

COMMERCIAL MORALITY AND COMMERCIAL CRIMINALITY

Paper delivered by
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INTRODUCTION

I would like to use the opportunity this Seminar affords to discuss various aspects of the issue of corporate accountability and how it can be enhanced.

The erosion of the integrity of the capital formation process and of the private enterprise system generally is at the core of what I am about to say. Public confidence in the accountability of business has of recent time been somewhat disturbed — Confidence which must prevail if private capital markets are to survive and flourish, and if the advantages of private enterprise are to be preserved.

The integrity of corporate earnings has been questioned. A query has been raised as to whether business is run in the best interests of its shareholders and the larger society of which it is part; whether our equity markets are an attractive and fair place for the individual investor to place his after-tax investment dollars.

The answers to these questions are important, not only to our economic future but also in terms of the respective roles which the private sector and Government play, and will play in the future shaping of our economic and social structure.

If the private sector tends at times to be expedient, lacking in vision in assessing the future and what it holds, and reactive in attempting to meet the demands and expectations to which it must respond, then those who advise it must share in the responsibility for the consequences.

The accountant, in his roles as counsellor and adviser, plays a significant, positive role. If accountants choose to bear the broader vision with which many are well equipped, they can then help to preserve the flexibility and vigour of the corporate system.

Accountants, because of their role as architects with lawyers of the corporate structure, must share some of the blame for perceived corporate irresponsibility. They often share in the spotlight of public scrutiny, and are likely to be touched by the legislative constraints which are almost certain to emerge if a consensus develops that business by itself will not take the necessary steps to ensure that the power it wields over our national life is exercised with due regard for our public and social aspirations.

The preferable antidote for legislation is for corporations to take steps to assure society that they are capable of self-disci-

pline, the same being consistent with both the realities of the market place and the non-economic aspects of the social interest.

A BUSINESS CENTRED SOCIETY

No group in our society is more influential than businessmen. Their influences for good or evil enters every life and every home many times each day. If the influence is good, then the nation is strengthened. If it is evil, the nation is weakened.

The many decisions of businessmen significantly determine national health, ethical as well as economic. Many, especially the young, imitate the mores and manners of successful businessmen.

Business ethics is a topic so vast and varied that generalisation about it is fraught with risk. The businessman who has personally experienced and become acquainted with a segment of business behaviour usually thinks that "this is how the whole thing is".

One manager is sure that business practice is nearly flawless and cannot believe reports to the contrary, whilst another sees the business world as a jungle or a rat-race. Part of the difference in the views of the two persons is attributable to their subjective outlook, but probably more of the difference stems from their varied experiences.

Men generalise from what they know. The accuracy of their generalisation is dependent to a large degree upon the breadth and depth of their knowledge. Experience is not the sole source of knowledge, but most businessmen generally rely upon a very subjective reaction to facts and circumstances.

IDENTIFICATION OF COMMERCIAL CRIMINALITY

At the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Geneva, September 1975) and under the heading of "Changes in Forms and Dimensions of Criminality, Transnational and National", the discussion guide for the Congress stated that the purpose of the item was to invite attention to the changing shape and size of the crime problem, and to simulate thinking about policies for its more effective reduction and containment.

The rise of crime in many countries appeared to the Congress to be related to periods of exceptionally rapid social and

technological change, the same affecting the system and methods, as well as the extent of crime.

It was suggested that the Congress under this item might examine innovative ways and means of organising comprehensive action "to deal with the new forms and dimensions of crime with which traditional codes and procedures could no longer cope". It was suggested that it might be helpful for the Congress in discussing the broad question to break it down into more manageable key issues, amongst which were —

"Crime as business at the National and Transnational levels. Organised crime.

White Collar Crime, and Corruption".

This issue was described as —

"At both the National and Transnational levels, the control of crime as business poses many problems. Very often accelerated national economic expansion provides opportunities that could create new forms of economic crime; the techniques of legitimate business are utilised for illegal transactions. By the same token where war, disaster, faulty planning, or inherited under-development give rise to economic shortages, smuggling, black-marketing and corruption are likely to occur. What national and international means can be devised to free nations from this costly burden on their national economies? Conversely, to what extent do existing laws and conventions provide loopholes for these crimes to be committed across national boundaries?"

The Secretariat of the Congress observed in its report that —

"For most countries the economic and social consequences of economic criminality were much greater than the consequences of the traditional forms of violent crime and crime against property. Indeed, they posed special problems of control, not least because they often transcended national boundaries."

Sutherland, in 1940, used the phrase "White Collar Crime", intending it to define crimes committed by persons of respectability and high social status in the course of the business occupations.

The phrase has since then been extended by writers to cover violations of financial trust, such as embezzlement, and offences that violate the well-being of the national welfare, such as black-market operations. It has been suggested that the term should be regarded as applying to any occupational deviation and violation of professional ethics.

Business crimes, however, have certain characteristics peculiar to themselves. The area dealt with is often of a highly technical nature, and of considerable complexity, and may involve sophisticated questions of financial management, accounting, commercial and industry practices. Often there is no identifiable victim; it is the general public or victims who do not know that they have been victimised. There is, on occasions, no victim who complains. Complaint may be brought by a journalist, or often by a politician.

The conduct that is being here considered is thus in general the taking advantage of a position of trust to derive a personal benefit over and above that envisaged by the terms of election, engagement, employment or status. It infects the lesser in the industrial and commercial scale as much as the greater, even though the opportunities present themselves more often and with greater prospective reward to the latter than the former. What is said to be an increasing use of legitimate business for dishonest purposes illustrates but only a portion of the overall field.

What, then, are the characteristics of various acts that together constitute this breach of trust or commercial morality that attracts the power of the State? The parameters have been sought to be defined by looking at the environment in which the various acts are committed. Crime as business tends to

possess the following features:—

1. It is carried out primarily for economic gain and involves some form of commerce, industry or trade.
2. It involved some form of organisation in the sense of a set or system of more or less formal relationships between the parties to the criminal acts such as syndicated crime and price fixing.
3. It involves either the use or the misuse of legitimate forms and techniques of business, trade or industry, or typically but not necessarily, the persons involved in committing these crimes have relatively high social status or political power, or both.

The offences contained within the term "commercial criminality" are not those usually subsumed under the regular criminal code, such as theft, but rather are actions that run counter to the regulation of business, both State and Federal. They are instanced by those who use the funds of a company for forbidden or not permitted purposes, who falsify company books and reports, who violate the standards of weight, the quality and content of materials in foods and drugs, who overload planes and buses and trucks, who pollute the environment, and all these coming within the purview of commercial criminality. (See Reckless, *The Crime Problem*, p.316).

Corporation officials do not conceive of themselves actually as criminals. They rationalise their behaviour in terms of the unfairness of the law and the necessity to make a profit. The rationale of their actions has been analysed by Geis in his study of electrical conspiracy cases. (Geis, *White Collar Crime*, p.112).

"For the conspirators there had necessarily to be a conjunction of factors before they could participate in the violations. First, of course, they had to perceive that there would be gains accruing from their behaviour. Such gains might be personal and professional in terms of corporate advancement towards prestige and power; they might be vocational in terms of a more expedient and secure method of carrying out assigned tasks. The offenders also apparently had to be able to neutralise or rationalise their behaviour in a manner in keeping with their image of themselves as law abiding, decent and respectable citizens."

Thus, the identification of commercial criminality whereby activities the like of those just described are clearly indicated to society at large as criminal, is necessary and too long delayed. The importance of knowledge of familiarising a community as the "standards of commercial behaviour" which will, and which will not be the subject of criminal sanctions, is essential if respect for and compliance with the law is to be achieved.

Is there, then, something different about commercial criminality as contrasted to other forms of criminal behaviour? Justice Mitchell, in her Boyer Lectures, under the title "The Web of Criminal Law", put forward a view that the criminal law "will tend more and more to be recognised as the protector of persons and property from the depredations of others rather than the vehicle for the enforcement of accepted standards of moral behaviour". I indicate a view contrary to Her Honour's so far as commercial criminality is concerned.

Why then, should there be an emphasis different in the case of commercial criminality to that applicable to other criminal acts?

Common elements likely to be found in all commercial criminality were identified by Edelhertz (*The Nature, Impact and Prosecution of White Collar Crime*, Washington D.C., National Institute of Law Enforcement and Criminal Justice, U.S. Government Printing Office 1970, at p.12), namely:—

- a) Intent to commit a wrongful act, or to achieve a purpose inconsistent with law or public policy;
- b) Disguise of purpose or intent;
- c) Reliance on ignorance or carelessness of the victim;

- d) Acquiescence by the victim in what he believes to be the true nature and the content of the transaction;
- e) Concealment of the crime by —
 - (i) Preventing the victim from realising that he has been victimised; or
 - (ii) Relying on the fact that only a small percentage of victims will react to what has happened and making provision for restitution to, or the handling of the disgruntled victim; or
 - (iii) Creation of a deceptive paper organisational or transactional facade to disguise the true nature of what has occurred.

The differences between commercial criminality and other forms of criminal activity were further highlighted by S.L. Halleck in "psychiatry and the Dilemmas of Crime", where at page 200 he said:—

"Greed, lust and aggression may be natural tendencies of man. It is erroneous to assume that every offender must experience unusual stress before he will violate the law. In some situations crime could be the most advantageous and reasonable adaptation the offender could seek. It is possible, therefore, that crime could be chosen even where other adaptations are available, simply because the criminal knows that his act provides maximum gain for minimal expenditure of energy. If the criminal also has some assurance that he will not be punished, and if he believed that he can deal with his conscience, the adaptive value of crime becomes even greater. Crime obviously does pay well for some. It is difficult to argue that the white collar criminal who defrauds his Government or firm with impunity is behaving in an unreasonable manner. His actions might be deplorable on moral grounds, but if evaluated in terms of success goals of our society, he would be looked upon as a rational man."

The acts thus committed, the breaking of rules described as criminal, are not uncommon in the Australian society. There are few individuals who do not contravene some of them frequently; rules that are publicly sanctionable.

Much of this rule-breaking is not viewed as crime by the actors themselves. Many acts described under the categories of commercial criminality instanced by stealing from work, contain a series of justifications and beliefs which render application of the term "crime" apparently redundant because the actors themselves and the rule enforcers share the belief that such acts are "all right under the circumstances".

CAUSES OF COMMERCIAL CRIMINALITY

Commercial criminality, by its very name, attracts instinctively a tag of money need as a cause. Economic shortages, social deprivation, inefficient economic planning, inflation, high taxation, may all seem to provide a cause but rarely do more than provide what the perpetrator might like to be considered as an explanation.

More than in any other field of criminal activity, commercial criminality does seem to happen as a result of the interaction upon an individual of the many influences to which he has been subject during his formative years. Formative, in this context, extends to the times when the individual is being influenced, indeed if not trained in the ways and means of commercialism and the mores of the commercial community. What he sees as being accepted practices in his early years as, for example, an office boy, be they instances of no great magnitude (falsifying petty cash vouchers, padding time schedules, and the like), all tend to create in the mind of the individual techniques regarded as legitimate which may be utilised for illegal transactions.

The descriptive causation of crim "differential association" is perhaps nowhere as applicable as it is in commercial criminality. The dominant goals which members of society are en-

couraged to seek are inbred into persons generally as a result of influence from, or example by members of their family and members of their peer group. Awareness of the legitimate or socially approved ways of achieving these goals may, of course, be derived from the same person, but where in the words of Phillipson (Sociological Aspects of Crime and Delinquency, p.133) an acute disjunction between the goal and the means for large sections of the population occurs, then as a result, there is strong pressure to deviate from the approved norm.

The deviation from legitimate norm is a reflection of society structuring individuals as a result of their being conditioned to breach commercial morality on account of being unable otherwise to arrive at the same stage of material success. The structuring of society so as to condition individuals to breach commercial morality is a root cause of commercial criminality.

"It is true, however, that many business operations and transactions in the kind of highly regulated free enterprise system that exists today still depends upon sharp practices. Businessmen must be cognisant of all angles of their operations if they are going to survive in a free enterprise system." (The Crime Problem, Reckless, p.315).

Of course the atmospheres must exist where the commercial criminality can be practised upon a compliant victim. Unfortunately our society is so existent that such a group seemingly is readily available. The President of the New York Stock Exchange was moved to say when dealing with the influx into the market of a mass of new and inexperienced investors:—

"Reports reaching us indicate that some would be investors are attempting to purchase shares in companies whose names they cannot identify, whose products are unknown to them, and whose prospects are at best highly uncertain. There is disquieting evidence that some people have not yet discovered that it is impossible to get something for nothing, and they are attempting to make improper use of the facilities of the investment community."

Human deviance is, however, closely associated with social problems and social control. In the absence of self imposed control, control imposed by one's peers, or control imposed by reason of legislation, an individual must look to his own tenets before committing any particular act. It may be more difficult in the latter case than in any one of the former. That is, where a person has to make his own assessment as to commercial morality without guidelines by peer imposed levels of morality, the choice may well be more difficult. If guidelines are provided by some other person, then it will be easier for the individual to say that the limits have been set by such guidelines. Therefore, anything within such limits is permissible. If he himself has to make up his mind as to the parameters, they may be more extensive than where they have been defined by his union, organisation, employer, or by statute.

CODES OF COMMERCIAL ETHICS

In order to discern whether a person, be he a director or employee in a lesser sense, has committed a breach of commercial morality, it is often necessary to decide the parameters of commercial morality and thereby whether they have been fixed by provisions of the Crimes Act, the Companies Act, the Securities Industry Act, or the Rules and Regulations of a Union or Employee Organisation. In the absence of their being so defined, a person may well curtail activities in accord with his own personal morality. The existence of rules and regulations enables an individual to excuse himself for non-compliance with his own moral code by way of saying — "Well, those who are likewise engaged as I, have resolved that this shall be our way of behaviour, and therefore it is permissible." Often, if an individual is left to dictate the terms of his own conscience, he will behave in a narrower field than would other-

wise be the case. Here group support for occupational and commercial deviance invariably widens the field of commercial misbehaviour.

Businessmen, although they may distrust competitors and the existence of accepted industry practices which are unethical, may at the same time indicate a desire to alter these practices and to build mutual trust. One way of implementing this desire is by the use of codes or guidelines. Such guidelines may be referred to as a code of ethical practices, a corporation creed, or a policy statement.

In the face of potential commercial criminality, many regulatory bodies have enacted local rules to promote integrity. Laws or rules regarding conflict of interest, financial disclosure, declaration of interest, campaign financing, open meetings and records, and codes of ethics, seek to set down in formal fashion what a community expects of its public officials, public employees, listed companies, and officers, and establish what the community intends to do if these expectations are not met. Formal policies and regulations or rules that do not have the force of law do tend nevertheless to embody a formal statement of expectations.

Codes may be composed for groups of various sizes and orientations — for a single department in a company — for the whole company — for an industry or trade association — for a professional or occupational group — for all businessmen.

One of the difficulties is deciding upon what constitutes ethical behaviour in a specific situation. Because of the variety of value systems current in our pluralistic society, it is often impossible for men to achieve agreement on principles. It is somewhat easier to secure consensus on practices or on guidelines for decisions.

Decision makers need some consensus concerning practices and norms by which to judge whether a possible change would have good or bad social results. A code of ethical practices is a limited document, but it may be a step in the right direction.

A code of ethics can help a commercial man in several ways. For example, take a situation in which it is difficult to refuse an unethical request such as when it comes from a friend or associate. A direct refusal gives a "holier than thou" impression and may seriously jeopardise what otherwise is a pleasant, interpersonal relationship. Faced with such a request one looks for a way to refuse without offending. A specific code of ethics provides an impersonal and welcome way of refusing such a request. Of course, a code can also be used or misused as a screening device to be cited when the amount of money involved is slight — to be ignored when the amount of money is large.

A code can serve as a good educational device for youthful newcomers to the business world. In view of their strong desires for business success, they are in dire need of guidelines.

Codes of ethics establish formal guidelines for ethical behaviour and cut down on the ambiguity that can attend individual consideration of ethical rights and wrongs.

Most businessmen verbalise sentiments of general concern for ethical business behaviour. Many say that businessmen should be concerned with goals additional to profit making, and declare that a manager, for example, who operates solely in terms of his shareholders' interests would be unethical. A small percentage agree with the principle of let the buyer beware.

Many executives, however, disagree on the specifics of "ethical" or "unethical" conduct. Many profess a higher level of ethical aspiration and conduct for themselves than they are willing to concede for the average businessman.

Executives do tend to put forth an exaggerated picture of themselves reporting on the kind of organisational official they would prefer to be rather than the kind they actually represent.

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TO SUMMARISE – CODES OF ETHICS

Requirements

1. Codes of ethics must be buttressed with indoctrination and familiarisation training.
2. Codes of ethics must not describe only "should not's"; they must also be addressed to "shoulds".
3. Codes of ethics must not attempt to address all questions of ethics comprehensively. If they do, any situation not forbidden appears to be permitted.
4. Codes of ethics must be associated with a disciplinary code, and must have teeth.

Advantages

1. Codes of ethics set forth the kind of behaviour a community expects from officers of public and private corporations.
2. A code provides a standard against which to judge an individual's behaviour, and against which an individual might judge his own behaviour.
3. A code demonstrates to the public at large that commercial ethics is a matter of concern to the commercial community.

Disadvantages

1. If not properly written, a code may be difficult to enforce.
2. If not given continued visibility through training, a code may lose all relevance.
3. If a code is not consistently observed, the community may have visible evidence that the commercial officers lack credibility.

It has been said that you cannot legislate virtue. This objection, however, confuses what is internal to man with what is external. No-one believes that written rules change a man's heart. However, a written code may be desirable because it can make it easier for good men to conform their external behaviour to their internal ideals. Written codes and laws are the ways civilised societies have always employed to implement the will of the members of society and to educate the young.

An objection further urged is that a code reduces the standards of some businessmen because the code becomes the

maximum as well as the minimum for everybody in the industry. This objection supposes that after the introduction of a code a manager with high standards will lower them until they correspond to the minimum required by the code. It might be thought that if a manager would react in this way, it would suggest that his high prior standards were due less to personal conviction than to misunderstanding of company policy or industrial practice.

The improvement of business ethics is then a goal with which few persons will find fault. Written codes for companies and industries, more and better College courses in ethics, and knowledgeable guidance constitute a means for improving business behaviour. Achieving agreement on fundamental notions of ethics, however, is an obstacle to improvement of business behaviour.

Reduction of Incidence

The possibility of reducing the incidence of commercial criminality and deviance by perpetrators in the economic and commercial environment can only be realised when all persons associated with such environment consciously become involved in the process of correction. To this end, acceptance of the following may be worthy of consideration:—

1. A clear, explicit statement in codes or ethics of commercial conduct, or alternatively, legislation and consequent community recognition of those breaches of commercial morality which attract the criminal sanction.
2. A positive and explicit inculcation into the minds of young persons, and especially those involved in the commercial and economic facets of our society, or about to become so involved, of what are expected to be the norms of commercial and economic practice.
3. The frequent publication and propagation of such norms of commercial activity and practice.
4. An extended obligation on the auditor to report.
5. Increasing public awareness and mobilising public support against economic crime.
6. An increased participation by shareholders and employees (other than directors) in the affairs of corporations and of public servants in public enterprises.

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