

**Senate Economics References Committee:
INQUIRY INTO PENALTIES FOR WHITE COLLAR CRIME**

Submitted: 30 March 2016

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INTRODUCTION AND PERMISSION

Thank you for establishing this senate inquiry into penalties for white collar crime and for the opportunity to contribute. We cannot adequately convey our gratitude that this forum exists or for the various senate inquiries undertaken in recent years which have contributed to a growing recognition amongst parliamentarians, industry and the community that something is very gravely amiss.

Representatives of HNAB-AG are willing to appear at any hearing as has occurred in previous related inquiries.

This submission is written from the perspective of victims of white collar crime who are not lawyers, economists or professionally skilled in the financial services industry. This material may be made public.

Given our unique, but regrettably not rare, perspective, the experience of victims is vital to enhance and complement the expertise of those considering and creating policy, laws and regulatory protocols. Sometimes simple and inexpensive alternatives or solutions become lost in complex legal and technical details.

TERMS OF REFERENCE

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

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

RESPONSES TO TERMS OF REFERENCE – items b, c, d, e and g.

A. Penalties must be in context of drivers of white collar crime

To meaningfully consider penalties it is our firm opinion that the problem, and what drives it, must be understood.

In brief, from many years of painful experience, it is the view of victims that substantial impediments which minimize a culture of white collar crime relate, in particular, to:

- 1) **Grossly inadequate legal and regulatory systems** which do not safeguard the community but protect lenders, product issuers, accountants, financial advisers/planners, liquidators and others in the financial services industry motivated by profit and/or removing a concern quickly and cheaply, through appearing to address the easiest factor/s rather than commit to adequate investigation or action in complex deception and fraud, or where large numbers of victims occur.
- 2) **Profit/greed-centric failures of the FSI to safeguard welfare** such as could be rectified by providing measures to check key information has been communicated to, and on behalf of, a prospective client / customer in a clear, simple, manner enabling all parties to proceed or decline. The public, lenders and product issuers (particularly where issuers are involved in arranging loans) need to be in a position to make an informed decision and not be reliant on an accountant / adviser / authorized representative / member of staff who may be motivated by conflicted remuneration, including reputation and promotion based on statistics related to performance goals for loans written or products sold.
- 3) **Silence, and silencing of, victims** prevents community awareness, and thus concern, which would place pressure on authorities to address, not merely the financial crimes, but the gut-wrenching personal and family impacts extending to all aspects of life. Victims are intimidated and bullied to find their breaking point to acquiesce to lawyers or banks and liquidators either directly, or via in-house 'hardship' programs which have the law, in its considerable limitations, behind them. Moreover, it is an industry in which the majority of victims are out of their depth, hence having sought professional financial assistance. As in rape, sexual abuse, family violence and other crimes which violate a person's sense of safety and security, victims often do not speak out, feeling humiliated, even when they understand it is not their fault: this is a psychological defence when rendered powerless which creates the illusion of control. It distances from other, more overwhelming, emotions such as rage, grief and despair. Indeed, the trauma is such that many are not able to face it, far less engage in activism. Understandably, they retreat, withdraw and hide from the reality of what they were subjected to.
- 4) **Social and cultural taboos** play a hazardous role in keeping these crimes unspoken, invisible and able to fester in the dark. Denial, minimization, rationalization, excuses and victim-blaming

serve the function of abdicating social responsibility because it can be avoided. There is a point beyond which it is dangerous psychologically for a community – or individual - to feel unsafe or believe major banks, regulators or authorities cannot be trusted. People discuss their sex lives and interests but their money and financial activities remain very much a taboo. Finances typically are just ignored: a no-go zone. Almost no-one thinks they have enough money, no matter how rich they are. Many resent, or fear, others have more money than they, or obtained it more easily, with less effort. Attitudes towards money reflect much about the emotional, and (for want of a better word) spiritual, maturity of a person or a society.

- 5) **Lack of sound ethical and economic leadership by successive governments** deferring to Big Business despite repeated, devastating disclosures of corruption and white collar crime across the financial services industry (including agribusiness, margin lending, superannuation, insurance etc.) impacting hundreds of thousands – is shamefully similar to institutional responses to child sexual abuse by authorities in churches, synagogues, schools and other organizations as well as the horrendous issue of family violence. A robust healthy economy requires a society to trust authorities have its interests in focus. Civilizations rise and fall based on the abuse of power. History repeats itself until individuals, families, communities and authorities learn from past experience.

A key motivation for white collar crime appears to be greed as a substitute for dissatisfaction and impotence. The perception that more is better and somehow equates to increased personal power, compensates for the degree to which there is paucity of an enriched, meaningful, life and sense of agency.

B. Penalties must extend beyond direct agents to enablers and those who seek to cover-up or conceal

Scapegoating an individual or hanging out the “fall guy” is not going to change white collar crime. Ethics, integrity and humanity cannot be legislated for but responsibility can, and must, be.

The people who engage directly in deception or its concealment are responsible.

Equally, their superiors, as part of the employing entity, are responsible for enabling white collar crime by way of lack of measures to provide simple, informed consent (not hidden in pages of legalese, technicalities and small print) or to implement protocols to ensure these are followed.

Colleagues share responsibility to be alert to suspicions of corruption and raise the alarm with superiors, if not also externally.

The main offenders are:

Lending institutions: the entity, chief and managing executives, staff

Product issuers: the entity, chief and managing executives, staff

Accountants: principal, staff, colleagues

Financial planners /advisors: principal, staff, colleagues

Liquidators: principal, staff, secured creditors, colleagues

In-house hardship program and compensation schemes: the entity, advocate/s, staff, colleagues.

C. The punishment must fit the crime

The haul

Billions of dollars have been made on the backs of victims of white collar crime.

The impact

Innocent people have been forced to sell their home, had their life-savings and/or superannuation effectively stolen, retirement rendered impossible or the quality of it radically reduced including ending up in poverty. People have been forced into bankruptcy or insolvency arrangements.

Beyond the devastating financial ramifications, from which many will never recover, the personal life-altering toll is inestimable and deeply traumatic. The toxic tentacles extend to marriages / relationships, children, elderly parents, friendships, social-life, work and career and include severe physical, emotional and mental health impacts extending to suicidality.

The protracted nature over many years of trying to extract from the ordeal, on top of next to no accountability required of the culprits, far less avenues for justice and restitution, exacerbate the intense and profound trauma experienced by the victims.

The lack of resources for victims

There are next to no resources or avenues for help to navigate the minefield of white collar crime and its consequences beyond general trauma counselling.

ASIC discouraged people from lodging complaints, advising it is best to "move on." Only after our persistence did it ban Peter Holt for 3 years yet this was inadequate given his conduct met ASIC's criteria for a minimum of 10 years - Life ban.

Criminal charges were considered eventually (7 years after the last round of victims reported complaints). Its attitude is revealed when, after a journalist (independently) enquired about the progress, it threatened, *"Please also note that ASIC's progress on this matter may be delayed if resources are diverted to responding to media enquiries regarding the matter."*

Similarly FOS failed victims refusing to take on cases because compensation was not available and Peter Holt did not co-operate with providing documents required. It excluded victims due to its low cap on losses related to cases FOS would hear.

Community centre financial counsellors were out of their depth. Community legal advice assistance equally was unable to help due to the complexity of cases. They typically empathized with the lack of resources and avenues available.

Lawyers often understood less than victims. Many made tens of thousands of dollars from victims who, yet again, mistakenly thought they could trust in professionals and the legal system.

The way forward - suggestions

It is reported that 6 million Americans were made homeless by the GFC. Offenders were rewarded: banks were propped up. Their victims were penalized in being left with the consequences. The institutions and executives were not held accountable; criminal charges were not laid. Victims were bankrupted (and yet still must pay rates and fees on homes, going to rack and ruin, in which they are not allowed to live). Mental health concerns include an increased rate of completed suicides and terrible suffering.

It is the wrong way around. Mortgages could have been adjusted in line with the decreased property values created by the lenders. Offenders could have been tried in criminal courts and banned from the industry. Victims could have been assisted financially.

Clever criminals will always exist and find loop-holes but the depth and breadth of white collar crime is a sickening travesty, weakening the fabric of society, and from which people deserve to be protected.

Penalties may not provide disincentives financially or personally for some unscrupulous criminals who are intent on profiting from the game of deceit and betrayal. Current fines, reputational damage via the media, or the rare (and all too brief) custodial sentences, do not appear to be effective.

However, meaningful accountability of institutions and individuals must be sought for victims and society, at least in terms of financial resolution.

Radical overhaul and review is essential through:

- 1). **Substantial fines** (perhaps 5-10 times the amount procured from a victim) which would provide:
 - a) restitution for victims' losses
 - b) compensation for victims' trauma and ordeal
 - c) funding toward the cost of investigating, assessing and awarding victims
 - d) funding toward the cost of training enough, competent – and trauma-informed - professionals to examine reports of white collar crime
 - e) funding of a victims advisory service for the industry and government
 - f) funding of a victims' support service to provide understanding, emotional and psychological assistance, referral to genuinely independent advocates and professionals
 - g) funding for community awareness programs to safeguard the public
 - h) funding for enough genuinely independent advocates who are competently trained and trauma-informed (and not beholden to lenders, liquidators etc. via payment or other conflicted interests) and can see a case through from beginning to end, including where a victim is too distraught, unwell, unable or without the financial sophistication to understand how deception occurred far less launch action over it toward restitution and compensation
 - i) funding toward the establishment of a new, dedicated organization properly trained and competent to assess reports of white collar crime, empowered to award restitution of losses and compensation and recommend criminal charges (the acronym **FICS** being the aim of the organization with respect to the impact financially on victims of white collar crime: we propose the name **Financial Integrity Commission and Service** or perhaps **Financial Integrity Conduct Service**)
 - j) funding for a **Retrospective Compensation Scheme of Last Resort** to help victims back on their feet until mechanisms are in place to properly award restitution and compensation.
- 2). **Salaries (and bonuses or other forms of remuneration) of CEO and senior staff to be inversely linked to** levels of white collar crime. This would encourage implementation, updating and auditing of measures

to safeguard against corruption. Transparency and accountability to shareholders and the public could be required in disclosing reports of white collar crime (perhaps quarterly or monthly depending on volume).

3). **Significant criminal charges** could be implemented against those directly involved and also senior executives, who have enabled these crimes having failed to provide measures to safeguard customers or who thwart the provision of documents required to evaluate a case. Prison time for at least as long as it takes all the offender's victims to receive restitution and compensation would seem appropriate.

4). **Ban offenders from the industry** (to avoid businesses being phoenixed and continuing to operate behind staff; and avert people being moved around within an institution or onto another etc.) – zero tolerance would help weed out offenders.

5). **Change laws enabling financial service industry members to secure assets beyond creditors' reach** hidden in other company names and family trusts and in off-shore accounts such as in Dubai and the Cayman Islands etc. This would reduce the motivation to offend as the means to conceal or protect money made would be greatly impacted. The dire consequences personally would be heightened if the offender's spouse and children were impacted (as occurs in the family of victims).

6). **Encourage, protect and reward whistleblowers plus penalize enabling or complicit staff** with fines and / or criminal charges where it can be demonstrated he / she / they could reasonably be expected to have been aware that a customer / client was not being provided with adequate information or was being taken advantage of.

7). **Require participation in a program along the lines of Restorative Justice** whereby offenders and enablers must listen to their victims, and can engage in healing the trauma created. Victims' pain and suffering is lost when reduced to mere case numbers and statistics. To change the culture, it must include participation of:

- (i) the CEO, Deputy CEO, and Chairperson, of the offending institution
- (ii) the senior executives, managers and team leaders of the offending institution
- (iii) the staff involved with the offending accountant or advisor
- (iv) all levels of staff from the regulatory system
- (v) parliamentarians as part of learning about crime, its impacts, and what needs to change.

Such programs have not only benefitted victims in their personal recovery but assist offenders and enablers to appreciate the cost of their actions and regain their humanity through the chance to take personal responsibility, genuinely apologize and make amends.

D. Accountability of the regulatory system

It is a dangerous false economy to stall on financial reform. Compensation could be drawn from meaningful fines of lenders and products issuers. Criminal sentences must apply. Ensuring our largest companies pay tax while releasing victims of the industry from tax assessed as due until adequate restitution is in place, is a reasonable (if limited) option.

a) ASIC

As noted, a new organization is recommended to replace ASIC in terms of considering and dealing with these reports of white collar crime. How to hold ASIC accountable, and what functions it can reliably perform, is beyond the scope of this submission.

ASIC failed to act on reports about Peter Holt in the past, well prior to the batch of victims revealed in 2008/9. It failed to ensure product issuers and lenders genuinely acted with due diligence or provided appropriate material to the ordinary, unsophisticated, financial 'investor'. It handed victims on a plate to these offenders.

Successive governments bear responsibility. There is an obligation to provide at least some means of compensation until proper assessments can be made for restitution.

b) ATO

Reportedly, out of 1539 of Australia's largest corporations, 38% paid no tax in 2013/4. The bulk of tax obtained is from hard-working low to middle-income earners - while billions go uncollected from the biggest earners.

Revenue for all manner of needs and requirements to run Australia and give its citizens a 'fair go' could be obtained by ensuring fair taxation.

An immediate avenue, which would be a fair and reasonable consequence for victims of white collar crime who are discriminated against by inadequate regulatory protections, would be to halt the payment of tax assessed as due, over as many years as covers their loss - until such time as an appropriate service exists to provide proper restitution and compensation.

c) Financial Services Industry Codes – plus a Levy

The industry has a responsibility to ensure appropriate codes of ethics are set with disciplinary action that is meaningful.

A levy or such on members towards funding the changes required may also assist in encouraging members not to tolerate white collar crime.

E. Re-victimization by the law or its misuse:

As a result of the deception, victims did not have the money to press charges against Peter Holt. Lawyers were not interested in pursuing cases when his grossly inadequate professional indemnity insurance of \$2million dollars was quickly used. The PI insurance did not go anywhere near covering even just those 485 clients he placed in Timbercorp with an estimated debt of \$120million on top of the losses they incurred having paid into these schemes.

Despite documentation, including details of the widespread pattern, after finally considering criminal charges 7 years later, ASIC concluded: *"After a full assessment of a range of information resulting from enquiries made, ASIC has concluded that there is insufficient admissible evidence to establish to the standard required that there has been a breach of the law."* ASIC managed to add insult to injury, commenting people *"might be disappointed."* A Royal Commission is necessary.

Meanwhile, it is possible to make significant changes regarding aspects of the law related to debt incurred through deception, in relation to:

a) **Deed of Settlement**

- i. **Responsibility** - a victim of white collar crime should not be required to make the false statement (particularly on a legal document) that they agree / accept the debt related to deception is owed – instead, a truthful, accurate statement should be clear that the victim *accepts only that the (liquidator / lender) deems a debt of \$X is owed under the limitations/parameters of the law*. It should be noted that the legal term "Borrower" or such is used accordingly. The law allows for this currently but implementing it has been denied by hardship advocates, lawyers and liquidators.
- ii. **Gag orders** - should not be required on settlements in which victims of white collar crime have no choice but to accept.
- iii. **Entitlement to speak openly about the experience** (of a legal case, hardship program etc.) – should not be curtailed with the threat of recommencing action in the event of 'disparagement'. Victims of white collar crime are already at their most vulnerable, depleted and powerless on top of being re-victimized by inadequate laws which further conceal unreasonable treatment.
- iv. **Eliminate coercion and duress** - lawyers, hardship advocates, liquidators and others who demand or coerce people into accepting gags and false statements about responsibility should be penalized. Victims should not be required to sign a false statement of entering a Deed voluntarily and without duress regarding deceptive debt.
- v. **Require victims' interests and welfare to be met** - lawyers, hardship advocates, liquidators and others who provide so-called

'free, independent, legal' advice in relation to Deeds should be penalized where such advice is not centred on the victim's interests, including by omission for related aspects.

b) Statute of Limitations

This is a serious matter as many people were unaware for years about having been placed in loans without their knowledge or consent. Further, many had products and loans substantially misrepresented to them. It was only when agribusinesses failed, or margin loans were liquidated that many realized there was any inkling of a problem. The priority then became dealing with the shock and trauma, salvaging what was possible and trying to adjust or restore life to a semblance of what it had been.

Endeavouring to take responsibility for their financial welfare and retirement, people believed they were in safe hands engaging a (well qualified) accountant and/or advisor to manage their "investments" after recommending and setting these up.

Recent information is that there is no Statute of Limitations on criminal charges only on civil matters. KordaMentha, the liquidator for Timbercorp was able to extend the Statute of Limitations beyond six years to continue to serve writs on thousands of victims. It is reported this apparently occurred twice extending the period over yet another year. This possibility was never apparent to the victims to use in their cases against various industry organizations.

Timbercorp accepted loan applications which were incomplete contrary to its own criteria. Some also contained false information (not in the victim's writing and clearly supplied later if they were ever shown the application). Photocopies of applications are used against victims because their signature appears despite a lack of originals, or reports of Peter Holt misrepresenting what he had people sign, explaining it was his job to understand and deal with details – which he knew were beyond people's understanding. The pattern is extensive and extends into margin lending and other agribusinesses.

Victims are at a disadvantage because they do not know details about the law and their rights in these dealings. Indeed, the industry is not only aware but has contacts and information of which individual offenders or institutions make full use.

This includes liquidators who swoop in like vultures stripping victims of money or asset that may remain for debt incurred through deceptive conduct. They hide behind statutory obligations to secured creditors while ignoring the power under these same legal duties to grant waiver or make a case to creditors for it.

A Statute of Limitations could be removed for victims of white collar crime where a pattern is demonstrated, or there is serious concern even if not determined to the current standard required for criminal charges.

c) Immunity and protection for whistleblowers and witnesses – and preferably, reward

The culture needs to change to reward, or at least protect, whistleblowers and witnesses. As it stands, the offenders are rewarded, reinforced and safeguarded. Those with the courage and integrity to speak out appear to experience persecution or retaliation and suffer in various personal ways.

d) Return proceeds of crime to victims – with compensation

Offenders should have to relinquish all assets to the amount effectively stolen from their victims. Where assets do not cover this, a percentage of income earned henceforth, until losses are recouped and compensation for the ordeal, could be paid. The offender should not be permitted to keep income beyond a modest rent and basic survival: this is more than many of his or her victims will endure.

F. Senate Inquiries – necessity to hold contributors accountable

Senate inquiries serve a vital function in terms of providing a forum for serious matters to be examined with a view to informing policy and change through its recommendations. However, they become part of the problem when, amidst the weight of many parliamentary responsibilities and commitments, they fail to hold people (particularly with vested interests) accountable for their testimony or claims. (Further information is available in relation to concerns reported to the *Senate Inquiry into Forestry Managed Investment Schemes*.)

a) Misleading and inaccurate testimony

Testimony provided to senate inquiries is subject to a parliamentary *Act* which makes false or misleading testimony a crime if breached. Reports this has occurred, or may have, warrant thorough investigation and action.

For the sake of transparency (particularly important to victims of white collar crime) the findings of an investigation, and the reasons supporting it, could be provided to the person/s making the notification and certainly publicized where these are upheld.

Unless witnesses and contributors know they will be held accountable, the message sent is that if challenged, statements can be rationalized by providing 'further context' or explained by 'information inadvertently omitted' even when it paints an entirely different or opposite picture. It signals that there is not the will to

pursue people, and the green light the regulators give the industry, is reinforced.

b) Right of reply where industry seeks to discredit victims

Inquiries occur because misconduct is revealed and victims, or potential victims, are identified. It can be considerable time (years) before victims of white collar crime are in a stable enough personal position, after struggling to deal with the devastation and trying to repair their life, to come to some understanding of what occurred to be able to take a stand and speak out.

It may not be apparent that providing information and appearing at a senate hearing is a daunting notion for the vast majority of victims. It is beyond the possibility of most to even consider.

It is very easy for a bank, product issuer, liquidator or hardship advocate, all with vested interests in protecting their involvement, to make erroneous allegations about victims or insinuations with the express purpose to discredit and undermine.

The insidious effort by those who seek to cover their involvement or protect their reputation in such activities in relation to people who are struggling from years of protracted distress and powerlessness is nothing short of disgraceful. It warrants meaningful penalties as afforded by the law in relation to senate inquiries, beyond extending the courtesy to those victims to refute.

Comments and concerns HNAB-AG have made are backed by hard evidence or supporting material.

G. Calls for a Royal Commission into White Collar Crime and Institutional Responses

It would seem inevitable that without financial mechanisms to address the hundreds of thousands of future victims, and those who already exist, that calls for a Royal Commission into white collar crime and institutional responses to it, will increase along with demands to radically overhaul the regulatory and legal systems.

Concerted effort to implement fairly simple and cheap measures to provide meaningful informed consent to protect against white collar crime is vital. However, this will not address the victims who exist, or those whose fate has already been set in motion by offenders.

Greg Medcraft, Chairman of ASIC, notes, *"Australia is a paradise for white collar crime."* Before our experience we would never have thought this was accurate of the country we so love and cherish. Without swift and ethical action, the cost to the community economically, and socially, will continue to be immense.

Repair, redress and reform are much cheaper and more humane.

Conclusion

Without meaningful penalties for white collar crime, offenders and enablers will fester undeterred and undetected. Billions of corrupt dollars will continue to be made out of Australian citizens.

Victims pay immeasurably and inestimably, well beyond the financial losses incurred. The life-altering toll is an anguish and despair impacting well-being, families, friends, work and health beyond measure. It costs the Australian community far more, in many ways, than is currently recognized.

Victims are an invaluable asset, if not the greatest, in consultation about, and implementing measures, to address white collar crime.