependants.

Secondly, the primary function of the sentencing court is to impose a sentence commensurate with the gravity of the crime. Thirdly, to treat family hardship as the basis for the exercise of leniency produces the paradoxical result that a guilty person benefits in order that innocent persons suffer less. Fourthly, to treat an offender who has needy dependants more leniently than one equally culpable co-offender who has none would “defeat the appearance of justice” and be “patently unjust.” Hence it is only in the exceptional case, where the plea for mercy is seen as irresistible, that family hardship can be taken into account.122

The trend of the decisions demonstrates that courts have applied the test strictly.123 For example, in R v Nagul124 the court held that family hardship in the form of the offender’s wife being diagnosed with cancer and their son completing secondary school did not cross the threshold to constitute a mitigating consideration.125

A broader, more compassionate approach (from the perspective of the offender and his/her family members) was taken in R v Hill,126 where the court stated:

In the present case, medical evidence and a further

122 Id. ¶¶ 6–7 (footnotes omitted).
123 See, e.g., DPP (Cth) v Gaw [2006] VS Ca 51, ¶¶ 20–21, 23 (Austral.) (Calloway, J.A.).
124 R v Nagul [2007] VS CA 8 (Austral.).
125 Id. ¶¶ 36, 46. The court stated: In the present case, I am of the view that the circumstances of hardship do not warrant the exercise of mercy such as to reduce the period of the head sentence that would otherwise be appropriate. . . . It is impossible not to sympathise with the applicant’s family and recognise the hardship that they will bear because of his imprisonment, but in all the circumstances, as I have said, I consider that this does not justify the exercise of discretion to extend mercy in relation to the head sentence. It is important to bear in mind in this context the caution sounded by Callow JA in Carmody, namely that the sentencing judge will be failing in his or her duty of proper sentencing considerations where overwhelmed by an emotional response to the hardship that a sentence would impose upon the family of the offender. Similarly the exercise of mercy should not undermine the general principle that, save for exceptional circumstances, hardship to family members by reason of the offender’s imprisonment is not a relevant consideration for sentencing purposes.
126 Id. ¶ 46 (footnote omitted) (citing Carmody v The Queen (1998) 100 A Crim R 41, 46–47 (Austral.)).
affidavit has been put before this Court. This material was not before the sentencing judge. The further evidence discloses a significant hardship suffered by the defendant’s family, by reason of the support that was given by him to his ailing father prior to his incarceration. The defendant’s mother is a nurse at the Lyell McEwin Hospital. The family is financially reliant upon her retaining her employment. She works two days a week, during which time the defendant would ordinarily assume the position of primary caregiver to his father. Since his incarceration, his 14-year-old sister has had to assume some of these responsibilities which the defendant would otherwise have attended to. This has placed additional strain on the family, and has had a particularly acute effect on the defendant’s father’s mental health.

The hardship identified is one that goes beyond the economic or emotional hardship to be expected when one is imprisoned. An approach to sentencing that weighs the interests of the defendant’s family with other matters, such as the gravity of the offending, is warranted.\footnote{Id. ¶¶ 42–43. Family hardship also mitigated penalty in DPP (Vic) v Coley [2007] VSCA 91, ¶ 45 (Austl.) and MGP v The Queen [2011] VSCA 321, ¶ 10 (Austl.). Where the offender is a female and is pregnant or has a very young child, this is a mitigatory factor. See HJ v The Queen [2014] NSWCCA 21, ¶¶ 66, 76; R v Togias (2001) 127 A Crim R 23, ¶ 7.}

While it is generally accepted that in order for hardship to family to be mitigating it must be exceptional,\footnote{It should be noted that family hardship which is not exceptional can mitigate penalty if knowledge of the hardship causes additional distress to the offender, making his time in imprisonment more onerous. In Markovic, the Court of Appeal stated: “An offender’s anguish at being unable to care for a family member can properly be taken into account as a mitigating factor—for example, if the court is satisfied that this will make the experience of imprisonment more burdensome or that it materially affects the assessment of the need for specific deterrence or of the offender’s prospects of rehabilitation. These are conventional issues of mitigation, and they are not subject to the “exceptional circumstances” limitation.” Markovic v The Queen [2010] VSCA 105, ¶ 20 (Austl.) (footnote omitted).} there is some authority that, in the context of the Crimes Act 1914, normal hardship is sufficient. Judge Beech-Jones, in dissent, in \textit{R v Zerafa}\footnote{R v Zerafa [2013] NSWCCA 222 (Austl).} stated:

If in other contexts Courts are bound to consider the impact of their orders on innocent third parties, why is the impact on children of any sentence under consideration to be excluded unless their hardship is only exceptional? The primary objects in sentencing of “retribution, deterrence [and
the protection of society” described by Wells J in Wirth can still be given effect to without requiring sentencing courts to divide the forms of hardship occasioned to an offender’s family into those which meet the description “exceptional” and those which do not. The assessment of probable hardship to family members is a task that sentencing courts are perfectly able to undertake, and no doubt they do. In any event, the words of the section and the secondary materials indicate a clear policy choice on the part of the legislature on this topic.\textsuperscript{130}

C. Overview of Relevance of Offender Profile in Sentencing in the United States and Australia

Thus, it is clear that there are starkly different approaches to the relevance of the profile of the offender in determining criminal penalty in the United States and Australia.

In summary, the above analysis reveals the following ten points:

1. The United States and Australian sentencing regimes both recognize that there are at least three different aspects of an offender’s profile that can potentially impact on criminal penalty.

2. The considerations are the absence of prior convictions, good deeds, and family obligations.

3. To the extent that these considerations apply in the sentencing realm they mitigate, rather than aggravate, penalty.

4. The Australia sentencing regime allows more scope for the profile of the offender to mitigate penalty than in the United States.

5. The absence of prior convictions can mitigate penalty in Australia. However, there are a number of offense types where good character carries little weight, including white collar crime, child sexual offenses, and very serious offenses.

6. The absence of prior convictions can mitigate penalty in

the United States. However, as is the case in Australia, they are not mitigatory in relation to child sexual offenses, serious violent offenses, and drug offenses. Unlike Australia, in these circumstances, the absence of prior convictions does not normally mitigate at all, as opposed to having a reduced mitigatory weight.

7. Past good character can mitigate penalty in Australia. However, the utility of this principle is to some degree undermined by the fact that past good character is often simply equated with the absence of prior convictions.

8. Past good character normally does not mitigate in the United States.

9. In Australia family ties can mitigate penalty where the imprisonment of the offender would cause exceptional hardship to dependents of the offender.

10. In the United States there is a statutory preference against family ties mitigating penalty; however, the judiciary invoke it as a mitigating factor relatively infrequently.

We now consider which of the above approaches, if any, is sound. As it transpires, few of the above principles can withstand critical analysis.

III. THE ABSENCE OF PRIOR CONVICTIONS SHOULD MITIGATE

As we have seen, prior convictions aggravate penalty. However, it is not the case that the absence of an aggravating factor should necessarily mitigate penalty. In order for the absence of prior convictions to mitigate penalty, it is necessary to make an independent argument in support of this proposition.

To this end, it is important to ground the existence of any mitigating (or aggravating) factors within the construct of a coherent doctrinal rubric. Despite the multifaceted nature of aggravating and mitigating considerations, one of us has recently argued that considerations should only aggravate or mitigate sentence if they: (i) advance an objective of sentencing (which itself is justifiable); (ii) are necessary to give effect to the proportionality principle; (iii) are justified by reference to

131 See supra text accompanying notes 30–32; see also Roberts, supra note 3, at 309 (“Today, most jurisdictions employ explicit statutory sentencing enhancements for recidivist offenders . . . .”).
broader objectives of the criminal justice system; or (iv) are supported by reference to the requirements of broader (concrete) principles of justice.\footnote{132} The most compelling argument for the relevance of a good criminal record to sentencing stems from the first of these considerations: the objectives of the sentencing system. A key objective of the sentencing system is to reduce crime. Indeed, protection of the community has been described as the cardinal goal of sentencing.\footnote{133} The community has less reason to fear offenders who are unlikely to reoffend than those who have a high likelihood of reoffending.

The absence of a prior conviction (or only a minor criminal record) should mitigate penalty if it is demonstrated that first-time offenders or those with only minor prior convictions are less likely to reoffend than offenders with a long criminal history. The empirical data regarding the impact of prior convictions on recidivism have been analyzed in two relatively recent reports in both the United States and Australia.

A report by the U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, titled \textit{Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010,} examined the recidivism patterns of prisoners released in 2005.\footnote{134} The report examined the recidivism patterns of prisoners for five years postrelease.\footnote{135}

The report noted that the last time a similar wide-ranging analysis was undertaken was for prisoners released twenty-one years earlier—in 1994.\footnote{136} The utility of the 1994 study was to some extent limited because it tracked prisoners for only three years postrelease.\footnote{137} The current study noted that it was not possible to exactly match the study of the two cohorts for a number of reasons, including the increased accuracy of the 2005 data,\footnote{138} more states participated in the latter survey (thirty in 2005 compared to fifteen

\footnote{133} See, e.g., \textit{Channon v The Queen} (1978) 33 FLR 433, 438 (Austl.); see also infra Part VI (discussing how the community protection consideration should impact sentencing).
\footnote{135} Id.
\footnote{136} Id. at 2.
\footnote{137} Id. at 1.
\footnote{138} Id. at 3–4.
in 1994).\textsuperscript{139} and a greater portion of older offenders were released in 2005.\textsuperscript{140} Noting these differences, the report noted that it is not tenable to make accurate comparisons of the respective recidivism rates.\textsuperscript{141} However, the best comparison that could be made was to compare the reoffending rates for the respective cohorts (while controlling for known disparities) for arrests for violent offenses.\textsuperscript{142} This comparison showed that the proportion of released prisoners who were arrested for a violent offense within three years in 1994 and 2005 was very similar, with a slight increase for the 2005 cohort (21.8% for the 2005 cohort compared to 21.3% for the 1994 cohort).\textsuperscript{143} This (slight) increase is despite the fact that during this period one would have assumed that the quality and effectiveness of rehabilitation programs would have improved.\textsuperscript{144}

Given the limited span of the 1994 study, the observations below relate to findings concerning the 2005 cohort. The study noted that there were 404,638 prisoners released in 2005 from prisons in 30 states, which held 76% of the total prison population in the United States.\textsuperscript{145} The prisoners that were released in 2005 were divided into four cohorts: drug offenders (31.8%), property offenders (29.8%), violent offenders (25.7%), and public order offenders (12.7%).\textsuperscript{146}

In terms of crude findings, the report showed a very high correlation between previous imprisonment and reoffending. Overall, more than two-thirds (67.8%) of the 404,638 prisoners released in 2005 were arrested within three years of release and more than three-quarters (76.6%) were arrested within five years of release.\textsuperscript{147}

The report also revealed a distinction in the recidivism rate for offenders depending on the type of offense they committed. By reference to the five-year time frame, the offenders who reoffended at the greatest rates were property offenders.\textsuperscript{148} This was followed

\textsuperscript{139} Id. at 2.
\textsuperscript{140} Id. As noted below, older offenders reoffend less frequently. Id. at 1.
\textsuperscript{141} Id. at 2.
\textsuperscript{142} Id. at 5.
\textsuperscript{143} Id.
\textsuperscript{144} For an overview of the effectiveness of rehabilitative techniques, see Mirko Bagaric & Theo Alexander, The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn’t Work, Rehabilitation Might and the Implications for Sentencing, 36 CRIM. L.J. 159, 161, 167–71 (2012).
\textsuperscript{145} DUROSE ET AL., supra note 134, at 6.
\textsuperscript{146} Id.
\textsuperscript{147} Id. at 1.
\textsuperscript{148} Id.
by drug offenders, public order offenders, and then violent offenders.\textsuperscript{149} In exact terms the reoffending rates for these cohorts over five years were property offenders (82.1%), drug offenders (76.9%), public order offenders (73.6%), and violent offenders (71.3%).\textsuperscript{150} These offenses are further broken down into more specific offense types.\textsuperscript{151} The types of offenses which meaningfully departed from these averages in terms of having a lower recidivism rate for the respective offense cohorts are homicide (51.2%) and rape (60.1%), both of which are categorized as violent offenses; fraud/forgery (77.0%), which are property offenses; and driving under the influence (59.9%), which is a public order offense.\textsuperscript{152} The offense types which had noticeably higher recidivism rates are robbery (77.0%) and assault (77.1%), both of which are violent offenses, and larceny/motor vehicle theft (84.1%) and burglary (81.8%), both of which are property offenses.\textsuperscript{153}

The data becomes especially illuminating when broken down into the types of offenses for which offenders recidivate. Overall, 28.6% of the released cohort was arrested for a crime of violence within five years.\textsuperscript{154} The arrest percentages for the other offense types were higher: property offenses (38.4%), drug offenses (38.8%), and public order offenses (58%).\textsuperscript{155} The data also indicated crime-type specialization, with a higher portion of offenders incarcerated for violent offenses being more inclined to commit an offense of violence postrelease (33.1%), compared to those incarcerated for a property offense (28.5%), public order offense (29.2%), and drug offense (24.8%).\textsuperscript{156} Similar specialization patterns also applied for property, drug, and public order offenses.\textsuperscript{157}

When recidivism did occur, it normally occurred shortly after release. More than a third (36.8%) of prisoners who were arrested within five years of release, were arrested within the first six months postrelease and more than half (56.7%) were arrested within a year of release.\textsuperscript{158}

\textsuperscript{149} Id.
\textsuperscript{150} Id. at 1, 8.
\textsuperscript{151} Id. at 8.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id. at 9.
\textsuperscript{155} Id. The combined total is more than 100% because some offenders were arrested for more than one offense. Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} Id. at 1.
The age of the offender was an important predictor of reoffending. Within five years of release, 84.1% of offenders who were 24 years or younger were arrested.\textsuperscript{159} By contrast only 69.2% of offenders aged 40 or older were arrested within five years.\textsuperscript{160}

Another important finding to emerge from the study was that recidivism rates increase significantly depending upon the extent of inmate criminal history. The percentage of inmates with four or fewer prior arrests who committed another offense within five years after release was 60.8%.\textsuperscript{161} This increased to 75.9% for inmates with five to nine prior arrests and 86.5% for inmates with ten or more prior arrests.\textsuperscript{162}

The study also examined recidivism by variables other than arrest. These included conviction and return to prison.\textsuperscript{163} The advantage of using arrest as the determinant is that it happens earlier in time, whereas conviction and return to prison can take considerably longer, taking the event outside the five year study period.\textsuperscript{164} However, examining the data from the perspective of a return to prison is illuminating because it provides a useful contrast to similar data in Australia (which is discussed below).

The report noted that within three years of release 49.7% of inmates were reimprisoned and this grew to 55.1% within five years of release.\textsuperscript{165} Broken down to offense type for which an inmate was imprisoned the most likely cohort to be reimprisoned were property offenders (61.8%), compared to drug offenders (53.3%), public order offenders (52.6%), and violent offenders (50.6%).\textsuperscript{166}

The findings in this report are generally consistent with the situation in Australia. The most recent wide-ranging report on recidivism levels in Australia notes that for offenders released from Australian prisons during the 2009–2010 financial year, the rate at which prisoners were returned to prison within two years was 39.3%.\textsuperscript{167} This had remained relatively steady over the preceding
five years, with the highest rate being forty percent and the lowest 38.5%. The actual recidivism levels were higher given that the data do not include released prisoners who reoffended within two years but received a sanction other than imprisonment.

This report did not provide information regarding recidivism and offense type. However, an earlier report by the Australian Bureau of Statistics set out more acute findings regarding reoffending for a number of prisoner cohorts, including one focusing on prisoners released during the period July 1, 1994 through June 30, 1997. The report noted that recidivism levels varied markedly depending on the offense type for which an offender was incarcerated. Offenders imprisoned for theft and burglary were returned to prison (over a ten-year period) more than fifty percent of the time, compared to drug and sexual assault offenders whose rate of prison return was less than twenty-five percent. Moreover, the report noted significant levels of offense specializations—when offenders did return to prison, they were disproportionately more likely to have committed their original offense type than were other prisoners.

The significant advantage of both the United States and Australian studies is that they involve very high numbers of offenders, the offending types are broken down into offense categories, and they track offenders for a considerable period of time. It is not tenable, however, to make a direct comparison of the studies given that offense classifications are not identical, the follow-up period is longer in Australia (for the 1994–1997 cohort), and the classification of criminal history is different (the Australian report compares first-time offenders with repeat offenders while the United States report focuses on offenders with varying numbers of prior convictions: four or fewer, five to nine, and ten or more).

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168 Id. at C.22.
169 See id. at C.20.
171 Id. at ii, 10.
172 Id. at 29.
173 Id. at 29–30.
174 Id.
175 Id. at 31–32.
176 See DUROSE ET AL., supra note 134, at 8; ZHANG & WEBSTER, supra 170, at 22.
177 DUROSE ET AL., supra note 134, at 6, 10; ZHANG & WEBSTER, supra note 170, at 22, 30–31.
However, despite these caveats, a number of clear conclusions emerge. They are as follows:

- first-time offenders, and those with a minor criminal record, reoffend at a considerably lower rate than offenders with a significant criminal history;\textsuperscript{178}
- the offenders who reoffend most frequently are property offenders and, in particular, inmates who have been convicted of burglary and larceny (known as theft in Australia);\textsuperscript{179}
- offenders who tend to recidivate the least are those convicted of violent and sexual offenses;\textsuperscript{180} and
- offenders tend to specialize in offense type.\textsuperscript{181}

The above analysis is counter to existing sentencing orthodoxy in the United States and Australia, that serious offenders (such as violent, sex and drug offenders) should receive little, if any, mitigating consideration for the absence of prior convictions. Further, in Australia, white collar offenders also get less of a reduction on the basis of prior criminal record.\textsuperscript{182} The rationale for this is that such offenses are normally committed by people who do not have a criminal past.\textsuperscript{183}

The observation that certain offenses are committed more frequently by offenders without a criminal record is no more relevant than to note that certain offenses are committed more regularly by offenders of a certain race, or indeed, height or weight range. Observations of this nature only assume relevance if they impact on a sentencing objective. On this standard, the disproportionate commission of certain offenses by first-time offenders is inert. Sentencing is a purposive endeavour and its objectives are forward looking and come in the form of deterrence, rehabilitation, and community protection.\textsuperscript{184} The only nonforward looking aim is the principle of proportionality, which informs how much punishment is appropriate. Moreover, it is flawed to not

\textsuperscript{178} DUROSE ET AL., \textit{supra} note 134, at 8, 10; ZHANG & WEBSTER, \textit{supra} note 170, at 22, 30–31.
\textsuperscript{179} DUROSE ET AL., \textit{supra} note 134, at 8, 10; ZHANG & WEBSTER, \textit{supra} note 170, at 22, 30–31.
\textsuperscript{180} DUROSE ET AL., \textit{supra} note 134, at 8, 10; ZHANG & WEBSTER, \textit{supra} note 170, at 22, 30–31.
\textsuperscript{181} DUROSE ET AL., \textit{supra} note 134, at 8, 10; ZHANG & WEBSTER, \textit{supra} note 170, at 22, 30–31.
\textsuperscript{183} See id. at 324.
\textsuperscript{184} See infra Part VI.
provide a discount to offenders simply because the offense is serious. Offenders with a good criminal record who commit serious offenses are less likely to reoffend than those with an established criminal past.\textsuperscript{185} Community protection remains relevant, and possibly even more relevant, to serious offenders.

Accordingly, reforms should be introduced that acknowledge the empirical data regarding the disproportionately lower rate of recidivism of offenders with no, or only a minor, criminal record. All offenders with a good prior record should receive this discount. If an exception is to be made to this, it should be for property offenders who, the data indicate, reoffend at a higher rate than other offenders.\textsuperscript{186} This is especially the case in relation to inmates convicted of burglary and larceny.\textsuperscript{187}

White collar offending can also loosely be termed a property crime.\textsuperscript{188} However, in neither the United States nor the Australian study is there an attempt to separately evaluate this form of crime. However, to the extent that the data match the offending types which are commonly committed by white collar offenses, they most naturally correlate with ‘deception’ offenses in Australia and fraud or forgery offenses in the United States.\textsuperscript{189} As noted above, both of these offense types have lower recidivism levels than other types of property offenses.\textsuperscript{190}

The other important operational consideration is the appropriate size of the discount. It needs to be large enough to reflect the lower risk presented by first-time offenders but, at the same time, not so large that the penalty would be so light as to be grossly disproportionate to the seriousness of the crime. A reduction in the order of twenty-five percent satisfies these considerations. This is the typical penalty reduction that offenders in Australia receive if they plead guilty to an offense\textsuperscript{191} and that guilty plea has not resulted in patently disproportionate sanctions being imposed.\textsuperscript{192} At the same time, it is considerable enough to offer offenders a

\begin{footnotes}
\item[185] See Du rose et al., supra note 134, at 10; Zhang & Webster, supra note 170, at 31–32.
\item[186] See Zhang & Webster, supra note 170, at 30.
\item[187] See id.
\item[188] Bagaric & Alexander, supra note 182, at 320.
\item[189] Du rose et al., supra note 134, at 8; Zhang & Webster, supra note 170, at 44.
\item[190] Du rose et al., supra note 134, at 8; Zhang & Webster, supra note 170, at 30.
\item[192] Crimes (Sentencing Procedure) Act 1999 (Cth) s 22; Criminal Law (Sentencing) Act 1988 (Cth) s 10B–C.
\end{footnotes}
pragmatic incentive to plead guilty, and hence, it is a meaningful degree of mitigation.

Accordingly, all offenders with a good criminal record should receive a sentencing discount. The definition of a good criminal record is admittedly obscure. The United States study focused on offenders with varying numbers of prior convictions, while the Australian study contrasted repeat offenders with those who had no prior convictions.\textsuperscript{193} In both systems, a significantly lower rate of recidivism was noted when compared with other surveyed cohorts.\textsuperscript{194} This difference was most marked in relation to the Australian study.\textsuperscript{195} Considerations of clarity and empirical force incline to the view that the good prior track record should be confined to first offenders.

IV. GOOD ACTS SHOULD NOT MITIGATE PENALTY

We now turn to whether good acts should mitigate penalty. The most extensive consideration of whether good acts should mitigate penalty is by Carissa Hessick. She contends that offenders who have committed past good acts should get a reduction in penalty.\textsuperscript{196} However, this conclusion does not stem from an overarching analysis of the doctrinally sound role of good acts in the sentencing calculus, but derives from the role that bad acts, and in particular prior convictions, currently play in sentencing law and practice.\textsuperscript{197} Hessick correctly observes that prior criminal history is a strong aggravating sentencing factor and, for reasons of parity, she contends that prior good acts should have the opposite effect.\textsuperscript{198} However, this approach does not firmly press the argument for good acts being mitigatory. First, “[m]itigating and aggravating factors

\textsuperscript{193} Durose et al., supra note 134, at 6; Zhang & Webster, supra note 170, at 19.

\textsuperscript{194} Durose et al., supra note 134, at 10; Zhang & Webster, supra note 170, at 30.

\textsuperscript{195} See Zhang & Webster, supra note 170, at 35–38 (discussing the empirical data collected on recidivists’ repeat participation in criminal conduct).

\textsuperscript{196} Hessick, supra note 43, at 1133.

\textsuperscript{197} Id. at 1134.

\textsuperscript{198} Id. at 1135–36. Hessick does, however, contend that good acts would not be mitigating under theories of mitigation proposed by other commentators, because they do not relate to the seriousness of the crime, the offender’s decision to commit the crime, or offender’s culpability. Id. at 1136; see also Dan Markel, Against Mercy, 88 Minn. L. Rev. 1421, 1435–36 (2004) (identifying a system where leniency in sentencing may be granted after considering other facets of the defendant’s character outside the commission of the crime); Carol S. Steiker & Jordan M. Steiker, Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing, 102 Yale L.J. 835, 846–48 (1992) (defining evidence of good character as a mitigating factor to the severity of sentencing).
do not represent different sides of the same coin.” Thus, for example, while a vulnerable victim increases the penalty, a robust and resilient victim does not reduce the sanction—the opposite of an aggravating factor does not necessarily mitigate. Moreover, while prior convictions do have a profound aggravating impact, it is not the case that this approach is logically or normatively defensible. Indeed, it has been recently argued that prior convictions should assume far less prominence in the sentencing inquiry. Thus, in order to assess the relevance of good acts to sentencing, a wider examination is necessary.

A potential obstacle to good acts reducing penalty relates to the definitional issue of what exactly constitutes a “good” act. Hessick attempts to overcome this line-drawing difficulty by stating that the focus should not be on whether an offender is a “good” person, or the offender’s motives, but the nature of the act itself. There is some validity to this approach. While the number of concrete ways in which a person can behave is almost incalculable, there are some actions that are objectively and unequivocally positive. Common examples include paying taxes and engaging with people in a polite and civil tone.

Even more praiseworthy are benevolent acts that benefit others, and which involve no tangible benefit to the individual, such as charity work and donating money to the less well off. Then there are some acts, often underpinned by rare talent or commitment (or both), which enhance the lives of many people. The setting in which this can occur comes in a variety of forms; ranging from music, sport, and art (forums in which millions of people can be engaged) to medical research (which can develop new medicines that save millions of lives). By way of further example, Hessick contends that military service (and charitable work) should mitigate irrespective of the motive.

Thus, it is possible to identify, with a degree of accuracy, acts which are positive. However, the line-drawing exercise is considerably complicated by the fact that humans perform an infinite number of acts and tasks. Moreover, while people perform

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202 Id. at 1148.
many acts, they are not necessarily consistent and coherent in their behavior, and hence there is a degree of arbitrariness associated with focusing only on certain categories of acts for sentencing purposes. Bad acts (apart from prior convictions) must also be factored into this assessment.

At this point, the inquiry becomes very complex. To make an assessment about an individual’s overall weight of good and bad acts would require “a superhuman level of insight into the individual.”203 For this reason, Andrew Ashworth contends that judges “should not be interested in inquiring either into any bad social deeds the offender has been involved in, except previous offences, or into any good social deeds.”204

Complexity in line-drawing or definition of a legal concept is not a principled reason for rejection of a proposal.205 However, in relation to any legal issue, accuracy in outcome is important. There must be a basis for confidence that the principle is likely to be correctly applied, otherwise the integrity of the process is undermined. Integrity risks need to be factored into the decision regarding whether a principle should be adopted. The risk of error needs to be accommodated. If the concept in question is inherently vague, only a strong argument in support of the principle can justify the exhaustive search necessary to formulate the criteria and determine the boundaries which might give the principle workable legal operation. No such strong justification exists for incorporating good acts into the sentencing inquiry.

Past positive contributions should not mitigate criminal sanctions because they do not bear on the objectives of the sentencing system. There is no evidence that charity workers, for example, recidivate less frequently than other offenders. Further, there are no wider principles of law and justice that support punishing offenders who have committed commendable acts less harshly. In a market-based system, many good acts are rewarded financially, and where there is no financial benefit, people often receive nontangible rewards in the form of feelings of satisfaction and accomplishment. Thus, to confer a sentencing discount for past acts would be to “double-dip” when it comes to acknowledging such behavior. Thus, no good acts should mitigate penalty, including military service.

It is pertinent to note, however, that good acts can be divided into

203 NIGEL WALKER, PUNISHMENT, DANGER AND STIGMA 138 (1980).
two temporal components. The first are those prior to the sentence. Second, are those that are likely to occur in the future, but may be frustrated by the imposition of a criminal sanction. A stronger argument can be made in favor of the latter acts being mitigatory. These acts have not occurred and hence, unlike past acts, the benefit to others has not yet been transmitted.

But even the prospect of such actions should not mitigate penalty. In any decision making process, concrete benefits should be preferred over speculative ones. In a properly crafted sentence, the benefits of a proportionate sentence are clear, whereas the performance of future good acts is never certain. Moreover, the capacity of an individual to significantly improve the lives of others, to the point that the lives of others would be diminished if the proposed acts were not performed, is slight. Boxer Mike Tyson entertained and delighted millions of people with his punching prowess prior to being imprisoned for three years for rape at the height of his career in 1991. However, his incarceration did not cause a meaningful reduction in the well-being of any other person.

Theoretically, it is possible to imagine situations where imprisoning an offender will reduce the flourishing of many people. A classic instance is a brilliant scientist on the verge of a life-saving medical breakthrough. However, the rarity of such an episode underscores the undesirability of such a principle. General legal principles should not be developed to accommodate extreme scenarios.

V. OFFENDERS WITH PHYSICAL OF FINANCIAL DEPENDENTS SHOULD RECEIVE A REDUCED SENTENCE

However, different conclusions apply regarding the sentencing of offenders with certain family ties. The lives of nearly all individuals are interconnected with other people. There is enormous diversity in the type of connections that individuals have and the number of people with whom they are connected. Despite this, certain connections are demonstrably more profound and important than

others. An individual’s life can, in some situations, become so interconnected with others that they become dependent on them.

There are different forms of dependency. The main ones are emotional, physical and financial. There is no clear line regarding when any of these forms of interconnectedness becomes a dependency, but in general terms, a dependency occurs where the other person’s flourishing is significantly negatively impacted if the relationship were to be severed.209

As noted above, the concept of dependence has been broached in sentencing cases, but has not been defined with any degree of precision.210 This reflects the peripheral relevance of family ties in the sentencing domain. The form of dependency that is the most obscure, and perhaps the most common, is emotional dependence. This is a concept that does not have a legal recognition in other areas of the law. It is not one that requires examining in the sentencing context either. It is inherently vague and unverifiable with any degree of rigor, and hence, incapable of forming a concept which can properly inform outcomes in the sentencing realm.

Other forms of dependence are, however, more concrete. Financial and physical dependence are relatively well established in other areas of law, such as migration211 and social security.212 The criteria used to establish these form of dependency (or adaptations of them) can be readily transported to sentencing law. The classic instance of financial dependency is a sole parent who works to support the material needs of his/her children. Physical dependency includes situations where a spouse caters for the mobility requirements of a seriously chronically ill partner, for example, one with severe symptoms of multiple sclerosis or dementia.

There are two principles that weigh in favour of financial or physical dependency having a mitigating effect. The first is the right to family. The other is the prohibition against punishing the innocent. We consider them in that order.

The right to a family is enshrined in a number of international and domestic law legal instruments. Article 17 of the International Covenant on Civil and Political Rights provides:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or

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209 For a further discussion of this topic, see generally Bagaric, supra note 206.
210 See supra Part II.
211 See, e.g., Migration Act 1958 (Cth) (Austl.).
212 See, e.g., Social Security Act 1991 (Cth) (Austl.).
correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.\textsuperscript{213} Article 23 of the same instrument states:

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.\textsuperscript{214}

The right to a family has been one of the less commonly litigated human rights, and hence, there is little developed jurisprudence regarding its meaning and scope. It expressly includes the right to found a family, and by implication, the capacity to live in a familial structure.\textsuperscript{215} Imprisoning a family member, and especially the family member who is the principal provider for the family, places at risk the integrity, flourishing, and sometimes, the viability of the family as a unit.\textsuperscript{216}

However, irrespective of the content of the right to a family, it is unlikely that it can be invoked to ground a strong stand alone argument in favor of reducing the sanctions imposed on offenders with dependents. This is because of an intrinsic feature of rights.

No right is absolute. This has been acknowledged by leading rights proponents. Ronald Dworkin accepts that it is correct for a government “to infringe on a right when it is necessary to protect a more important right, or to ward off some great threat to society.”\textsuperscript{217} In a like manner, Robert Nozick states that consequential “considerations would take over to avert ‘moral catastrophe.’”\textsuperscript{218}

\textsuperscript{214} Id. at art. 23; see also Charter of Human Rights and Responsibilities Act 2006 (Cth) s 17 (AustL) (noting similar terms); Human Rights Act 2006 (Cth) s 11 (AustL) (noting similar terms).
\textsuperscript{218} ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 495 (1981).
Rights can be defeated in two broad situations. The first is where they clash with a more important right.\textsuperscript{219} The right to physical integrity is normally subordinate to the right to life.\textsuperscript{220} Thus, it is permissible to harm a person who uses potentially life-threatening force against another individual.\textsuperscript{221} In fact, sometimes it is even permissible to kill an attacker.\textsuperscript{222}

The second situation where rights can sometimes be eroded is where they are contrary to the common good.\textsuperscript{223} For example, the right to protest on the roadways can often be defeated by the right of a community to be able to efficiently travel, and security concerns override the right to privacy of passengers who board planes, who must make themselves subject to identity checking and a search of their baggage and clothing.\textsuperscript{224}

There is no clear methodology for identifying the hierarchy of rights and the circumstances when rights may be limited. Hence the often abstract notion of a right is rarely a defining concept in favor of implementing a concrete social, economic, or legal proposal. This is especially so in relation to rights whose contours are indeterminate and still evolving, such as the right to a family. The scope for this right to be used as a jurisprudential sword to carve out mitigation for offenders with dependents is further minimized by the fact that in some contexts it is expressly subject to the interests of the criminal justice system. Thus, for example, Article 8 of the \textit{European Convention on Human Rights} provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.\textsuperscript{225}

While the right to a family has tenable application to the

\textsuperscript{221} Id.
\textsuperscript{222} Id.
\textsuperscript{224} See id. (discussing the balancing act between individual rights and the common good).
\textsuperscript{225} Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8 Nov. 4, 1950, 213 U.N.T.S. 221 (emphasis added).
sentencing of offenders with dependents, its obscure nature and the jurisprudential complexities associated with its limits when contrasted with competing considerations diminish its capacity to be operationalized in the sentencing realm so as to ground the basis for a concrete mitigating factor. Yet, there is a more forceful principle, which can be invoked to this end.

Mitigation for dependency can also be supported on the basis of the principle that the innocent should not be punished. This principle is not only widely accepted and weighty but is also seemingly clear-cut. The proscription applies most acutely in relation to people who have committed no crime and who are subjected to criminal sanctions. The principle has been most dramatically illustrated in the context of punishment deliberately inflicted on people known to be innocent. A good example is the following dilemma devised by H. J. McCloskey:

Suppose a sheriff were faced with the choice either of framing [an African American] for a rape which had aroused white hostility to [African Americans] (this particular [African American] being believed to be guilty) and thus preventing serious anti-[African American] riots which would probably lead to loss of life, or of allowing the riots to occur. If he were . . . [a] utilitarian he would be committed to framing the [African American].

The proscription against punishing the innocent is so powerful that it is one of the reasons that utilitarianism has fallen out of favor as the most influential theory of punishment—it is thought that any theory that commits us to such heinous outcomes must be flawed. The proscription against punishing the innocent extends to not only punishing accused persons that are known to be innocent, but also to those that the system does not know to be innocent; that is, to all wrongful convictions.

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226 See, e.g., R v YL [2004] ACTSC 115, ¶¶ 52–53 (Austl.) (noting that the right to a family does not even entail that in certain circumstances children cannot be taken from their parents by the state).


228 Duff believes that disproportionate punishment and punishment for strict liability offenses also constitute punishing the innocent. See id.


231 See id. at 133.

232 See id. at 147–48. Hence the establishment of organizations such as the Bluhm Legal Clinic, Center on Wrongful Convictions. See generally, Center on Wrongful Convictions, BLUHM LEGAL CLINIC, http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/ (last
On closer analysis, however, the scope of the operation of the no
punishment of the innocent principle is unclear. In particular, it is
not certain whether the principle extends to those who indirectly
suffer from the punishment, such as the dependents of offenders.
The answer to this in part turns on the definition of punishment. A
large number of definitions of punishment have been proposed.
According to John McTaggart and Ellis McTaggart, punishment is
"the infliction of pain on a person because he has done wrong."233
More expansive is one of the most influential modern day
sentencing jurists, Andrew von Hirsch, who states: "[P]unishing
someone consists of visiting a deprivation (hard treatment) on him,
because he has committed a wrong, in a manner that expresses
disapprobation on the person for his conduct,"234 or "[p]unishing
someone consists of doing something painful or unpleasant to him,
because he has purportedly committed a wrong."235 Jeremy
Bentham used more succinct terms in stating that "all punishment
is mischief: all punishment in itself is evil."236 C. L. Ten emphasizes
the hardship that is an inherent aspect of punishment. According
to him, punishment "involves the infliction of some unpleasantness
on the offender, or it deprives the offender of something valued."237
This is a theme which has also been noted by R. A. Duff who stated:
"The intrinsic point of punishment is that it should hurt—that it
should inflict suffering, hardship or burdens."238 A more extensive
definition is offered by Nigel Walker, who believes that punishment
"involves the infliction of something which is assumed to be
unwelcome to the recipient: the inconvenience of a disqualification,
the hardship of incarceration, the suffering of a flogging, exclusion
from the country or community, or in extreme cases death."239

Despite the different language that has been used to define and
describe punishment, broken down to its core and intrinsic features
it can be defined as a deprivation or hardship which is imposed for a

233 JOHN MCTAGGART & ELLIS MCTAGGART, STUDIES IN HEGELIAN
COSMOLOGY 137 (1918).
234 Andrew von Hirsch, Censure and Proportionality, in A READER ON
235 ANDREW VON HIRSCH, PAST OR FUTURE CRIMES 35 (1985).
236 Jeremy Bentham, Cases Unmeet for Punishment, in AN INTRODUCTION TO THE
238 Anthony Duff, Punishment, Citizenship & Responsibility, in PUNISHMENT, EXCUSES
AND MORAL DEVELOPMENT 17, 18 (Henry Tam ed., 1996).
transgression which has been committed.\textsuperscript{240}

Thus, orthodox terminology and thinking suggests that punishment by its very nature involves the infliction of a degree of inconvenience or hardship on an offender by an authority (i.e., a court) and it also involves a connection between the offending and the punishment.\textsuperscript{241} However, while conventional thinking debunks the concept of punishing being applicable to hardship which is not imposed by an authority, legal principle and practice is more accommodating to a wider understanding of the meaning of punishment.\textsuperscript{242}

Courts in Australia have accepted that incidental suffering sustained by the offender can be used as a basis for offsetting or reducing the need for formal punishment.\textsuperscript{243} Thus, injuries sustained by an offender during the commission of an offense\textsuperscript{244} and public humiliation\textsuperscript{245} and reduced employment prospects\textsuperscript{246} stemming from the offense are mitigatory.\textsuperscript{247} These incidental hardships are regarded as offsetting the need for a fully proportionate penalty because they are a component of a net punishment experienced by the offender.\textsuperscript{248}

This evinces a liberal approach to the nature of punishment, given that there is no requirement for the court to intentionally impose the hardship. Pain occasioned to the offender’s dependents is arguably even more closely associated with the orthodox view of punishment than incidental punishment, given that it is foreseeable at the time of the imposition. Accordingly, by analogy, it too should operate to mitigate penalty on the basis of an extended approach to the understanding of the concept of punishment.\textsuperscript{249} Of course, analogies are only as strong as the cornerstones that are utilized. The suggestion that incidental harm suffered by offenders is a form of punishment is contestable.

However, even if the analogy breaks down, the ideal behind the analogy can be persuasively recast. Recasting the principle “the

\begin{footnotes}
\item[241] Id. at 36–37.
\item[242] R v Hannigan (2009) 193 A Crim R 399, ¶ 15 (AustL); Bagaric, supra note 240, at 37.
\item[243] Hannigan, 193 A Crim R 399, ¶¶ 15, 42.
\item[244] Id. ¶¶ 15, 46.
\item[245] Ryan v The Queen (2001) 206 CLR 267, ¶ 123 (AustL).
\item[247] Id. ¶ 78.
\item[248] See id.
\item[249] However, the weight that should be applied to operation of this principle is diluted by the level of indirectness of the imposition.
\end{footnotes}
innocent should not be punished” into the principle that “the innocent should not suffer” circumvents the stricture possibly associated with the concept of punishment, without meaningfully eroding the appeal and persuasiveness of the principle. It is clear that dependents of offenders are innocent. It is also clear that they suffer if the offender is imprisoned. The only way to ameliorate this suffering is to not imprison the offender, or to reduce the severity of the punishment, and in particular, the length of the prison term.

Thus, there is a coherent argument for accommodating the interests of dependents into the sentencing calculus. It could be countered that pain experienced by dependents should be ignored because the hardship they experience, while foreseeable, is not intended. This form of argument invokes the “doctrine of double effect.” This is the principle that it is permissible to perform an act having two effects, one good and one bad, where the good consequence is intended and the bad merely foreseen, there is proportionality between the good and bad consequences, and those consequences occur relatively simultaneously.

The doctrine is employed in a wide variety of situations in an attempt to justify practices which result in bad consequences which were foreseeable. In the wartime or battlefield context it supposedly justifies why it is permissible to bomb a military target despite the fact that it will invariably result in civilian deaths. In the medical setting it is sometimes invoked to justify killing unborn babies where the pregnancy is a demonstrable risk to the life of the mother. Moreover, it is sometimes used to explain why it is permissible to prescribe or administer high quantities of pain killers to terminally ill patients, even though it may result in their death.

The soundness of the doctrine, however, is not universally accepted. The key distinction employed by the doctrine is devoid of a coherent foundation. There is no basis for distinguishing between consequences that are intended as opposed to those that are “merely” foreseen—certainly in a manner that is morally

250 This of course assumes that they did not participate in the offense.
significantly. It is untenable for a person who wishes to make a political protest to throw a bomb into a crowd and to exculpate himself/herself from censure on the basis that the death of the bystanders was merely foreseen—his/her actual intention (supposedly) being to highlight an important social injustice.

The correct approach is that there is no logical or normative difference between consequences that we foresee and those which we intend. Individuals are responsible for all consequences which they knowingly cause. The only tenable foundation for the distinction adverted to by the doctrine of double effect is the consequentialist position that it is acceptable to bring about consequences which are merely foreseen if these bad consequences are outweighed by the benefits resulting from the act. And, from the perspective of the innocent person who suffers from the imposition of a criminal sanction, it certainly does not matter whether his/her suffering is intentional or merely foreseen: it hurts just the same. The doctrine of double effect is devoid of an overarching justification, and cannot be used to ignore the plight of the dependents of offenders.

There is no clear basis for determining the discount that should be available to offenders who have dependents. It needs to be significant enough to ease some of the suffering of the dependents, but not so large as to meaningfully impinge on the proportionality principle. Once again, a twenty-five percent discount is appropriate for reasons set out in relation to the proposed first-offender discount.

The operation of mitigating factors should not operate in a simple cumulative manner; otherwise, a combination of mitigating factors could potentially amount to a discount of 100% or more. Instead, the discounts or additions are to be applied individually, to the contracted sentence, following application of the previous consideration. Thus, a first offender who has dependents should not receive a fifty percent discount of the entire sentence. Rather, the discount is 42.5% (i.e., twenty-five percent plus the remaining part of the sentence—seventy-five percent—multiplied by twenty-five percent). This discount is not inconsiderable. However, as discussed above, neither are the principles in support of the

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255 See id.; see also Dolinko, supra note 251, at 521 (discussing the need for one of two arguments to justify the practice of punishment in all possible situations).
256 See Dolinko, supra note 251, at 521 (applying this consequentialist position to justify punishment).
considerations which underpin the reductions.

VI. FIRST-OFFENDER AND DEPENDENTS DISCOUNTS WILL NOT UNDERMINE OTHER VALID SENTENCING OBJECTIVES

The core argument in this article in favor of a sentencing discount for first-time offenders is that the community has less to fear from offenders who have not previously committed an offense. The objective of community protection will not be meaningfully undermined if first-time offenders receive a shorter sentence, given that first-time offenders are less likely to reoffend than other offenders.\(^{257}\) The rationale in favor of a discount for offenders with dependents is different: it stems from the need to observe the principle that the innocent should not suffer.

However, the analysis thus far has not taken into account all key objectives of sentencing. Prior to confirming the recommendations in this paper, it is necessary to assess whether the proposals would conflict with or undermine any of the main sentencing objectives. If, for example, shorter sentences for first-time offenders would limit the capacity for punishment to deter crime, it may be appropriate to abandon or attenuate the proposals in this article.

The key contemporary sentencing objectives are incapacitation, rehabilitation, general deterrence, and specific deterrence.\(^{258}\) We now assess the desirability of the reforms in this article through the lens of each of these aims. We start with the objectives that do not in fact influence the current discussion. Rehabilitation cannot operate to counter the proposals. Rehabilitation, when it is applicable, favors a more lenient sentence\(^{259}\) and hence the proposals are consistent with this objective.\(^{260}\)

Specific deterrence and general deterrence also cannot properly be invoked to counter the proposals, given the limited efficacy of sentencing to achieve these ends. There have been an enormous number of empirical studies regarding whether sentencing can achieve these goals. We have recently analyzed this data at length.\(^{261}\) The following is a summary of the current knowledge.

\(^{257}\) See supra text accompanying note 178.

\(^{258}\) FED. SENTENCING GUIDELINES MANUAL § 1A1.2 (2013); BAGARIC, supra note 240, at 127.

\(^{259}\) Bagaric & Alexander, supra note 144, at 160.

\(^{260}\) See id. at 167–70 (discussing the effectiveness of rehabilitation).

\(^{261}\) See id. at 163–65; Mirko Bagaric & Theo Alexander, The Fallacy That Is Incapacitation: An Argument for Limiting Imprisonment Only to Sex and Violent Offenders, J. COMMONWEALTH CRIM. L. 95, 101–03 (2012); Mirko Bagaric & Theo Alexander, (Marginal)
The theory of specific deterrence is the view that offenders can be dissuaded from committing crime in the future by inflicting hardship on them. If offenders are met with an undesirable sanction for committing crime they will, so the theory runs, be reluctant to again commit an offense because of their desire to avoid the same unpleasant experience. This theory is not supported by the empirical data. Thus, mitigating the penalties that are imposed on some offenders will not make them more likely to reoffend in the future.

The studies that establish the inability of sentencing to deter specific offenders have been undertaken over several decades and across a wide range of jurisdictions and different time periods. A relatively recent literature review of the studies examining the efficacy of criminal punishment to achieve the goal of specific deterrence was undertaken by Daniel Nagin, Francis Cullen, and Cheryl Jonson. The authors looked at over fifty separate studies which analyzed the impact of custodial sanctions on reoffending and contrasted this with the recidivism levels associated with less harsh sanctions. They also reviewed studies which focused on ascertaining if sentence duration impacted the rate of reoffending.

The authors concluded that harsher sentences do not lead to lower rates of offending. In fact, imprisonment may lead to slightly higher rates of recidivism than less harsh sanctions. The authors noted:

Taken as a whole, it is our judgment that the experimental studies point more toward a criminogenic
[(that is, the possible corrupting effects of punishment)] rather than preventive effect of custodial sanctions. The evidence for this conclusion, however, is weak because it is based on only a small number of studies, and many of the point estimates are not statistically significant.  

This position is confirmed by more recent research. It is futile to argue for increased penalties with the aim of decreasing the likelihood that offenders will reoffend in the future. Accordingly, it cannot be validly asserted that the proposals in this paper should not be pursued because the goal of specific deterrence will be compromised.

The type of deterrence that is most commonly invoked in support of harsh criminal sanctions is general deterrence. This is the theory that people will be discouraged from committing criminal offenses if they are aware of the penalties that are imposed on actual offenders.

General deterrence can be broken down into two separate theories. The most common manner in which it is typically employed is what is known as marginal general deterrence. It is the theory that there is a causal nexus between the harshness of criminal sanctions and the incidence of crime: supposedly, crime will be reduced with increasingly harsh penalties. The more modest general deterrence theory is that there is a link between the imposition of some form of hardship (which need not be particularly severe) and the crime rate. This is known as absolute general deterrence.

The weight of the existing empirical data suggests that only

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271 Id. at 145.
272 See Donald P. Green & Daniel Winik, Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism Among Drug Offenders, 48 CRIMINOLOGY 357, 381 (2010) (finding that incarceration had little effect on likelihood of recidivism).
273 See Dieter Dölling et al., Is Deterrence Effective? Results of a Meta-Analysis of Punishment, 15 EUR. J. CRIM. POL’Y RES. 201, 201 (2009).
276 See id.; see also Herbert M. Kritzer, Enforcing the Selective Service Act: Deterrence of Potential Violators, 30 STAN. L. REV. 1149, 1152 n.12 (1978) ("Absolute deterrence refers to whether the creation of a sanction, usually by legislative enactment, reduces or eliminates a particular type of behavior. The concept of absolute deterrence does not address differences resulting from variations in the nature of the sanctions themselves.").
absolute general deterrence is valid. If individuals did not believe that as a result of criminal activity they could be subjected to a sanction, the crime rate would escalate considerably. Accordingly there is a causal nexus between the rate of crime and the presence of criminal penalties. This nexus does not extend to a link between more severe penalties (even in the form of the death penalty) and less crime. The upshot of this is that general deterrence theory can be used to justify the existence of criminal sanctions, but not to justify the need for particularly harsh penalties.

Thus, deterrence properly informs sentencing only to the extent that it requires a hardship to be imposed for criminal offending. It does not require a particularly burdensome penalty, merely one that people would seek to avoid. This aim can be satisfied by a fine or a short prison term. Thus, a twenty-five percent reduction to a term of imprisonment for first-time offenders or those with dependents cannot reduce the deterrent impact of a sentence (to the extent that deterrence is achievable through a state imposed system of

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278 See Ritchie, supra note 263, at 7, 15 (finding that while absolute deterrence enjoys historical support, the existing research suggests that increases in sentence severity do not correspond to increased deterrent effects).

279 See id. at 7.

280 See John J. Donohue III, Assessing the Relative Benefits of Incarceration: Overall Changes and the Benefits on the Margin, in Do Prisons Make Us Safer? The Benefits and Costs of the Prison Boom 269, 274, 309 (Steven Raphael & Michael A. Stoll eds., 2009) (noting that research on the impact of imprisonment on crime is unable to separate the effects of incapacitation from deterrence); William Spelman, The Limited Importance of Prison Expansion, in The Crime Drop in America 97, 123 (Alfred Blumstein & Joel Wallman eds., 2000) (concluding that the dramatic increase in the incarceration rate had a limited impact on the observed decrease in the crime rate in the United States); Nigel Walker, Sentencing in a Rational Society 60–61, 191–92 (1969); John K. Cochran et al., Deterrence or Brutalization? An Impact Assessment of Oklahoma’s Return to Capital Punishment, 32 Criminology 107, 129 (1994); Dölling et al., supra note 273, at 220–22 (finding that the threat of the death penalty did not appear to have a statistically significant effect on the crime rate); Anthony N. Doob & Cheryl M. Webster, Sentence Severity and Crime: Accepting the Null Hypothesis, 30 Crime & Just. 143, 187–89 (2003); Steven D. Levitt, Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not, 18 J. Econ. Persp. 163, 175–76 (2004) (expressing skepticism about the deterrent effect of the death penalty); William Spelman, What Recent Studies Do (and Don’t) Tell Us About Imprisonment and Crime, 27 Crime & Just. 419, 423 (2000) (noting that research on prison effectiveness has been unable to distinguish between the effects of incapacitation and deterrence). But see Dale O. Cloninger & Roberto Marchesini, Execution and Deterrence: A Quasi-Controlled Group Experiment, 33 Applied Econ. 569, 576 (2001) (finding support for the deterrence hypothesis in the death penalty context); Paul R. Zimmerman, State Executions, Deterrence, and the Incidence of Murder, 7 J. Applied Econ. 163, 187–88, 190 (2004) (finding that while there was an observed deterrent effect between the death penalty and the murder rate, the deterrent effect was related to the actual implementation of executions, as opposed to just having the death penalty available).

sentencing).

Incapacitation and community protection are often used interchangeably—the principal means by which the community is protected from criminals is by incapacitating them behind prison walls. There is no need to incapacitate offenders (from the perspective of community protection) if they would not offend if they were not imprisoned. As noted above, empirical data establishes that offenders with a criminal past are less likely to commit another offense than criminals with a long criminal history and hence this cohort of offenders is entitled to a discount. However, this is not necessarily the case with offenders who have dependents. Often they will have a criminal record.

In Part II of this article, we noted that in all sentencing systems there is a heavy loading that is applicable to recidivists. One of us has recently argued that this premium is too weighty. However, victimology studies establish that sexual and violent offenses (unlike other offenses) often have a lasting destructive impact on the lives of victims. Moreover, these offenses are disproportionately committed by recidivists. Accordingly, it has been suggested that recidivist offenders who commit serious violent or sexual offenses should receive a penalty loading, albeit one that is lighter than is currently the situation. The premium that should be imposed for these types of offenses on recidivists is twenty to fifty percent. Offenders who have dependents and fall into this cohort group should still have a reduced penalty, but the discount will need to be calculated with reference to the serious offender recidivist enhancement. This means that offenders with

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283 See id. at 2.


286 See Bagaric, *supra* note 200, at 415.


290 Id. at 411.
dependents who have a criminal record and commit serious sexual or violent offenses should still have their penalty mitigated by twenty-five percent in the interests of their dependents but this reduction will in some cases not totally cancel out the recidivist premium.²⁹¹

VII. CONCLUSION

The focus of sentencing is most directly on the nature of the offense, and in particular, the harm caused by the crime. Factors personal to the offender typically assume little relevance, apart from prior convictions which can carry considerable aggravating weight. One of the key reasons that the profile of the offender has not assumed a greater role in the sentencing inquiry is because this area of law is under-researched and underdeveloped.

A systematic analysis of the relevance of offender profile to sentencing reveals that it should assume more prominence than is currently the situation. So far as sentencing is concerned, there are three aspects to an offender’s profile. The first is the offender’s prior criminal history. Much has been written, and even more legislated upon, regarding a bad criminal history. This article has examined good criminal history. Pursuant to the objectives of sentencing, it emerges that good criminal history should have a considerable impact on sentencing. First-time offenders reoffend at lower rates than repeat offenders, and hence, are less of a danger to the community. The objective of community protection applies less acutely to them. It follows that first offenders should receive a sentencing discount in the order of twenty-five percent. This rule should not be subject to any exceptions depending on offense type as is currently the situation.

The second relevant aspect of an offender’s profile is any past good act. On close analysis, it emerges that offenders who have committed previous past good acts should not get a discount beyond that associated with a good criminal history (assuming that, in fact, they have not previously committed an offense). There is no tenable basis for accurately calculating the net caliber of an individual’s acts, and even if such a calibration could be undertaken, it would be futile given that an offender’s past conduct is irrelevant to any proper objective of sentencing.

²⁹¹ There will be no cancellation where the recidivist loading is in excess of twenty-five percent.
The impact that sentencing has on the lives of people connected to an offender is an area that is not currently sufficiently accommodated in the sentencing calculus. Offenders should be punished commensurate with the gravity of their offense. However, principles which are acutely applicable to the sentencing domain do not exhaust the range of considerations that should properly inform sentencing outcomes. Sentencing is not superior to other areas of law. There is a need for legal and normative coherence in all areas of the law. The principle that the innocent should not suffer is universal, and should be accommodated. Offenders who have physical or financial dependents should have a penalty reduction in the order of twenty-five percent. Operationalizing a clear principle of this nature will have an especially positive impact in the United States federal system by abolishing a major disjunct that currently exists in relation to this area of the law. As we have seen, the current default position pursuant to the Federal Sentencing Guidelines is that family ties are not relevant to sentencing, however, the reality reveals that this consideration is often applied by courts to mitigate sentence.

The recommendations in this article, if adopted, will make sentencing law consistent with the available empirical evidence regarding recidivism levels and cohere the law with wider principles of justice, while continuing to emphasize the importance of matching the punishment to the crime.
A RATIONAL APPROACH TO SENTENCING
WHITE-COLLAR OFFENDERS IN AUSTRALIA

ABSTRACT

There are no overarching (and few settled) principles governing the sentencing of white-collar offenders. This is especially the situation in relation to the relevance of public opprobrium to the sentencing calculus and the manner in which employment deprivations stemming from the penalty impact on the sentence. To the extent that there is general convergence in the approach to sentencing white-collar offenders, the approach is often not sound. This is the case in relation to the minor sentencing discount accorded for previous good character, and the prevailing orthodoxy which assumes that offences targeted at major institutions, such as banks, meaningfully impair community confidence in such institutions. Fundamental reform of the manner in which white-collar offenders are sentenced is necessary in order to make this area of law more coherent and doctrinally sound. These reforms include providing a significant and pre-determined discount for restitution, reducing the weight given to general deterrence in the sentencing calculus, and providing a greater discount for previous good character and employment deprivations suffered as a direct result of the sentence. Further, crimes against individuals should be regarded as being more serious than those committed against large corporations or the public revenue. The article focuses on the existing law in Australia, however, the reform proposals and doctrinal analysis could be applied to all jurisdictions.

I INTRODUCTION

White-collar crime stands apart from other criminal offences. The differences are often exacerbated when it comes to sentencing white-collar offenders. Considerations that often distinguish white-collar offences from other types of crime include:

• white-collar offenders are not normally from socially-deprived backgrounds;

• white-collar offenders often do not have prior convictions;

• white-collar offences often involve a breach of trust or violation of some other moral virtue, such as loyalty;

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the offences are normally well planned or may continue over a long period of time;

- it is often possible to fully remedy the resulting tangible harm through monetary restitution;

- there is no limit to the maximum benefit derived from the crime;

- the harm caused by the offence often goes beyond that inflicted on individuals and extends to financial institutions and markets;

- there are often non-criminal sequels to the conduct in question; and

- there is often a range of incidental sanctions which are suffered by white-collar offenders, including loss of reputation and reduction of future career prospects.

The unique features of white-collar offending have resulted in a fluid and unsettled jurisprudence in the sentencing of such offenders. This is unremarkable given the absence of legislative fiat dealing expressly with this criminological subset. This article examines the nature of white-collar crime with a view to providing a framework for a rational and consistent approach to sentencing white-collar offenders.

In part II of the article, we define ‘white-collar crime’. Part III analyses the current sentencing approach to white-collar criminals. In part IV, we suggest how the sentencing of white-collar criminals should be reformed.

The reforms we ultimately propose include: making restitution to the victim a stronger mitigating factor; providing a greater sentencing discount for previous good character; recognising the impact of incidental harms, such as diminished career prospects, in the sentencing process; and making the measure of harm caused by the offence the key determinant in sentence severity, consistent with the concept of proportionality.

II THE DEFINITION OF WHITE-COLLAR CRIME

There is no universally-accepted definition of white-collar crime despite the concept first being introduced over 80 years ago by Edwin Sutherland as ‘a crime committed by a person of respectability and high social status in the course of his occupation’.1 This definition is forensically inadequate because notions such as ‘respectability’ and ‘social status’ are too obscure to be meaningful,2 and

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1 This was the description given by Sutherland in a speech he delivered to the American Sociological Society in 1939: see J Kelly Strader, Understanding White-Collar Crime (LexisNexis, 2002) 1.

white-collar offending clearly transcends occupational or workplace transgressions.³

In a relatively recent analysis of white-collar crime in his book, *Lying, Cheating and Stealing: A Moral Theory of White-Collar Crime*, Stuart Green declines to attempt an exhaustive definition of what is encompassed by the concept. He notes the failure of sociologists to ascribe a consistent meaning to ‘white-collar crime’, observing that the conduct often concerns behaviour at the margins of the criminal spectrum. The diversity of conduct falling within the rubric of ‘white-collar’ leads Green to steer away from identifying semantic parameters, instead observing that such offending shares certain characteristics with other similar types of offending, though no single characteristic is essential.⁴

According to Green, key characteristics include: a diffused type of harm (often harming financial environments as opposed to identifiable individuals); wrongdoing that violates accepted norms (such as employee fidelity); and, a diminished role for mens rea.⁵ However, he concedes that many offences stand apart from this model. Thus, some offences which have a high mens rea, such as bribery and obstruction of justice offences, still fall within the white-collar crime rubric. The wrongs that Green identifies which are committed by white-collar criminals include breaches of trust, loyalty, dishonesty, deception and lying.⁶

The nebulous nature of white-collar crime is further illustrated by Arie Freiberg, who notes:

Discussion of the problem of sentencing [a] ‘white-collar criminal’ is plagued by the initial problem of identifying the subject matter. There is no discrete group of offences which can readily be identified as ‘white-collar crime’ … [O]ver recent years, the phrase has been extended … to cover any occupational deviance, whether by persons of high status or not, and violation of professional ethics. It would thus extend to cover the case of an academic who demands sexual favours in return for good grades. To some it has come to refer to almost any form of illegal behaviour other than conventional street crimes.⁷

⁵ Ibid 34.
⁶ Ibid.
The United States Department of Justice gave a partial definition of white-collar crime in the following terms:

Nonviolent crime for financial gain committed by means of deception by persons whose occupational status is entrepreneurial, professional or semi-professional and utilizing their special occupational skills and opportunities; also, nonviolent crime for financial gain utilizing deception and committed by anyone having special technical and professional knowledge of business and government, irrespective of the person’s occupation.\(^8\)

Indeed, a workable definition of white-collar crime has proved so elusive that some commentators have suggested defining the phrase by what it is not. Thus, J Kelly Strader posits that a white-collar crime is one that does not:

(a) necessarily involve force against a person or property;
(b) directly relate to the possession, sale, or distribution of narcotics;
(c) directly relate to organized crime activities;
(d) directly relate to such national policies as immigration, civil rights, and national security; or
(e) directly involve ‘vice crimes’ or the common theft of property.\(^9\)

While definitions of white-collar crime can vary widely, it does not mean that the search for a definition should be abandoned. A working definition is crucial to the coherent analysis of existing jurisprudence, as well as to the process of informed decision-making and to any proposals for reform.

A white-collar crime involves an act which involves the taking of money or property (such as shares) or avoiding a legal obligation (such as a tax liability) without legal justification by an individual who is in a position of substantial influence regarding the relevant transaction. Examples of influence are where a bank employee transfers bank money into his or her account or where an individual submits a fraudulent tax return or deposits a false cheque or subverts the normal operation of the market system. It is further illustrated by paradigm instances of white-collar offending, which include:

- theft of company assets by company directors and employees (such as bankers);
- theft of client money by lawyers and accountants;
- insider trading and other market manipulation by people employed in industries associated with the financial markets;


\(^9\) Strader, above n 1, 2.
complex tax fraud;
- corruption; and
- money laundering.

III CURRENT APPROACH TO SENTENCING WHITE-COLLAR OFFENDERS

A General Matters Relevant to Sentence

Sentencing is a complex activity and it is not feasible in an article of this size (and with its focus) to explain the key principles and rules.\(^\text{10}\) However, by way of background, we provide an overview of the structure of the sentencing law and the manner in which sentencing determinations are made as a backdrop to the remaining discussion.

Sentencing law and practice is not uniform throughout Australia. Each of the nine jurisdictions has distinctive statutes which guide sentencing decisions.\(^\text{11}\) Sentencing law throughout Australia is, however, remarkably similar in the context of white-collar offending. This is because all of the sentencing statutes set out similar objectives of sentencing, in the form of general and specific deterrence, community protection, denunciation and rehabilitation.\(^\text{12}\) In relation to each statutory scheme, there is no attempt to prioritise these sometimes conflicting objectives.\(^\text{13}\) The High Court of Australia has established that the key consideration in setting the penalty is the proportionality principle, which stipulates that the harshness of the sanction should match the seriousness of the offence.\(^\text{14}\)

Moreover, the aggravating and mitigating considerations that inform the sentencing determination are largely universal. These factors are, principally, a manifestation of the common law, although some statutory schemes set out such matters in detail.\(^\text{15}\) Important factors that can aggravate or mitigate penalty include the level of harm caused by the offence, the offender's prior criminal record, remorse, the attitude of the victim (including victim impact statements), the level of planning

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\(^{11}\) The main statutes that deal with sentencing in the respective Australian jurisdictions are as follows: *Crimes (Sentencing) Act 2005* (ACT); *Crimes Act 1914* (Cth) pt 1B ss 16–22A; *Crimes (Sentencing Procedure) Act 1999* (NSW); *Sentencing Act 1995* (NT); *Penalties and Sentences Act 1992* (Qld); *Criminal Law (Sentencing) Act 1988* (SA); *Sentencing Act 1997* (Tas); *Sentencing Act 1991* (Vic); *Sentencing Act 1995* (WA).

\(^{12}\) See Bagaric and Edney, above n 10, [1-39101].

\(^{13}\) Ibid.

\(^{14}\) See further the discussion below.

\(^{15}\) See especially the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A.
involved, the prevalence of the offence, the effect of the proposed sanction, hardship to others (especially the offender's family), any guilty plea, voluntary reparation, worthy social contributions, and assistance to the criminal justice system.16

All Australian sentencing schemes provide for the imposition of a similar range of sanctions. The least serious is a finding of guilt without any further harshness being imposed on the offender, and the most severe being a term of imprisonment.17

Further, the High Court has made clear that sentencing decisions are an ‘instinctive synthesis’ of all of the relevant variables as opposed to a mathematical calibration of each determinant that is relevant in a particular case.18 As a result, there is no single penalty which is objectively correct in any case. As was noted recently by the Victorian Court of Criminal Appeal in Freeman v The Queen:19

[i]t is a basic principle of sentencing law that there is no single correct sentence in a particular case. On the contrary, there is a ‘sentencing range’ within which views can reasonably differ as to the appropriate sentence.20

Within this rubric, sentencing principles relating to white-collar crime are largely unsettled, but, in practice, there is nonetheless a number of widely-accepted and observed rules. Prior to examining the issue in some depth, it is possible to provide a framework by setting out some core matters.

White-collar offences are generally regarded as being committed principally for greed,21 thus, a paramount consideration in sentencing is the amount of money

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16 Bagaric and Edney, above n 10, [1-42001], [1-60721].
17 Bagaric and Edney, above n 10, [1-501].
18 Markarian v The Queen (2005) 228 CLR 357; Hili v The Queen (2010) 242 CLR 520. The instinctive approach to sentencing means that discussions of sentencing which focus on increases and reductions in penalties are somewhat obscure, given that generally a mathematical or clear weighting is not ascribed to relevant variables. In this discussion we focus in particular on mitigating considerations. Although the extent to which any mitigating factors reduce the sanction is unclear, it is settled that where more than one mitigating factor is applicable, the factors operate in a cumulative manner to reduce sentence. There is no precise mathematical precision associated with this process other than the limitation that the factors cannot cumulate so significantly to result in a disproportionate sentence. This allows the courts to adopt a ‘rolled up’ or an ‘analytical approach’; see R v Ehrlich (2012) 219 A Crim R 415 (Adams J); R v NP [2003] NSWCCA 195 (17 July 2003); R v El Hani [2004] NSWCCA 162 (21 May 2004). The extent to which mitigating factors impact on sentence is made clearer by the fact that, as discussed below, certain considerations (namely, plea of guilty and assistance to authorities) attract a mathematical reduction to the penalty.
20 Ibid [6].
involved.\textsuperscript{22} Other important considerations are the level of sophistication and planning of the offence\textsuperscript{23} and whether or not a breach of trust occurred.\textsuperscript{24} Offences committed over a long period of time are normally considered to be more serious.\textsuperscript{25} That may be because long periods of time provide an offender the opportunity to desist from offending. Where an offender has desisted it is a strong mitigating factor, especially if coupled with an offender who voluntarily discloses the crimes to police.\textsuperscript{26} The most important sentencing objective that the courts emphasise in sentencing white-collar criminals is general deterrence. It is mainly for this reason that white-collar crimes involving large amounts (roughly in the order of $100,000) normally result in an immediate custodial term being imposed, irrespective of other mitigatory factors.\textsuperscript{27}

A good recent example of the general approach to sentencing white-collar offenders is set out in the comments of Warren CJ, Redlich J and Ross AJA in \textit{DPP (Cth) v Gregory}\textsuperscript{28} in the context of rejecting an appeal against sentence for a tax evasion offence. The passage is set out at some length to illustrate the complexity of the sentencing inquiry in such matters:

In seeking to ensure that proportionate sentences are imposed, the courts have consistently emphasised that general deterrence is a particularly significant sentencing consideration in white-collar crime and that good character cannot be given undue significance as a mitigating factor, and plays a lesser part in the sentencing process … Moreover, general deterrence is likely to have a more profound effect in the case of white-collar criminals. White-collar criminals are likely to be rational, profit seeking individuals who can weigh the benefits of committing a crime against the costs of being caught and punished. Further, white-collar criminals are also more likely to be first time offenders who fear the prospect of incarceration.

In many if not most cases, imprisonment will be the only sentencing option for serious tax fraud in the absence of powerful mitigating circumstances. A sophisticated degree of planning accompanied by a lack of contrition should ordinarily lead to a more severe sentence of imprisonment. But despite the recognised importance of general deterrence, tax fraud has not always been as

\begin{itemize}
\item \textsuperscript{22} Freiberg, above n 7, 9. See also, \textit{Hoy v The Queen} [2012] VSQA 49 (7 March 2012).
\item \textsuperscript{24} \textit{R v Smith} (2000) 114 A Crim R 8.
\item \textsuperscript{25} \textit{R v Ralphs} [2004] VSQA 33 (9 March 2004) (fraud by a law clerk over a nine year period); \textit{R v Grossi} (2008) 23 VR 500 (theft from employer lasting six years); \textit{R v Galletta} [2007] VSQA 177 (30 August 2007) (theft from employer for nine years).
\item \textsuperscript{26} \textit{R v Lopez} [1999] NSWCCA 245 (12 March 1999); \textit{R v Kittson} [2008] VSQA 77 (5 May 2008).
\item \textsuperscript{28} \textit{DPP (Cth) v Gregory} (2011) 250 FLR 169.
\end{itemize}
severely enforced as other forms of criminality. Over a decade ago this court, constituted by Winneke P, Brooking and Callaway JJA observed in *R v Nguyen and Phan* that the seriousness of the offence of defrauding the Commonwealth of income tax ‘has not always been sufficiently reflected in the sentence passed’ …

A sentence imposed for fraud upon the taxation revenue, is intended to reaffirm basic community values that all citizens according to their means should fairly share the burden of the incidence of taxation so as to enable government to provide for the community, that the revenue must accordingly be protected, and that the offender should be censured through manifest denunciation. When these considerations are not reflected in the responses of the courts, the criminal justice system itself fails to achieve its objectives.29

Several notable aspects emerge from the above passage. First, the preparedness of the court to look widely at the harm caused by a white-collar offence, in this case tax evasion, and focus not only on the obvious and immediate victim (the tax office) but also the ultimate victim (the general public). Second, the degree of planning and sophistication of the offence is important. Third, general deterrence is given considerable weight in the sentencing calculus because of the need to discourage similar offending. It is assumed that this will be especially effective in the case of those inclined to commit white-collar offences, because they do not normally have prior convictions and are likely to be rational agents who undertake a cost/benefit analysis prior to engaging in offending. Finally, it is noted that previously, in some instances, white-collar crimes were inadequately punished, which justifies an increase in current tariffs.

The cardinal role of general deterrence in relation to such crimes has been confirmed by numerous other authorities. For example, Sheller JA in *Director of Public Prosecutions (NSW) v Hamman*30 stated:

General deterrence is a predominant consideration when sentencing for offences of defrauding the revenue. Appeal Courts have discussed and emphasised the seriousness of frauds committed to the detriment of the public revenue. Inevitably, the Australian system of tax collection depends upon the honesty of taxpayers and, in particular, upon their fully declaring in each year of income what their gross income is.31

The previous good character of the offender is recognised in the sentencing calculus. However, as was highlighted in *R v Gregory* above, the current sentencing orthodoxy maintains that this is the very feature of many white-collar offenders which enables them to commit such crimes, and accordingly, little weight is usually attributed to this factor.

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29 Ibid 182–4 [53], [54], [57] (citations omitted, emphasis added).
30 (Unreported, New South Wales Court of Criminal Appeal, Sheller JA, 1 December 1998).
In *R v Coukoulis*\(^{32}\) the role of good character in sentencing white-collar offenders was addressed by Ormiston JA in the context of a solicitor who committed a large-scale fraud (of more than $8 million from over 40 people — mainly clients), where his Honour said:

> Although the fact that the appellant has had no prior convictions is of importance and must be recognised, these are the very circumstances in which he was able to deceive so many of his clients. His very reputation, as a solicitor and generally in the community, enabled him to obtain the moneys he stole, to persuade his clients and others that he was always acting in their interests, to reassure them and to allow him to dissuade them from enquiring further as to the precise manner of their moneys’ application. Implicit faith was, wrongly, placed in him in circumstances where, were the moneys obtained by an unqualified person or through a person with a lesser reputation, those depositors might well have been more cautious about protecting themselves against possible misuse of their moneys.\(^{33}\)

It is notable that, as in *Coukoulis*, above, assessing the harm done required the court to look again beyond the immediate victim, and to recognise the damage caused to the profession and the wider community in which the offender practised the profession. In evaluating the harm, the court also stated that the victims were caused greater distress because the offence involved a breach of trust. It was partly for this reason that the court stated that a heavy penalty was necessary to appropriately denounce the conduct.

In *R v Swift*\(^{34}\) Nettle JA (with whom Vincent JA and Habersberger AJA agreed) noted that there is no tariff for white-collar offences, but that a breach of trust is a strongly aggravating factor, as is the financial vulnerability of the victim. Moreover, the Court gave little weight to factors personal to the accused (including loss of reputation and excellent prospects of rehabilitation) and rejected an appeal against a term of imprisonment of five years and three months for offending that spanned over two years, and totalled approximately $1.5 million.

In *McMahon v The Queen*\(^{35}\) the offender pleaded guilty to 38 counts of tax fraud and 42 counts of identity fraud, and was sentenced to a total effective term of six years imprisonment with a minimum term of four years. In rejecting his appeal against sentence, the New South Wales Court of Appeal again noted that while previous good character is relevant to the sentencing of white-collar offenders, it is pragmatically of little weight given the strong need for general deterrence.\(^{36}\)

The Court also rejected a submission that white-collar offenders should be met with a shorter non-parole period, primarily because of the growing seriousness

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\(^{32}\) (2003) 7 VR 45.


\(^{34}\) (2007) 15 VR 497.


\(^{36}\) Ibid [76].
and visibility of such offences (in the community) and the fact that such offences are difficult and expensive to detect.\textsuperscript{37} Even where a sentencing court is moved by an ‘exceptionally good prior character’ to wholly suspend a sentence of imprisonment, such as in \textit{R v Pollard}\textsuperscript{38} which involved electronic theft from an employer of about $92 000 over three months, the Court of Criminal Appeal declared that such a sentence would be manifestly inadequate. It opined that ‘[t]he limited relevance of prior good character in formulating the length of an appropriate sentence cannot be transformed into a more compelling factor for the purposes of determining whether a sentence of imprisonment should be suspended’.\textsuperscript{39}

In \textit{Stevens v The Queen}\textsuperscript{40} the Court again noted the increasing seriousness with which such offending is viewed — even when a breach of trust is not involved — and the institutional damage that it can cause. That case involved a number of systematic deceptions in a bank, over a 16 year period which totalled approximately $400 000. It noted that there can be no tariff for such offending, given the wide range of circumstances in which it can be committed, and the impact that a crime has on public confidence in a system is a strong aggravating consideration:

\textquote{If public confidence in the integrity of the [electronic banking] system is to be maintained the courts have an obligation to ensure that when dishonest breaches of its security are identified the offenders are appropriately punished. Both personal and general deterrence are of particular significance in relation to these types of offences.}\textsuperscript{41}

Although there is no tariff, the courts have on occasions catalogued a large number of other white-collar facts and penalties to provide some level of consistency to the sentences imposed. Recent examples of this are \textit{Pollock v Western Australia},\textsuperscript{42} \textit{Brennan v Western Australia}\textsuperscript{43} and \textit{Scoop v The Queen}.\textsuperscript{44}

Voluntary restitution by the offender is consistently regarded by the courts as an important consideration. However, where restitution does occur, it does not automatically result in a significant discount because of the perception that an offender is ‘buying his or her way out of prison’.\textsuperscript{45} In \textit{R v Phelan},\textsuperscript{46} Hunt CJ at CL stated that

\begin{itemize}
  \item \textsuperscript{37} Ibid [82]–[84]; See also \textit{Hili v The Queen} (2010) 242 CLR 520, 538–41 [59]–[67].
  \item \textsuperscript{38} [2006] NSWCCA 405 (15 December 2006).
  \item \textsuperscript{39} Ibid [19]. It should be noted that the Court declined to allow the Crown appeal on the basis of the double jeopardy principle.
  \item \textsuperscript{40} (2009) 262 ALR 91.
  \item \textsuperscript{41} Ibid 104 [79] (McClellan CJ at CL).
  \item \textsuperscript{42} [2011] WASCA 133 (15 June 2011) [42].
  \item \textsuperscript{43} [2010] WASCA 19 (15 February 2010).
  \item \textsuperscript{44} (2008) 185 A Crim R 164.
  \item \textsuperscript{45} See \textit{Kovacevic v Mills} (2000) 76 SASR 404, 421 [81] (Doyle CJ, Mullighan, Bleby and Martin JJ).
  \item \textsuperscript{46} (1993) 66 A Crim R 446.
\end{itemize}
offenders should not be able to purchase a lesser sentence, but then qualified this by stating: ‘[w]here there has been a substantial degree of sacrifice involved in the repayment, that is a matter which may properly be taken into account by way of mitigation’.47

Thus, to the extent that voluntary restitution currently impacts upon a sentence, it is only in circumstances where the restitution constitutes a demonstrable hardship to the offender that it will provide a significant mitigation of penalty. The utilitarian benefits of reparation to the victim appear to be a secondary consideration.

### B Impact of Incidental Burdens and Hardships

A particularly complex sentencing issue is the extent to which courts factor into the sentence hardships or burdens which directly stem from the offending, but which are not strictly part of the court-imposed penalty. These are referred to as the ‘incidental burdens or hardships’ flowing from the offence. They take two broad forms: those which are imposed by the courts and those not imposed by courts but are a direct consequence of the sentence. We consider them in that order.

There are three forms of curial deprivations. The first are confiscation orders. The second are restitution orders. The third are disqualifications from being involved with companies.48 The main forms of non-curial hardships are:

- shame, embarrassment and social ostracism; and
- reduced employment and career prospects.

We first look at the current legal position regarding incidental curial deprivations.

#### 1 Confiscation Proceedings

Confiscation proceedings are being increasingly used against offenders, especially in relation to drug and property offences.49 Broadly, these proceedings can result in reclamation of property or money derived from the offence, or go further and strip

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48 For an extensive analysis of incidental curial deprivations, see Fox and Freiberg, above n 10, ch 6.

49 The relevant statutory provisions are: Confiscation of Criminal Assets Act 2003 (ACT); Proceeds of Crime Act 2002 (Cth); Confiscation of Proceeds of Crime Act 1989 (NSW); Criminal Assets Recovery Act 1990 (NSW); Criminal Property Forfeiture Act 2002 (NT); Criminal Proceeds Confiscation Act 2002 (Qld); Criminal Assets Confiscation Act 2005 (SA); Crime (Confiscation of Profits) Act 1993 (Tas); Confiscation Act 1997 (Vic); Criminal Property Confiscation Act 2000 (WA).
The obligation to disgorge the proceeds of crime is not a penalty. Disgorgement is necessary to prevent unjust enrichment. Forfeiture of the proceeds of crime has, nevertheless, been treated as a mitigating factor in some cases. Thus, it has been said that pecuniary penalty orders which relate entirely to profits from the unlawful activity constitute an additional punishment.

Disgorgement of benefits apart, forfeiture is relevant to penalty. At common law, forfeiture of lawfully-acquired property has generally been regarded as a mitigating factor in sentencing, since it places the offender in a worse position than he/she was before the commission of the offence. That is, forfeiture has a punitive or deterrent effect.

The sentencing principle of proportionality requires that the nature and extent of any forfeiture of property be considered in fixing the sentence. That is not to say that such orders are always to be viewed as warranting mitigation of penalty. It is necessary to consider whether the forfeiture will have a disproportionate or exceptional effect on the offender and may have a substantial deterrent effect.

In that case, the Court also held that, in setting the penalty, the likelihood of future hardship in terms of exaction of property may be taken into account. This approach is reflected in s 320 of the Proceeds of Crime Act 2002 (Cth). In McMahon v The Queen the Court stated that repayment of money (in this case to the Australian Taxation Office) through a pecuniary penalty order is not in itself mitigatory, however, consent to such an order can be taken into account as an indication of genuine contrition and remorse.

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51 Ibid 685–6 [16]–[18]. In R v Ford (2008) 100 SASR 94 a similar approach was taken by Gray J (with whom Doyle CJ agreed).
52 This states:
   A court passing sentence on a person in respect of the person’s conviction of an indictable offence:
   (a) may have regard to any cooperation by the person in resolving any action taken against the person under this Act; and
   (b) must not have regard to any forfeiture order that relates to the offence, to the extent that the order forfeits proceeds of the offence; and
   (c) must have regard to the forfeiture order to the extent that the order forfeits any other property; and
   (d) must not have regard to any pecuniary penalty order, or any literary proceeds order, that relates to the offence.
54 As a consequence of s 320(d) of the Proceeds of Crime Act 2002 (Cth).
55 McMahon v The Queen [2011] NSWCCA 147 (22 June 2011) [72].
The situation is different in New South Wales and Western Australia, where s 24B of the Crimes (Sentencing Procedure) Amendment Act 2010 (NSW) and s 8(3) of the Sentencing Act 1995 (WA), respectively, preclude confiscation orders of any nature from being taken into account to reduce penalty.56

2 Restitution

Courts in all jurisdictions have power to order restitution to victims of property offences.57 In Victoria, for example, where goods have been stolen and a person found guilty of an offence connected with the theft, the court may order that the person return the stolen goods or the proceeds of their sale to their true owner.58 As noted above in Kovacevic v Mills,59 restitution in the context of property offences is a mitigating consideration, but is not necessarily a weighty factor.

3 Disqualifications

Individuals convicted of certain offences are disqualified — normally automatically — from being involved in the management of corporations for some period of time. ‘Managing corporations’ is defined expansively, not only prohibiting offenders from acting as company directors, but also from participating in corporate decision making or significantly affecting a company’s financial standing, or from communicating instructions or wishes to directors who might customarily act in accordance with those instructions. It, thus, operates as an effective total ban on any managerial involvement with a company.60 The key provisions are contained in s 206B of the Corporations Act 2001 (Cth) as follows:

(1) A person becomes disqualified from managing corporations if the person:

(a) is convicted on indictment of an offence that:

(i) concerns the making, or participation in making, of decisions that affect the whole or a substantial part of the business of the corporation; or

(ii) concerns an act that has the capacity to affect significantly the corporation’s financial standing; or

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56 In Stock v The Queen (2011) 206 A Crim R 574 it was held that confiscation proceedings even prior to the legislative changes in NSW were not normally mitigatory. This was also the view in Greco v R [2010] NSWCCA 268 (25 November 2010).
57 Crimes Act 1914 (Cth) s 21B; Crimes (Sentencing) Act 2005 (ACT) ss 19–20; Criminal Procedure Act 1986 (NSW) s 43; Sentencing Act 1995 (NT) s 88; Penalties and Sentences Act 1992 (Qld) ss 35, 194; Criminal Law (Sentencing) Act 1988 (SA) s 52; Sentencing Act 1997 (Tas) s 65; Sentencing Act 1991 (Vic) s 84; Sentencing Act 1995 (WA) ss 109–122.
58 Sentencing Act 1991 (Vic) s 84.
59 Kovacevic v Mills (2000) 76 SASR 404, 421 [81].
60 Corporations Act 2001 (Cth) s 206A.
(b) is convicted of an offence that:

(i) is a contravention of this Act and is punishable by imprisonment for a period greater than 12 months; or

(ii) involves dishonesty and is punishable by imprisonment for at least 3 months; or

(c) is convicted of an offence against the law of a foreign country that is punishable by imprisonment for a period greater than 12 months.

The disqualification follows automatically upon conviction and the sentencing court is given no discretion. While not all white-collar offenders will suffer hardship equally as a consequence, Martin and Webster point out that any disqualification or disability ‘contributes significantly to the social stigma of the finding of guilt or conviction’. For those offenders whose occupation involved the management of a company, the disqualification presents an obvious and significant hardship. Courts have recognised this in some cases but not in others. Freiberg observes: ‘[t]he courts have been ambivalent on this issue, sometimes decreasing a sentence to take into account the additional detriment, and sometimes refusing to do so. The cases present no clear pattern’.

It should be noted that white-collar offenders can also be subject to disqualification orders consequent upon civil penalty proceedings, even where there are no criminal proceedings afoot. The discretion resides with the prosecuting authority, and there is no bar to pursuing a white-collar offender criminally after the conclusion of a civil penalty proceeding.

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61 However, the Court has power upon application by the disqualified person to grant leave to manage a corporation in the future: Corporations Act 2001 (Cth) s 206G.


63 For example, specific reference to disqualification can be found in R v Chan (2010) 79 ACSR 189, 194 [20] (Forrest J); DPP v Tang (aka Widjaja) (Unreported, County Court of Victoria, Patrick J, 8 December 2011) 68.

64 No reference to the statutory disqualification was made at all in R v Hartman (2010) 81 ACSR 121 or R v Richard [2011] NSWSC 866 (12 August 2011).

65 Freiberg, above n 7, 12.

66 Corporations Act 2001 (Cth) ss 1317DA, 206C.


68 Corporations Act 2001 (Cth) s 1317P.
4 Public Opprobrium and Social Ostracism

A common non-curial hardship stemming from white-collar offending is shame and embarrassment. The law is not settled on the impact that this should have on sentence. It was considered by the several members of the High Court in *Ryan v The Queen*, but a majority of the Court did not endorse a clear position. Kirby and Callinan JJ stated that public opprobrium was a factor which could be taken into account to reduce the sanction imposed by the court, whereas McHugh J took the opposite approach. Gummow J did not canvass the issue, while Hayne J ‘substantially’ agreed with McHugh J. Callinan J stated:

Of course the abuse of an office to commit a crime is greatly to be deplored but the crime of a person occupying an office of some prominence will often attract much greater vilification, adverse publicity, public humiliation, and personal, social and family stress than a crime by a person not so circumstanced. When these consequences are attracted they should not be ignored by the sentencing court.

Kirby J agreeing with Callinan J stated:

[s]tigma [stemming from conviction] commonly add[s] a significant element of shame and isolation to the prisoner and the prisoner's family. This may comprise a special burden that is incidental to the punishment imposed and connected with it. If properly based on evidence, it could, in a particular case, be just to take such considerations into account in fixing the judicial punishment required.

McHugh J rejected the relevance of public opprobrium because:

First, it would seem to place a burden on the sentencing judge which would be nearly impossible to discharge. The opprobrium attaching to offences varies greatly from one offender and one offence to another. How a judge could realistically take such a matter into account is not easy to see …

Secondly, the worse the crime, the greater will be the public stigma and opprobrium. The prisoner who rapes a child will undoubtedly be subject to greater public opprobrium and stigma than the prisoner who rapes an adult person.

In *R v Bunning* the Court regarded it as mitigating that the offender ‘lost his reputation, his career [as a police officer] … and suffered public humiliation’.

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70 Ibid 313–14 [157].
71 Ibid 318–19 [177].
72 Ibid 304 [123]. In *McDonald v The Queen* (1994) 48 FCR 555 Burchett and Higgins JJ, at 564–5 [23], gave this considerable mitigating weight.
73 *Ryan v The Queen* (2001) 206 CLR 267, 284–5 [53], [55].
75 Ibid [47].
The balance of authority indicates that shame can be a mitigating factor but that it generally carries little weight. In *Kenny v The Queen*, Howie and Johnson JJ stated that public shame could be given some weight if it was so significant as to damage the person physically or psychologically. In *Einfeld v The Queen* Basten JA (Hulme and Latham JJ agreeing on this issue) endorsed the position in *Kenny*, above, and stated that in that case two considerations could affect the manner in which public opprobrium factors into the sentencing calculus. The first was the offender’s status as a former judge, which made the offence worse and gave rise to an increased level of public humiliation. Second, the offender used his previous position to advance his unlawful purpose.

An extensive analysis of the authorities was undertaken in *R v Nuttall; Ex parte Attorney-General (Qld)* by Muir JA (Fraser and Chesterman JJA agreeing). The Court ‘assumed’ public opprobrium was relevant in light of the fact that it was not submitted that the sentencing judge failed to take it into account, but noted that public humiliation was of little weight given that it was inevitable:

> The attainment of high public office brings with it public exposure and media scrutiny as well as power, fame and prestige. Criminal abuse of the office, if detected, will inevitably attract media attention and result in shame and distress to the offender and his family.

In part IV(D) below, we discuss the weight that public opprobrium should have in the sentencing calculus.

5 Employment Deprivations: Dismissal or Loss of Opportunity to Work

There is no generally agreed approach to the relevance of employment deprivations to sentence. A number of different approaches have been taken. In both *Kovacevic v Mills* and *G v Police* the sentence was mitigated to avoid damage to the offender’s career prospects. In a similar vein, there have been a number of instances where sentences have been discounted because of consequential damage to career or prospects. On the other

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76 [2010] NSWCCA 6 (12 February 2010).
77 (2010) 266 ALR 598.
78 Ibid 621 [98]–[101].
80 Ibid 553 [65].
82 (1999) 74 SASR 165.
hand, in *R v Boskovitz*\(^{84}\) and *Brewer v Bayens*\(^{85}\) a sentence was imposed regardless of the effects on career or prospects, while in *R v Liddy [No 2]*\(^{86}\) and *Hook v Ralphs*\(^{87}\) the sentence was designed or calculated to destroy career or prospects.\(^{88}\)

The strongest statement regarding the supposed irrelevance of reduced employment prospects to the sanction which is imposed is found in the comments of McPherson JA in *R v Qualischefski*.\(^{89}\) His Honour stated:

The applicant … claims that a conviction for possession of cannabis will have dire consequences for him if it continues to be recorded. It will, he says, lose him his job as a computer operator with the Health Department, along with his career, his social position and his lifestyle. Those consequences are undoubtedly severe; but, if for that reason, appeals like this are allowed and recording of convictions set aside, the impact of the administration of justice will in the course of time be no less serious. *It will mean that we are sanctioning the division of offenders into two classes. There will be those with good jobs and careers, enviable social positions and prosperous life-styles. Their convictions will not be recorded for fear of the damage it may do them. Then there will be those without jobs, or career prospects, or with standards of living that are already depressed. In their case, convictions will be recorded. Such an outcome seems to me to be quite wrong and thoroughly indefensible. It smacks of privilege, and can only lead to the evolution of a special class of persons in society who are exempt from the full operation of the criminal law, at least at its lower reaches …*

Most recently, in *R v Nuttall; Ex parte Attorney-General (Qld)*\(^{90}\) Muir JA (Fraser and Chesterman JJA agreeing) took the view that: ‘the respondent’s loss of employment and lack of job prospects on his release are relevant considerations’.\(^{91}\) However, it is clear that the courts have failed to adopt a systematic or principled approach to the impact of likely employment deprivations on sentence.

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\(^{84}\) [1999] NSWCCA 437 (20 December 1999).

\(^{85}\) (2002) 26 WAR 510. The appellant psychologist was convicted of solicitation consequent upon a random police sting operation. A conviction was recorded despite (or regardless of) the likely effects on his career, PhD studies and occupational contributions to the community.

\(^{86}\) (2002) 84 SASR 231.

\(^{87}\) (1987) 45 SASR 529.

\(^{88}\) A sentence meant to put an end to a career may also be discounted *because* it has had that intended effect. In *R v Whitnall* (1993) 42 FCR 512, the sentence was increased as a consequence of the defendant’s career.


\(^{90}\) [2011] 2 Qd R 328.

\(^{91}\) Ibid 343 [59].
C Summary of Sentencing Principles Relevant to White-Collar Offences

The above analysis demonstrates that sentencing principles and practices are not uniform or well-settled in relation to white-collar criminals. However, some key themes emerge from the decisions:

- The type of conduct which constitutes a white-collar crime varies widely, hence, it is not feasible for a sentencing tariff to be developed.

- A key consideration in determining offence severity for white-collar crimes is the amount of money or value of property involved.

- General deterrence is commonly identified as the paramount objective in sentencing white-collar offenders. This serves to increase the penalty — often considerably — at the expense of all other sentencing factors.

- Crimes that are well-planned and committed over a long period of time are often punished more heavily.

- Breach of trust is a strong aggravating factor.

- Restitution of the amount taken is a mitigating factor but, generally, does not carry considerable weight.

- Offences against individuals are sometimes regarded as being more serious, but there is no clear acceptance of this proposition. It is assumed that offences against institutions can damage institutional and investor confidence, threaten the revenue or endanger the community good generally.

- Previous good character carries little mitigating weight, given that this is said to be both typical and facilitative of white-collar offending.

- The fact that an offender has made a worthwhile contribution to the community is often of little mitigating weight.

- Good family background is also of little mitigating weight.

- Extra-curial harm suffered as a result of being convicted and punished, in the form of loss of reputation, social and public humiliation and embarrassment and reduction in employment prospects, normally has little weight.

- Penalties imposed incidentally or consequently upon conviction in the form of confiscation, restitution and/or disqualification orders may or may not be taken into account, depending on the jurisdiction and the reason for the penalty.
IV Flaws with the Current Sentencing Approach

There are several flaws with the current approach to sentencing white-collar offenders. Unsupportable assumptions underlying current sentencing practices and inconsistency in approach are evident. We start with a consideration of the proportionality principle and its implications for sentencing practice for white-collar offending.

A The Principle of Proportionality: Offences Against Individuals Are More Serious

The key determinant in the sentencing of white-collar offenders, as with all offenders, is the principle of proportionality.92 In crude terms, this means that the punishment must fit the crime. This is underpinned by the broader principle that benefits and burdens should be distributed with regard to, and commensurate with, a person's merit or blame. Proportionality operates to restrain not only sentences that are too heavy, but also those that are too light.93 A clear statement of the principle of proportionality is found in the High Court case of Hoare v The Queen:94

a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances.95

The proportionality principle has two limbs: the harm caused by the offence and the level of pain inflicted by the punishment. The requirement of proportionality is satisfied if these limbs are aligned.

In Veen v The Queen96 and Veen v The Queen [No 2]97 the High Court stated that proportionality is the primary aim of sentencing. Proportionality is considered so important that it cannot be trumped even by the goal of community protection, which

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95 Ibid 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ) (emphasis in original).
96 (1979) 143 CLR 458, 467 (Stephen J), 478 (Jacobs J).
at various times has also been declared as the most important aim of sentencing.\textsuperscript{98} Thus, for dangerous offenders, while community protection remains an important objective, at common law it cannot override the principle of proportionality. It is for this reason that preventive detention is not sanctioned by the common law.\textsuperscript{99}

Proportionality has also been given statutory recognition in most Australian jurisdictions. For example, in Victoria, the Sentencing Act 1991 (Vic) provides that one of the purposes of sentencing is to impose just punishment\textsuperscript{100} and that in sentencing an offender the court must have regard to the gravity of the offence\textsuperscript{101} and the offender's culpability and degree of responsibility.\textsuperscript{102} The Sentencing Act 1995 (WA) states that the sentence must be 'commensurate with the seriousness of the offence',\textsuperscript{103} and the Crimes (Sentencing) Act 2005 (ACT) provides that the sentences must be ‘just and appropriate’.\textsuperscript{104} In the Northern Territory and Queensland, the relevant sentencing statutes provide that the punishment imposed on the offender must be just in all the circumstances,\textsuperscript{105} while in South Australia the emphasis is upon ensuring that ‘the defendant is adequately punished for the offence’.\textsuperscript{106} The need for a sentencing court to ‘adequately punish’ the offender is also fundamental to the sentencing of offenders for Commonwealth matters.\textsuperscript{107} The same phrase is used in New South Wales.\textsuperscript{108}

The courts have not attempted to exhaustively define the factors that are relevant to proportionality. The broad approach taken to this problem is to adopt the principle that the upper limit for an offence depends on its objective circumstances. However, some factors have been positively identified as relevant to offence seriousness. These include the consequences of the offence (including the level of harm), the victim’s vulnerability, the method of the offence, the offender’s culpability (which turns on such factors as the offender’s mental state),\textsuperscript{109} and the level of sophistication involved.\textsuperscript{110}

\textsuperscript{98} For example, see Channnon v The Queen (1978) 33 FLR 433; R v Valenti (1980) 2 A Crim R 170, 174; DPP (Cth) v El Karhani (1990) 21 NSWLR 370, 377.
\textsuperscript{99} Chester v The Queen (1988) 165 CLR 611, 618.
\textsuperscript{100} Sentencing Act 1991 (Vic) s 5(1)(a).
\textsuperscript{101} Ibid s 5(2)(c).
\textsuperscript{102} Ibid s 5(2)(d).
\textsuperscript{103} Sentencing Act 1995 (WA) s 6(1).
\textsuperscript{104} Crimes (Sentencing) Act 2005 (ACT) s 7 (1)(a). The Sentencing Act 1997 (Tas), however, does not refer to the principle of proportionality.
\textsuperscript{105} Sentencing Act 1995 (NT) s 5 (1)(a); Penalties and Sentences Act 1992 (Qld) s (9)(1) (a).
\textsuperscript{106} Criminal Law (Sentencing) Act 1988 (SA) s 10(1)(k).
\textsuperscript{107} Crimes Act 1914 (Cth) s 16A(2)(k).
\textsuperscript{108} Crimes (Sentencing Procedure) Act 1999 (NSW) s 3A(a).
\textsuperscript{109} For example, whether it was intentional, reckless or negligent.
In terms of property offences, the harm comes in two main forms. The first is financial loss to the victim. This is dependent on the value of property taken from the victim, and the means of the victim. To this end, high value offences will usually cause more suffering than small ones, and real individuals are usually more harmed than large institutions, which have a greater capacity to recover losses or build them into their financial planning. Thus, crimes committed against individuals, especially those who are financially vulnerable or fragile (ie the most poor, the unemployed or financially struggling), cause more direct and much greater harm than crimes committed against the revenue or large corporations. An individual's capacity to recover is often limited and their interests are demonstrably set back by such crimes.

Accordingly, the law should be reformed to reflect the fact that white-collar offences involving the taking of money from individuals should be punished more heavily. Not only would this more clearly adapt the proportionality principle, but it would also enhance the doctrinal consistency of sentencing principle. Victim vulnerability is an entrenched aspect of sentencing practice. It is an established aggravating factor in relation to a range of offences, including assaults against the elderly\textsuperscript{111} young,\textsuperscript{112} and people with an intellectual disability.\textsuperscript{113}

The second type of harm that is caused by white-collar offending is damage to institutional integrity and investor confidence. Depending on the crime, harm is normally caused to institutions, by insider trading offences, or to the body politic itself, by revenue offences. Sentencing courts often use the collective ‘community interests’ as a catch-all phrase to describe the victim. It could be argued that where the victim is \textit{everyone} as opposed to \textit{someone}, this type of offending is as serious, or perhaps even worse, than crimes against individuals. Former Federal Court judge Raymond Finkelstein, who heard many of the largest white-collar criminal trials and pleas, publicly adheres to this view.\textsuperscript{114}

However, damage to institutional integrity is speculative at best. There is no evidence of a correlation between, say, share market activity and insider trading convictions or bank deposits and bank fraud. If such a relationship did exist, presumably, the direct victims of such crimes would demonstrate the greatest reduction in confidence in the financial system. In the United Kingdom, a scandal involving a pension-fund fraud committed by former Member of Parliament Robert Maxwell, which affected


\textsuperscript{113} For instance, see \textit{R v Grech} [1999] NSWCCA 268 (6 September 1999) [37] (Carruthers AJ).

25,000 individuals, led to a small study on the attitudinal effects of the crime on 25 of those individuals. Spalek concluded that:

The study reported in this paper illustrates that in some cases of fraud, victims may not be ‘duped investors’, but rather may distrust particular agents prior to any crime occurring, and may therefore be engaging in risk avoidance strategies. As a result, becoming the victim of a financial crime may not necessarily lead to individuals avoiding the financial system in general, because an integral part of their trust may be acknowledging that as investors they run risks.

The absence of a correlation between financial crimes and trust in the political and economic arenas is supported by research conducted elsewhere. Consequently, reform is required such that criminal sanctions (which have real consequences) are not made more severe in order to reflect imaginary harm to ‘the community’ without tangible evidence in support of that approach.

Arguably, institutional integrity has a relevance beyond investor confidence in market systems. Individuals may well be able to operate in a corrupt system, however, in a competitive global market, less money may flow into countries which have corrupt markets. Even this broad consideration of the meaning of institutional integrity does not justify more severe punishment for white-collar criminals. There is no evidence that collective market honesty and transparency is a principal driver of the international flow of funds — as opposed to where investors feel they can maximize their return. Even if a strong link between market integrity and international money flows is established, the connection between the negative impact on the entire market and any single criminal act is likely to be so minor that it would violate proportionalism to meaningfully increase sanction severity for this reason.

**B Restitution Should Be a Strong Mitigating Factor — It Should Reduce the Penalty By Up to 30 Per Cent**

As noted above, one limb of the proportionality principle is the harm caused by the offence. This has considerable implications for the manner in which restitution by white-collar offenders should be treated. As we have seen, the courts place some weight on restitution, but normally it is not a cardinal sentencing consideration.

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117 We thank the anonymous referee for this observation.
The main rationale is that if restitution were given more prominence in sentencing, it would theoretically enable wealthy offenders to ‘buy their way out of prison’. There is some force to that argument and, in principle, it is an undesirable outcome. However, the practical consequence of adhering to that view is damage to victims. It means that offenders are not provided with any pragmatic incentive to repay victims and thus redress the harm they have caused.

Undeniably, non-restitution of relatively large sums of money, particularly to the financially vulnerable, can have a devastating impact on lives: in terms of health, enjoyment and longevity. This is a high price for victims to pay for doctrinal soundness. Thus, the harm from a crime can either be perpetuated, or it can be controlled, by acts of restitution. There is no easy way to resolve whether we should opt for ‘pure principle’ in the form of not rewarding offenders for paying back sums stolen from victims (a deontological perspective), or pursue good outcomes for victims and encourage those acts through sentencing discounts (a utilitarian perspective). However, as a general rule, speculative benefits should not be preferred over concrete benefits. This is certainly the manner in which the sentencing system resolves other similar tensions. It is readily observable in other contexts, such as the guilty plea discount and the discount for giving evidence against co-offenders.

All accused are entitled to plead not guilty and make the prosecution prove its case. In principle, offenders who plead not guilty to a crime should on no account be punished more heavily than those who plead guilty (apart from the extent to which a guilty plea is indicative of remorse). Yet, for pragmatic reasons, sentencing law provides a large discount to offenders who plead guilty. This is for no higher or more virtuous reason than without the discount, the court system would become clogged.

The High Court of Australia in Cameron v The Queen approved of the plead guilty discount and, in the process, the majority of the Court rejected a number of arguments against the discount, including that it constitutes a form of discrimination against offenders who elect to pursue their ‘right’ to a trial.

In all Australian jurisdictions, accused who plead guilty receive a sentencing discount. This is so, irrespective of whether the plea is coupled with remorse. For example, in R v Morton the Victorian Court of Criminal Appeal stated that:


120 Crimes Act 1914 (Cth) s 16A(2)(g); Crimes (Sentencing) Act 2005 (ACT) s 35(2); Penalties and Sentences Act 1992 (Qld) s 13(4); Sentencing Act 1995 (NT) s 5(2)(j); Crimes (Sentencing Procedure) Act 1999 (NSW) s 22(1); Criminal Law (Sentencing) Act 1988 (SA) s 10(g); Sentencing Act 1991 (Vic) s 5(2)(e); Sentencing Act 1995 (WA) s 8(2).

121 [1986] VR 863.
A plea of guilty may be taken into account regardless of whether or not it is also indicative of some other quality or attribute such as remorse … A court may always take a plea of guilty into account in mitigation of sentence even though it is solely motivated by self-interest.122

The main reason for the discount is purely the utilitarian benefit in the form of clearing court backlogs. Gaudron, Gummow and Callinan JJ in *Cameron v The Queen*123 stated:

[Australian courts] have taken the pragmatic view that giving sentence ‘discounts’ to those who plead guilty at the earliest available opportunity encourages pleas of guilty, reduces the expense of the criminal justice system, reduces court delays, avoids inconvenience to witnesses and prevents the misuse of legal aid funds by the guilty.124

The guilty plea discount is one of only two situations where a stated numerical discount is usually applied by the courts, despite the endorsement of the instinctive synthesis approach to sentencing.125 The reason is to underline to the accused the reality of the discount and, hence, encourage greater pragmatism by them.

The normal range of the discount is between 10 per cent and about 30 per cent, depending on the circumstances of the case. In several jurisdictions it is either conventional or a statutory requirement to indicate the size of the discount.126 In *R v Thomson*,127 the New South Wales Court of Criminal Appeal issued a guideline

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122 Ibid 867. This approach was also adopted by Spigelman CJ (with whom other members of the Court agreed) in *R v Thomson* (2000) 49 NSWLR 383, 411 [115] who stated that there are ‘benefits to the criminal justice system as a whole’ that result from a guilty plea. At 412, [122], his Honour further noted that the ‘public interest served by encouraging pleas of guilty for their utilitarian value is a distinct interest’.


124 Ibid 73–4 (emphasis added) (citations omitted).

125 This was most recently endorsed by the High Court in *Hili v The Queen* (2010) 242 CLR 520.

126 In New South Wales and Queensland, the Court must indicate if it does not award a sentencing discount in recognition of a guilty plea: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(2) and *Penalties and Sentences Act 1992* (Qld) s 13(3)). In South Australia, Western Australia and New South Wales, the courts often specify the size of the discount given. In Victoria, s 6AAA of the *Sentencing Act 1991* (Vic) states that when courts provide a discount for a plea of guilty, they must specify the sentence that would have been given in the absence of that discount. An appeal does not lie against that ‘notional sentence’. See *R v Burke* (2009) 21 VR 471. Also see *Giordano v The Queen* [2010] VSCA 101 (7 May 2010) [45]. There has been some judicial comment as to the artificiality of s 6AAA given the instinctive synthesis that produces the actual sentence. See *Scerri v The Queen* (2010) 206 A Crim R 1, 5 [23]–[25]; *R v Flaherty [No 2]* (2008) 19 VR 305. The rationale and size of the typical discount in Victoria is discussed in *Phillips v The Queen* [2012] VSCA 140 (29 June 2012).

judgement stating that a guilty plea will generally be reflected in a 10 to 25 per cent
discount on sentence, depending on how early the plea is entered and the complexity
of the case.128 This suggested range relates only to the utilitarian value of a guilty
plea to the criminal justice system and does not include additional discounts that
may be available — for example, where the guilty plea may be said to evidence
remorse. This now has a legislative basis.

Section 17 of the Criminal Case Conferencing Trial Act 2008 (NSW) states that an
eyearly plea attracts a discount of up to 25 per cent, and late pleas can obtain a discount
of up to 12.5 per cent. In Lee v The Queen129 it was held where the plea was taken
on the second day set for trial that a 12.5 per cent discount was appropriate. The
co-offender received a 20 per cent discount for pleading on arraignment and it was
held that the difference was appropriate.130 In Western Australia, the discount often
ranges from 20 to 35 per cent under the state’s ‘fast track system’.131 The Western
Australian Court of Appeal rejected submissions that a full ‘discount of the order
of 30 per cent will automatically be afforded for a fast-track plea of guilty without
more’.132 There is no requirement to quantify the discount in Western Australia.133
In South Australia the common range is between 15 to 25 per cent, with 25 per cent
regularly given for an early plea of guilty.134

Providing assistance to authorities is treated in a similar way to guilty pleas,
particularly where it results in the detection and prosecution of other offenders.
It is important to note that, as with the guilty plea discount, this benefit is given
independent of any reasons or remorse that might be demonstrated by assisting
authorities. Criminals, in principle, should not be dealt with less severely because
they opportunistically decide to give evidence against co-offenders. However, as a
matter of public policy, the law encourages those involved in criminal behaviour to
betray the confidence reposed in each other by providing a significant discount at
the sentencing stage of the criminal justice system.135 This is especially apposite
given that it often places the individual in personal danger.136

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128 See also Charkawi v The Queen [2008] NSWCCA 159 (4 July 2008); R v Bugeja
130 The same discount was accorded in Nakhla v The Queen [2011] NSWCCA 143 (24
June 2011).
131 See, eg, Trescuri v The Queen [1999] WASCA 172 (10 September 1999); Deering v
Western Australia [2007] WASCA 212 (17 October 2007).
132 Cameron v The Queen [2002] WASCA 81 (22 March 2002) [19].
133 McLean v Western Australia [2011] WASCA 60 (16 March 2011) [57].
135 Malvaso v The Queen (1989) 168 CLR 227, 239 (Deane and McHugh JJ).
136 R v Barber (1976) 14 SASR 388, 390 (Bray CJ). See also DPP (Cth) v AB (2006) 94
SASR 316.
Assistance to law enforcement officials enjoys recognition in a number of statutory regimes.\(^{137}\) In terms of the size of the discount that is available, it has been held that the discount for a plea of guilty and assistance to authorities should be up to 50 per cent.\(^{138}\)

Thus, when the legal system wishes to strongly encourage a course of conduct, the law is willing, with arithmetical clarity, to provide a significant and clear sentencing discount in order to encourage that conduct. This occurs despite the courts’ steadfast adherence to the instinctive synthesis theory, and despite the questionable morality of permitting resource allocation to dictate the punitive consequences of criminal conduct. For far better reasons, the same approach should be adopted in respect of restitution to victims of crime.

Property offences are one of the few crimes where it is possible to restore the victim, economically, to the same position as before the offence. Where restitution does not occur, victims can be devastated — especially when they are individuals. There is a measurable difference in terms of harm caused between white-collar crimes that are restituted and those which are not. This should be reflected in the sentencing calculus. White-collar offenders who provide full restitution should get a discount of up to 30% — proportionally less for partial restitution.

It is accepted that this will place property offenders in a different situation from other offenders, but does not mean that they are given an opportunity to buy their freedom. It simply reflects the different nature of their crime: the targeting of commodities as opposed to other human interests. Moreover, the lives of victims should not be sacrificed in the fanatical pursuit of the dubious principle that offenders should not buy their way out of gaol. Principle often yields to the practical imperatives of the criminal justice system;\(^{139}\) the lives of individual victims are no less important.

This approach entails that offenders who wish to but cannot make restitution, because they have dissipated the proceeds of their offending (for example, because of drug or gambling addictions), will receive more severe penalties than offenders

\(^{137}\) See Penalties and Sentences Act 1992 (Qld) s 9(2)(i); Crimes (Sentencing) Procedure Act 1999 (NSW) s 23; Criminal Law (Sentencing) Act 1988 (SA) s 10(1)(h); Sentencing Act 1995 (NT) s 5(1)(h); Crimes (Sentencing) Act 2005 (ACT) s 36. There are also similar provisions at the Commonwealth level. See Crimes Act 1914 (Cth) s 16(2)(h).

\(^{138}\) For an example of where a 50 per cent discount was allowed, see \textit{R v Johnston} (2008) 186 A Crim R 345, 349–50 [15]–[21] (Nettle JA). For an application of these principles, see \textit{Dan Ning Wang v The Queen} [2010] NSWCCA 319 (17 December 2010); \textit{Yue Ma v The Queen} [2010] NSWCCA 320 (17 December 2010); \textit{R v Nguyen} [2010] NSWCCA 331 (21 December 2010). This contrasts with the decision in \textit{R v Sahari} (2007) 17 VR 269 where it was held undesirable to specify a specific discount for cooperating with authorities.

\(^{139}\) One of the most fundamental rights, the right to a fair trial, is itself subject to a host of competing principles which delimit the scope and content of that right: see Mirko Bagaric, Theo Alexander and Marlene Ebejer, ‘The Illusion That Is the Right to a Fair Trial in Australia’ (2011) 17(2) Australian Journal of Human Rights 59.
who can make restitution. This is justified on the basis of the practical improvement to the lives of victims and the inherent logic in prioritising victim prosperity over abstract purity in sentencing.

C Previous Good Character is Relevant: the Need for Doctrinal Coherency in Light of the Progressive Loss of Mitigation Theory

As discussed in part III of this paper, the prevailing approach to the relevance of previous good character in relation to white-collar offending is that it only marginally mitigates. The argument is that most white-collar offenders do not have prior convictions, and it is this very characteristic that enables them to secure status and positions that later provide the opportunity to offend. This analysis is flawed, at least in terms of consistency with the conventional treatment of prior offending, or lack of it, in the sentencing calculus.

Prior convictions have their most significant role in sentencing where offenders have a long criminal history, in which case they can lead to a considerably longer penalty.\(^{140}\) This has fuelled criticism on the basis that it amounts to punishing the accused again for their previous crimes, that is, it constitutes double punishment and involves punishing people for their character, as opposed to what they have done.\(^{141}\)

These criticisms have been met with the endorsement of the ‘progressive loss of mitigation’ theory, which is the view that a degree of mitigation should be accorded to first-time offenders or those with a minor criminal record. This mitigation is ‘used up’ by offenders who repeatedly come before the courts, thereby resulting in ever-increasing penalties for recidivists.

Hence, it is not that offenders with prior convictions are being punished more heavily, rather, that first-time offenders are treated more leniently. Recidivism disentitles repeat offenders to the leniency which is normally afforded the first-time offender.\(^ {142}\)

In *Veen v The Queen [No 2]*\(^ {143}\) the High Court set out three other grounds for imposing harsher penalties on recidivists:

- the antecedent criminal history is relevant … to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested

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\(^{140}\) Approximately 60 per cent of imprisoned offenders have been to prison previously: see Australian Bureau of Statistics, ‘An Analysis of Repeat Imprisonment Trends in Australia’ (Research Paper No 1351.0.55.031, Australian Bureau of Statistics, August 2010) 12 <http://www.ausstats.abs.gov.au/>. Hence, this is a common aggravating factor.


\(^{142}\) See, eg, *Baumer v The Queen* (1988) 166 CLR 51, 58.

\(^{143}\) (1988) 164 CLR 465.
in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of the society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind.¹⁴⁴

Thus, it is well settled that, in general, good character results in less punishment. The fact that many offenders in a certain category of offending share this trait is no basis for diminishing its relevance. Rarity or commonality of a trait in relation to an offence type is not a basis for determining its role in the sentencing calculus. More than 90% of offenders plead guilty,¹⁴⁵ yet this does not diminish the weight given to the guilty plea discount. It follows that in relation to white-collar offending, good character should be accorded as much weight as in other types of offending.

D Extra-Curial Punishments Which Can Be Tangibly Measured Should Reduce Penalty

The other limb of the proportionality equation is the severity of penalty. Imprisonment is the harshest penalty in our system of law. However, a range of other deprivations can be imposed including partial loss of liberty or monetary exactions. For this article, the key issue is what types of losses should be regarded as relevant to this limb of the proportionality thesis: should this include only those losses directly imposed by the courts for sentencing purposes? Or should incidental hardships in the form of extra-curial hardship also be included?

As noted above, the main extra-curial penalty suffered by white-collar offenders is in the form of employment deprivation: either being dismissed from a job, being precluded from pursuing a certain career, such as a lawyer or accountant, or having those prospects severely curtailed as a result of a conviction. There is little doubt that these are damaging to the offender: ‘a person’s employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem’.¹⁴⁶


The correct approach to factoring employment deprivations into the sentencing equation requires consideration of the very nature of punishment. Criminologists and philosophers generally adopt expansive definitions of punishment, recognising that incidental negative consequences flowing from a finding of guilt may constitute punishment. Antony Duff defines punishment as ‘the infliction of suffering on a member of the community who has broken its laws’.\textsuperscript{147} Andrew von Hirsch states that ‘punishing someone consists of visiting a deprivation (hard treatment) on him, because he has committed a wrong, in a manner that expresses disapprobation on the person for his conduct’\textsuperscript{148} Similarly, punishment has been described as pain delivery.\textsuperscript{149} Further, it has been asserted that ‘the intrinsic point of punishment is that it should hurt — that it should inflict suffering, hardship or burdens’.\textsuperscript{150} Thus, drawing a line through the contemporary terminology, it would seem that punishment is a hardship or deprivation; the taking away of something of value for a wrong actually or perceived to have been committed. Notably, the definition does not take account of the forum (for example, a court, other institution or employer) which inflicts the hardship.

Thus it follows that although the experience of hardship by the offender in the form of employment deprivations may not be \textit{intended} as punishment (but instead is, for example, to maintain the integrity of a profession) or may only be a \textit{consequence} of punishment (for example, a statutory requirement), it does not mean that such deprivations do not of themselves constitute a punishment. As is evident from the definition above, what is crucial in this respect is the effect on the person, not the reason for which the hardship is inflicted. To ignore those hardships in the sentencing calculus is both illogical and contrary to the principle of proportionality.

The loss of a job or exclusion from an occupation tangibly sets back an individual's interests and there does not seem to be a justifiable reason for ignoring that aspect of a sentence on an offender. Thus, job status is a relevant criterion that should be recognised in the sentencing calculus. It has been argued that discrimination between offenders already exists in the form of (the privilege of) holding a job.\textsuperscript{151} To then allow that job to result in a sentencing discount only further compounds the disadvantage that is experienced by the unemployed offender. To this end, it is has been argued that an offender who comes from a deprived social background should receive a sentencing discount because they have had less opportunity to lead


\textsuperscript{148} Andrew von Hirsch, \textit{Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals} (Rutgers University Press, 1985) 35.

\textsuperscript{149} Nils Christie, \textit{Limits to Pain} (Martin Robertson, 1981) 19, 48.


\textsuperscript{151} A similar view was adopted by Jeremy Bentham who declared that ‘all punishment is mischief, all punishment in itself is evil’: Jeremy Bentham, \textit{An Introduction to the Principles of Morals and Legislation} (J H Bums and H L A Hart eds, Oxford University Press, 1970) 158.

\textsuperscript{151} See above, part III.
law-abiding lives and, hence, are less morally blameworthy. There is significant force in this argument. However, this is an argument which has not found favour with law-makers. Social deprivation is not, of itself, a mitigating factor because of the assumption that it would undermine the deterrent effect of criminal sanctions.\(^{152}\) Thus, the basic approach of sentencing law is that sentencing is not the place to redress social disparity and offenders must be taken as they are found at the time of sentencing. This is consistent with the approach to victims — they must be taken as they are, and offenders are liable for both the intended and the remote consequences of their conduct.\(^{153}\)

As noted in part III of this paper, there is some inconsistency and uncertainty regarding the impact of criminal wrongdoing on employment. This area of law is in need of fundamental reform. Employment deprivations are a form of punishment and, consequently, they should be recognised in the overall sanction meted out to an offender and subject to the normal sentencing practices and principles governing the infliction of criminal punishment.

This would also make sentencing law more consistent. In other instances, incidental deprivations stemming from offending are normally regarded as mitigatory. For example, a strong mitigating factor is incidental harm suffered by the offender, in the form of trauma associated with injuring or killing a friend or relative or also suffering serious injury.\(^{154}\)

Offenders who are not Australian citizens or permanent residents can be deported if they fail a ‘character test’; being sentenced to a term of imprisonment of a year or more can constitute evidence of bad character. Deportation or the risk of deportation is an additional burden that would then be faced by such an offender. Hence, logically it should be mitigatory. This was the position taken in *Valayamkandathil v The Queen*;\(^{155}\) *Guden v The Queen*\(^{156}\) and *Director of Public Prosecutions v Yildirim*.\(^{157}\)

Where an offender is harmed in the course of committing an offence, this can also reduce the penalty. In *Alameddine v The Queen*\(^{158}\) the Court regarded the fact that the offender was injured when his drug-making laboratory exploded as a matter to be taken into account in mitigation.

To be clear, what should mitigate is not only the loss of a job as a result of a criminal sanction but also any employment deprivation. This extends to the diminished

\(^{152}\) Bagaric and Edney, above n 10.

\(^{153}\) *DPP (Vic) v Eli* [2008] VSCA 209 (27 October 2008).


\(^{158}\) [2006] NSWCCA 317 (10 October 2006).
capacity of an offender to secure employment and the disqualification or suspension of a professional or similar qualification (such as in the areas of law, medicine or accounting) that often stems from a criminal sanction. These further hardships are normally less certain than the loss of a job and hence should carry less weight as penalty reductions than where it is clear that an offender will lose his or her job as a consequence of being found guilty of an offence. Moreover, the mitigatory impact of employment deprivations should apply even where the offence occurred in the employment setting.\(^{159}\)

The other form of incidental non-curial punishment is the censure that an offender may receive from family, friends, associates or the wider community. The extent of this sanction varies markedly according to such matters as the social connections and personal antecedents of the offender and the offence in question. This form of ‘punishment’ is too obscure and too hard to measure to be factored into the sentencing process. There is considerable logical force in the comments by Hayne J in \textit{Ryan v The Queen}\(^{160}\) where he stated:

> There is an irreducible tension between the proposition that offending behaviour is worthy of punishment and condemnation according to its gravity, and the proposition that the offender is entitled to leniency on account of that condemnation.\(^{161}\)

Although the public opprobrium and social ostracism suffered by an offender may be palpable to both the offender and the court, it should not factor into sentencing. However, this can only be a provisional view in the absence of a more extensive enquiry. It may be that bringing white-collar offenders publicly before the law constitutes both punishment and deterrence. Kahan and Posner suggest that, in certain circumstances, shaming might itself ‘provide sufficient deterrence to white-collar crime offenders’.\(^{162}\) But even if that is so, acting on such an assumption may result in an unjustifiable differential treatment between classes of offender.

\section*{E Curial Incidental Sanctions}

The current legal position is that curial incidental sanctions are mitigatory. This position is correct and not in need of reform.

\footnotesize{\begin{itemize}
\item \(^{159}\) This is to be contrasted with comments in \textit{R v Liddy [No 2]} (2002) 84 SASR 231.
\item \(^{160}\) (2001) 206 CLR 267.
\item \(^{161}\) Ibid 314 [157].
The strong emphasis by the courts on general deterrence when sentencing white-collar offenders is logically sound — especially in light of the assumption that such offenders are more likely to engage in a cost–benefit analysis than other offenders.

However, the assumption underlying this approach is not validated by the empirical evidence. The evidence on this front has been considered in a number of recent reviews. The studies show that harsh penalties, in the form of imprisonment generally and clearly disproportionate penalties, do not discourage crime. The greatest deterrence against crime is not the size of the penalty, but the perceived likelihood of detection. Of particular relevance is research establishing that this also applies to white-collar offences. The upshot is that penalties for white-collar crime should not be increased in order to discourage other would-be offenders.

This does not mean that severe punishment is never suitable for white-collar offences. Rather, it means that a justification for severe sanctions must be located within other sentencing objectives. Moreover, if tough sanctions do not deter white-collar offences, there is a need for the criminal justice system to implement other measures which will achieve this outcome. It has been suggested that the answer rests in greater monitoring of areas where white-collar offences are often committed. Thus, in the context of tax crime, it might be that more audits should be undertaken. In other areas it might mean that greater measures to monitor compliance are implemented. More generally, a greater proportion of resources should be deployed in the areas of policing and crime detection, and even the pathology of white-collar offending warrants further investigation.

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V Conclusion

Our analysis suggests that a doctrinally-sound approach to sentencing white-collar offenders requires a number of legislative reforms. The key reforms are:

- Providing a numerical and large discount for restitution — the argument that restitution allows offenders to buy their way out of gaol is outweighed by the good that comes from restoration for victims;

- Abolishing the pursuit of general deterrence and the increases in sentences which follow;

- Providing a greater discount for previous good character, consistent with other areas of sentencing;

- Providing a greater discount for non-curial harm in the form of employment deprivations; and

- Placing more emphasis on the harm caused by the offence to guide the sentence: crimes against individuals should be treated more seriously than those against the revenue or large corporations.