R v SHAWN DARRELL RICHARD

CROWN SUBMISSIONS ON SENTENCE

THE OFFENCES FOR WHICH THE OFFENDER IS TO BE SENTENCED

1. The offender has pleaded guilty to two offences contrary to section 1041G(1) of the *Corporations Act 2001* (Cth)[1] (the Act) that:

> *Between about 15 November 2005 and about 30 June 2009 at Sydney in the state of New South Wales did in the course of carrying on a financial services business engage in dishonest conduct in relation to a financial service knowing that conduct to be dishonest.*

> *Between about 8 October 2007 and about 30 September 2009 at Sydney in the state of New South Wales did in the course of carrying on a financial services business engage in dishonest conduct in relation to a financial service knowing that conduct to be dishonest.*

2. The offender has also admitted his guilt in respect of a further offence contrary to section 1041E(1) of the Act that:

> *Between about 15 February 2006 and 30 September 2009 at Sydney in the state of New South Wales did make statements which were materially misleading, and known by him to be materially misleading, that were likely to induce persons in Australia to acquire financial products*

and wishes that this offence be taken into account in passing sentence on him for the offences of which he has been convicted, pursuant to section 16BA of the *Crimes Act 1914*.

3. By virtue of s1311 and Schedule 3 of the Act these offence each carry a penalty of imprisonment for 5 years and/or a fine of $220,000[2].

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[1] The *Corporations Act* commenced on 15 July 2001.

[2] Schedule 3 *Corporations Act* provides a penalty of 2,000 penalty units or imprisonment for 5 years or both. Section 4AA *Crimes Act 1914* (Cth) provides that a penalty unit means $110. Penalties for contravention of the s. 1041E and s.1041G were increased on 13 December 2010 to:
In the case of an individual, imprisonment for 10 years or a fine the greater of the following: (a) 4,500 penalty units; (b) if the court can determine the total value of the benefits that have been obtained by one or more persons and are reasonably attributable to the commission of the offence - 3 times that total value; or both.

4. Details of the offender's conduct are contained in the Statement of Facts, the accuracy of which was adopted by the offender on 3 December 2010 and tendered by the Crown in these proceedings.

5. The Crown submits that having regard to the relevant sentencing provisions referred to below, the seriousness of the offence and the need for a sentence that reflects the objective criminality of the offender's conduct, the requirements of s17A of the *Crimes Act 1914* are satisfied and that a sentence of imprisonment is the only appropriate sentence. For the same reasons and to ensure that the sentence will give effect to the need for general deterrence, the Crown also submits that the sentence should include a period of actual full time custody.

6. All 3 offences before the Court are "rolled-up counts". Such counts are permissible upon a plea of guilty, in Commonwealth matters: ***R v Daubney***[3]; ***R v Annecchini***[4]; ***R v Chin***[5].

7. It is submitted that guidance in relation to sentencing for rolled up counts is provided in the following cases: ***R v Jones***[6]; ***R v Beary***[7]; ***DPP v Felton***[8]; ***R v Samia***[9]; ***PDA v The Queen***[10].

8. The relevant issue, so far as sentencing is concerned, is not the number of offences before the court but the criminality revealed by them: ***R v Knight***[11].

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[3] (unreported, NSWCCA, 6 October 1994, BC9405268) (Tab 1)
[4] (unreported, NSWCCA, 24 April 1996, BC9601668) (Tab 2)
[5] [2003] NSWCCA 267 at [9] (Tab 3)
[6] [2004] VSCA 68 at [12]-[13] (Tab 4)
[7] (2004) 11 VR 151 at [11]-[14] (Tab 5)
[8] [2007] VSCA 65 at [41]-[42] (Tab 6)
[9] [2009] VSCA 5 at [12] (Tab 7)
[10] [2010] VSCA 94 at [4] & [22] (Tab 8)
[11] [2004] NSWCCA 145 at [25] (Tab 9)

SENTENCING COMMONWEALTH OFFENDERS - GENERAL PRINCIPLES

9. Corporations Act offences are Commonwealth offences for the purposes of the sentencing process. Accordingly the sentence to be imposed upon the offender is to be determined in accordance with Part 1B of the *Crimes Act 1914* (Cth) ("Crimes Act").

10. Section 16A(1) of the *Crimes Act* provides that a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.

11. Section 16A(2) of the *Crimes Act* provides a checklist of the matters which the court must take into account in the sentencing of federal offenders. Specifically, 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;

    (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;

(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.

12. As subsection 16A(2) makes clear, this checklist is not a catalogue of considerations which is exclusive of other relevant considerations. Each consideration is in addition to any other matters which are relevant on the question of sentence.

13. In this regard, the consideration of general deterrence must also be taken into account in determining the appropriate sentence despite the absence from the checklist in subsection 16A(2) of any explicit reference to general deterrence. ***R v El Karhani***[12] and ***R v Thomas.***[13] This is particularly so in relation to "white collar" offences which are difficult to detect, investigate and prosecute successfully. ***R v Pantano;***[14] ***Hili v R; Jones v R.***[15]

14. In determining the appropriate sentence, the court must have regard to the nature and severity of the conditions that may be imposed on, or may apply to, the offender, under that sentence: subsection 16A(3) of the *Crimes Act.*

Imprisonment and additional sentencing alternatives

15. Section I7A of the *Crimes Act* provides that a court shall not pass a sentence of imprisonment in respect of a federal offender unless the court, having considered all other available sentences, is satisfied that no other sentence is appropriate in the circumstances.

16. Section 19(2) of the *Crimes Act* provides that where a person is convicted of two or more federal offences at the same sitting and is sentenced to imprisonment for more than one of those offences, the court must direct when each sentence commences, but so that no sentence commences later than the end of the sentence the commencement of which has already been fixed or of the last to end of those sentences.

17. By virtue of section 20AB of the *Crimes Act* additional sentencing alternatives available under the law of a participating State may be imposed in respect of a person convicted of a federal offence: subsection 20AB(1). New

[12] (1990) 21 NSWLR 370 at 377 (Tab 10)
[13] (1997) 37 ATR 296 at 307 (Tab 11)
[14] (1990) 49 A Crim R 328 at 330 (Tab 12)
[15] [2010] HCA 45 at [25] (Tab 13)

South Wales is such a State[16], permitting the imposition of additional sentencing alternatives. Those sentencing alternatives and the circumstances in which the court is permitted to impose such alternatives are set out in the *Crimes (Sentencing Procedure) Act 1999* (NSW). The alternatives include community service orders and more recently intensive correction orders[17] in appropriate cases.

18. Where a court passes sentence or makes an order under subsection 20AB(1) in respect of a person convicted of an offence against the law of the Commonwealth, the court may also do all or any of the following:

    a. impose any fine or other pecuniary penalty that the court is empowered to impose;

    b. make any order requiring the person to make reparation or restitution, or pay compensation, in respect of the offence that the court is empowered to make; and

    c. make any other order that the court is empowered to make: subsection 20AB(4) of the *Crimes Act*.

<u>The fixing of a minimum term to be served and the making of recognizance release orders</u>

19. It was previously considered appropriate in Commonwealth matters, for the ratio of the period to be served to be approximately 60 to 66.6% of the head sentence: ***R v Bernier***[18]; ***R v Stitt***[19]; **and** ***R v Behar***[20]. However in ***Hili v The Queen; Jones v The Queen***[21] the High Court made clear that a sentencing judge should, in Commonwealth matters, determine the minimum term to be served in accordance with Part 1B of the Crimes Act 1914, together with the application of the principles identified in ***Power v The Queen***[22], ***Deakin v R***[23] and ***Bugmy v The Queen***[24] and not by reference to an assumed starting point. Those cases provide that a court

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[16] New South Wales is a participating State pursuant to arrangements published in *Gazette* S293 12 November 1990.
[17] *Crimes Amendment Regulations* 2010 (No. 4) effective from 28 October 2010
[18] (1998) 101 A Crim R 44 (Tab 14)
[19] (1998) 102 A Crim R 428 (Tab 15)
[20] *(Unreported, NSWCCA, 14 October 1998)* (Tab 16)
[21] [2010] HCA 45 (Tab 13)
[22] (1974) 131 CLR 623 (Tab 17)
[23] (1984) 54 ALR 765 (Tab 18)
[24] (1990) 169 CLR 525 (Tab 19)

must set a minimum time that justice requires the person serve having regard to all the circumstances of the offence. In accordance with s.16A(1) having considered the matters within s.16A(2) of the Crimes Act 1914 together with applicable common law principles (such as general deterrence), the minimum term must be of a severity appropriate in all of the circumstances.

a. *Sentences greater than 3 years*

20. Where a federal sentence of imprisonment is imposed which exceeds 3 years, and at the time the sentence is imposed the person is not already serving or subject to a federal sentence, either a recognizance release order or a non-parole period must be fixed: subsection 19AB(1). The only exception is provided by subsection 19AB(3), which provides that a court may decline to fix a non-parole period, or make a recognizance release order if, having regard to the nature and circumstances of the offence or offences concerned, and the antecedents of the person, the court is satisfied that neither is appropriate. Where the court so finds, the court must state its reasons: subsection 19AB(4).

b) *Sentences of, or less than, 3 years*

21. Where a federal sentence of imprisonment is imposed which does not exceed 3 years, and at the time the sentence is imposed the person is not already serving or subject to a federal sentence, the court must make a recognizance release order in respect of that sentence and must not fix a non-parole period: subsection 19AC(1). There are two exceptions:

a. where the sentence does not exceed six months, the court is not required to make a recognizance release order: subsection 19AC(3); and

b. where the exception provided by subsection 19AC(4) operates. The exception provided in subsection 19AC(4) is in substance similar to that provided in subsection 19AB(4).

22. A recognizance release order is an order that a person be released, upon giving security, after serving a specified period of imprisonment calculated in accordance with section 19AF. (See section 16 and subsection 20(1)(b) of the *Crimes Act*).

Fines

23. Before imposing a fine on a person for a federal offence, the court must take into account, the financial circumstances of the person, in addition to any other matters that the court is required or permitted to take into account: subsection 16C(1). However, the court is not prevented from imposing a fine on a person because the financial circumstances of the offender cannot be ascertained by the court: subsection 16C(2). (See also ***Perez v The Queen***[25] and ***R v Belcher.***[26]

CONSIDERATION OF SPECIFIC MATTERS RELEVANT TO THIS CASE

Nature and circumstances of the offence: subsection I6A(2)(a)

24. The offences of which the offender has been convicted encapsulate conduct of a very serious nature which is detailed in the Statement of Facts.

25. In essence the offender, in carrying on a financial services business, during a period of 3 years and 10 months (from 15 November 2005 to 30 September 2009), dishonestly operated a scheme designed to divert Australian investors' money from superannuation funds and managed investment funds into overseas hedge funds, contrary to the interests of the investors, in return for significant, undisclosed payments to the offender and the ultimate controller of the scheme, Jack Flader ("Flader").

26. The offender was a pivotal actor in creating the scheme which could not have operated without the injection of Australian sourced funds.

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[25] (1999) 21 WAR 470 at [47] - [52] (Tab 20)
[26] (1981)3 A Crim R 124 at p 127- 129) (Tab 21)

27. As part of his dishonest conduct, the offender:

a. failed to avoid or otherwise disclose his conflict of interest in respect of the scheme and investments in overseas funds controlled by Flader, contrary to the duty he owed to Trio as its agent; and

b. did not act in the best interests of ASF or other relevant managed investment schemes and superannuation funds. This is because the offender invested their funds in circumstances where he knew the underlying investments were illiquid, of questionable value and that it was necessary for new monies from ASF to be made available in order for redemption requests to be met. This was contrary to the duties he owed to Trio as its agent.

28. Further, in order to carry out and continue the scheme, the offender engaged in a planned and systematic deception in that he:

a. made materially misleading statements about the value of the Flader Controlled Funds, knowing that these statements were included in valuation statements provided to Trio and were likely to have the effect of inducing Trio to apply for and acquire further financial products;

b. knowingly made materially misleading statements in a product disclosure statement for ASF and in questionnaire responses relating to ASF in circumstances where he knew that these statements were likely to induce Australian investors to apply for financial products, namely units in ASF;

c. knowingly misled Trio's Investment Committee in respect to the nature of the investments being made on behalf of ASF. In particular the offender participated in the creation of three new funds controlled by Flader when, in August 2006, the Trio Investment Committee banned further investments in the Exploration Fund, another fund controlled by Flader;

d. knowingly made false representations to a client of AAM, Mercer Investment Nominees (trustee of the Mercer Super Trust) namely that the full value of Mercer's investment was $1,655,500 in circumstances where he knew that the value of the investment was $2,638,399 therefore understating the value of the investment by $982,899;

e. made false representations in his dealings with the auditors of Trio, WGI, AFM and AAM namely that he controlled the Funding Companies loaning the monies to Trio, WGI, AFM and AAM, in circumstances where he was aware that these companies were actually controlled by Flader.

29. The offender used private email accounts and overseas bank accounts in Curacao and Liechtenstein to facilitate the concealment of his conduct.

30. The monies so obtained and invested by Richard was $26.6m made up of $16.2 million of ASF and Astarra Superannuation Plan monies (charge 1) and $10.4 million of ASF monies (charge 2).

31. As a result of the offender's role in the scheme, in addition to a net annual salary of $113,426, he personally received over $1.3 million in payments from the operation of the scheme and Astarra Asset Management Pty Ltd, a company of which he was a director, received $5.3 million.

32. In this case the following matters are relevant to a consideration of the seriousness of the offender's conduct:

a. All the offences demonstrate an ongoing course of conduct consisting of a series of criminal acts of the same or a similar character involving a high degree of planning and sophistication.

b. The offender received significant undisclosed payments in relation to his conduct of the scheme;

c. The deliberate design of the scheme knowing it would operate contrary to the interests of superannuants and other investors;

d. The systematic and repeated deception engaged in by the offender in order to carry out and continue the scheme;

e. The offender's gross breach of the trust placed in him by Trio, AAM, WGI, AFM, ASF and ultimately the investors, in knowingly acting contrary to their interests and engaging in the systematic deception. When an offender's conduct is in breach of trust this will be an aggravating factor to the extent that a custodial sentence will normally be required. ***R v Chaloner.***[27]

f. The conduct continued from about 15 November 2005 until about 30 September 2009 (a period of about 3 years and 10 months).

g. The amount of investor monies that have not been recovered as a result of these offences totals $26.6 million.

h. The offender was a pivotal actor in obtaining Australian sourced funds, without whom the scheme could not have operated,

i. When the Trio Investment Committee banned further investments in the Exploration Fund (controlled by Flader), the offender participated in the creation of three new funds controlled by Flader knowing that some of the monies flowing to the new funds would be used to meet outstanding redemption requests in the Exploration Fund.

33. In ***R v Rivkin***[28] Whealy J stated the general principles relating to sentencing in white collar crimes including the offence of insider trading, as follows –

> *"1. The element of general deterrence is important in white collar crimes. It is of course, an important part of the sentencing process in all crimes. It is however,*

[27] (1990) 49 ACrimR 370 (Tab 22)
[28] (2003) 198 ALR 400 at [44] (Tab 23)

an especially important matter in crimes such as the present because of the need to mark out plainly to others who might be minded to breach their professional or related obligations that such conduct will generally merit, in appropriate cases, condign punishment.2. An important reason why this is so, relates to the often remarked difficulty in detecting and investigating white collar crime. Insider trading is particularly hard to detect. It may often go unnoticed but where it occurs it has the capacity to undermine to a serious degree the integrity of the market in public securities. It has the additional capacity to diminish public confidence not only so far as investors are concerned but the general public as well. Moreover, this diminution in confidence may occur subtly and is not confined to the circumstances where a substantial insider trading transaction has taken place. There is a capacity to undermine and diminish public confidence in the market even where the offence may be shown as one which in some respects occupies a lower level of seriousness. This is likely to be particularly so in the case of an offender who occupies a substantial position as a trader and adviser in the market.

3. It is especially important that the sentencing process provide a firm disincentive to the carrying out of illegal activities especially by those who are engaged in the securities industry. There is a need to sound, in effect, a clarion call to discourage illegal and unethical behaviour among company directors, company officers, brokers, traders, advisors and those who have a close connection through, for example merchant banking, to the stock market."

34. In ***R v Pantano***[29] Wood J stated[30] (at 330) –

"... those involved in serious white collar crime must expect condign sentences. The commercial world expects executives and employees in positions of trust, no matter how young they may be, to conform to exacting standards of honesty. It is impossible to be unmindful of the difficulty of detecting sophisticated crime of the kind here involved, or of the possibility for substantial financial loss by the public. Executives and trusted employees who give way to temptation cannot pass the blame to lax security on the part of management. The element of general deterrence is an important element of sentencing for such offences: Glenister [1980] 2 NSWLR 597."

35. In ***R v Doff***[31] the Court of Criminal Appeal, in dealing with a Crown appeal against sentence, after stating they were not persuaded that the Crown appeal should be allowed, said:

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[29] (1990) 49 A Crim R at 330 (Tab 24)
[30] With whom Carruthers J agreed; Smart J dissenting.
[31] (2005) 54 ACSR 200; [2005] NSWCCA 119 per Wood CJ at CL, Adams and Bell JJ. (Tab 25)

"We do not, in this respect, suggest that anything other than a stern approach should be taken to offences of insider trading for the reasons earlier identified. It remains a serious offence, and there needs to be a considerable deterrent aspect reflected in order to protect the integrity and efficacy of the market. Those in a position of trust who receive price sensitive information in relation to securities are expected to confirm (sic) to exacting standards of honesty, and transgression can normally be expected to lead to custodial sentences as well as to pecuniary penalties."

Course of conduct: subsection 16A(2)(c)

36. All three offences demonstrate an ongoing course of conduct consisting of a series of criminal acts of the same or a similar character and also involved a planned and systematic deception of investors and his principle, Trio Capital Ltd to whom he owed a duty of care as the agent of that company. The fact that the offences are "rolled up counts" is also relevant in this regard.

37. Such conduct continued during a period of 3 years and 10 months. The Crown submits that the lengthy period of the offending is a factor relevant to the assessment of the objective seriousness of the offences.

Circumstances of victims; injury, loss and damage: subsections 16A(2)(d) & (e)

38. As a result of the offender's dishonest conduct in respect of which the offender has pleaded guilty, Australian investors and superannuants have lost their savings to the extent of $26.6 million. On 13 April 2011 the Australian Government announced that it would compensate the members of four regulated superannuation funds which invested in the Astarra Strategic Fund, such compensation to be recovered by way of a levy imposed by the Australian Government upon regulated superannuation funds. A copy of the media release no. 015 issued by the Assistant Treasurer and Minister for Financial Services and Superannuation, The Hon. Bill Shorten on 13 April 2011, is attached. No compensation is available to investors who invested directly in the Astarra Strategic Fund or investors in managed investment schemes that invested in the Astarra Strategic Fund or members of self managed superannuation funds that invested in the Astarra Strategic Fund.

39. The Crown submits that the amount of money that has been lost as a result of the offender's dishonest conduct which he sought to conceal by materially misleading statements is relevant to the assessment of the objective seriousness of the offences. In ***Hawkins***[32] the court said:

> *"In considering the gravity of the offences objectively as is required ... the amounts of money involved are a significant matter for consideration. The amount of money involved in cases of pre meditated planned deception and fraud are of necessity an important factor in the question of determining the degree of criminality for they are an indication of the extent to which a prisoner is prepared to be dishonest and to flout the law and to advance whatever are his own purposes".*

40. In ***Hawkins*** the court stated that the sum of $4 million involved in the offences in that case demonstrated *"the grossest criminality"*.[33]

Reparation made for loss and damage: subsection 16A(2)(f)(i)

41. The offender has not taken any action to make reparation for loss and damage resulting from the offences.

Plea of guilty: subsection 16A(2)(g)

42. In the present case the offender entered pleas of guilty in relation to the two offences and indicated his willingness to admit the third offence at the Downing Centre Local Court at the first return of the Court Attendance Notices and the Crown concedes that the offender entered his guilty plea at the earliest opportunity, once the facts of the offending conduct had been agreed between the parties.

43. Consequently the offender is entitled to have taken into account his plea of guilty. The plea of guilty may be taken to demonstrate a "willingness to facilitate the course of justice": ***Cameron v The Queen*** [34] per Gaudron, Gummow and Callinan JJ; ***R v***

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[32] (1989) 45 A Crim R 430 (Tab 26)
[33] (1989) 45 A Crim R 453 (Tab 26)
[34] (2002) 209 CLR 339 at [13]-[14] (Tab 27)

NP[35]. A further discount for voluntary disclosure referred to in ***R v Ellis***[36] is not applicable to the circumstances of this case.

Co-operation with law enforcement authorities: subsection 16A(2)(h)

44. Co-operation with law enforcement authorities may be taken into account as a mitigating factor and may, in the exercise of the sentencing judge's discretion, entitle an offender to a sentence discount.[37] The following considerations are relevant where assistance has been provided to authorities -

- The discount allowed for assistance to the authorities is for assistance that is accepted and used by them. The value of that assistance, and the discount to be allowed, are to be determined on objective and pragmatic grounds.[38]

- A discrete quantifiable sentence discount may be provided, where it is possible and appropriate to do so.[39] A combined discount for a plea of guilty and assistance is usually more appropriate where those factors are demonstrated.[40]

- There is no set discount where assistance has been provided, however (combined) discounts have customarily ranged between 20% and 50%.[41]

- A combined discount for guilty plea and assistance should not normally exceed 50% and a discount of more than 50% would be exceptional.[42] In *R v Sukkar*, Howie J (with whom McClellan CJ at CL agreed) observed –

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[35] [2003] NSWCCA 195 at [25]-[27] (Tab 28)
[36] (1986) 6 NSWLR 603 (Tab 29)
[37] The rationales and principles for the discount are set out in *R v Cartwright* (1989) 17 NSWLR 243 (Tab 43); *R v Gallagher* (1991) 23 NSWLR 220 (Tab 42).
[38] *R v Alchikh* [2007] NSWCCA 345 at [25], per Handley JA (Hulme and Hall JJ agreeing). Handley JA further noted: *"If the authorities reject the proffered assistance, and it is not used, the prisoner will have given no assistance in the result and will not be entitled to any discount on that basis. In such a case the prisoner may be entitled to a greater discount for his plea of guilty but only if the sentencing Judge is able to find on the civil onus that his proffered assistance was honest and truthful."*
[39] *Gallagher* at 227 - 228.
[40] *R v A* [2004] NSWCCA 292 at [27]. Where it is appropriate to provide separate quantifiable discounts for guilty plea and discount (rather than a combined discount), the sentence is usually first discounted by the percentage allowed for the plea and then the balance of the sentence is discounted for the percentage allowed for the assistance provided. The two discounts should not necessarily be added together so that the total sentence is then discounted by that percentage: *R v El Hani* [2004] NSWCCA 162 at [70], discussing *R v NP* [2003] NSWCCA 195. However, it has also been observed that the adding of the two quantified discounts may be permitted, provided the end resultant sentence is not otherwise reduced so as to be inappropriate: *R v Z* (2006) 167 ACrimR 436 at [83] - [88], per Beazley JA (with whom Howie J agreed).
[41] *R v Gallagher* (Tab 42); *R v El Hani* [2004] NSWCCA 162 at [71]; *R v Pang* (1999) 105 ACrimR 474; *R v Chu* (unreported, NSWCCA, 16 October 1998); *R v Cartwright* (Tab 43).
[42] *R v SZ* (2007) 168 ACrimR 249 at [3], per Howie J (with whom Simpson J agreed) and at [53] per Buddin J (with

> *"In my opinion discounts for a plea and assistance of more than 40% should be vary exceptional, if at all, granted in a case where there is no evidence that the offender will spend the sentence, or a substantial part of it, in more onerous conditions than the general prison population. It should now be accepted that a person who has provided assistance will not necessarily be disadvantaged in the prison system and, if the offender wishes to assert otherwise, he or she should lead evidence of that fact."*[43]

- The practical value of the assistance is an important consideration. If the offered assistance has no practical value, or relatively little practical value, that must have an impact on its significance, although it may still be relevant as an indication of contrition.[44]

- The actual benefit which flows from such assistance is a relevant matter to be taken into account, although the absence of any benefit is not to disentitle the offender to some discount for that reason alone, as a genuine offer of assistance may still be evidence of contrition.[45]

Character and antecedents of the offender: subsection 16A(2)(m)

45. The offender is 36 years of age and was 31 years of age when the offending conduct began. He is unmarried and has no prior convictions.

46. Whilst a lack of prior convictions may, amongst other things, found an assertion that a person is of prior good character, it is submitted that prior good character is to be given less weight in respect of so-called "white collar" offences such as these. In ***R v El Rashid***[46] Gleeson CJ[47] observed that: *"It may be observed that what is sometimes called white collar crime is rarely committed by people who do have a criminal history. Such people do not usually find themselves with the opportunity to commit offences of that character."*

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whom Simpson and Howie JJ agreed).
[43] *R v Joseph Sukkar* (2006) 172 ACrimR 151 at [5]. (Tab 41)
[44] *R v Louis Sukkar* [2005] NSWCCA 55 at [53], per Bryson JA (Barr and Hoeben JJ agreeing).
[45] *R v Dinic* (NSWCCA, unreported, 13 July 1997); *R v Barrientos* (NSWCCA, unreported, 10 February 1999).
[46] NSW Court of Criminal Appeal unreported judgment, 60682 of 1994; 7 April 1995 (Tab 30)
[47] With whom Mahoney JA and Sperling J agreed.

47. In ***R v Williams***[48] Wood CJ at CL noted the rationale for this propositions, at [61] as follows:

> *"As was observed in R v El-Rashid (NSWCCA 7 April 1995) per Gleeson CJ at 3 and in Regina v Rivkin (2004) 59 NSWLR 284; (2004) 184 FLR 365; [2004] NSWCCA 7 at [410] the existence of good character is a circumstance that normally places the offender in the position whereby he or she is in a position to commit white collar crime. As a consequence the need for general deterrence may displace, to some degree, the benefit which might otherwise attach, although for the reasons identified in Cameron v The Queen (2002) 209 CLR 339, it is not to be ignored."*

General Deterrence: subsection 16A(2)(j)

48. The Crown submits that in the present case the offences are of a nature that calls for a sentence that will reflect the need for a significant degree of general deterrence. The offences are objectively very serious and involve dishonest "white collar" crime.

49. If the need for general deterrence is strong, courts generally give less weight to good character: ***R v Corner***[49] & ***R v Thompson***[50]. This reflects recognition by the courts that it is often an offender's prior good character and standing within the community that places him or her in the position of trust from which he or she has been able to commit the offence. ***DPP v Bulfin***[51], per Charles JA (Winneke P and Callaway JA agreeing); ***R v Williams***[52]; ***R v Rivkin***[53]; ***R v Adler***[54]; and ***R v McKay***[55].

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[48] (2005) 216 ALR 113 (Tab 31)
[49] (unreported, Court of Criminal Appeal 19 December 1997 at p 210) (Tab 32)
[50] (1975) 11 SASR 217 at 222 (Tab 33)
[51] [1998] 4 VR 114 at 131 (Tab 34)
[52] (2005) 216 ALR 113 at 140-141 paragraph 60-61 (Tab 31)
[53] [2003] 198 ALR 400 at 412 paragraph 51 (Tab 23)
[54] [2005] NSWSC 274; (2005) ACSR 471 at paragraph 51 (Tab 35)
[55] [2007] NSWSC 275; (2005) 61 ACSR 470 at 482 (Tab 36)

50. In ***Hawker***[56] (a case a bank employee committing numerous s 178BA offences of obtaining money by deception), Wood CJ at CL noted in respect of "white collar crime", at [24]:

> *"It is now generally accepted that absent very special circumstances, crime of this character, particularly that which demonstrates blatantly dishonest conduct, with no regard to the propriety of the transactions or their consequences, will normally require a significant element of general deterrence..."*

51. In ***Hawker***, Wood CJ at CL reiterated the observations he had made in ***Pantano***[57], where he stated at 330:

> *"... As was observed in McKechnie, those involved in serious white collar crime must expect condign sentences. The commercial world expects executives and employees in positions of trust, no matter how young they may be, to conform to exacting standards of honesty. It is impossible to be unmindful of the difficulty of detecting sophisticated crime of the kind here involved, or of the possibility for substantial financial loss by the public. ... The element of general deterrence is an important element of sentencing for such offences – Glenister [1980] 2 NSWLR 597."*

Disqualification from holding office

52. The majority of the High Court in ***Rich v ASIC***[58] found that disqualification from holding office (as was sought in that case) was a penalty. The Court also acknowledged that disqualification orders under the *Corporations Act 2001* perform a dual role of the protection of the public and penalizing the person against whom it is granted.

53. On 3 December 2010 the offender entered into an Enforceable Undertaking pursuant to s.93AA of the *Australian Securities & Investment Commission Act 2001* permanently undertaking not to provide financial services. It is submitted that whilst that is a relevant matter, it is also relevant that in the admitted circumstances of the present case the making of a banning order to that effect under s.920A of the *Corporations Act 2001* was all but inevitable.

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[56] [2001] NSWCCA 148 (Tab 37)
[57] (1999) 49 A Crim R 328 (Tab 24)
[58] (2004) 220 CLR 129 at [37] (Tab 38)

54. A disqualification order is not sought in this case, but upon conviction of these offences the accused will be automatically disqualified from managing a corporation for a period of 5 years[59] although a court may grant leave for a disqualified person to manage a corporation.[60] In the light of the decision in ***Rich v ASIC*** it is appropriate for a sentencing court to take the issue of disqualification into account on sentence. It is submitted however that it is also appropriate that the sentencing court take into account that the disqualification provisions are also designed to protect the public.

SENTENCES IMPOSED IN OTHER CASES INVOLVING SECTION 1041G

55. In ***Braun v R***[61] Hall J with whom McClellan CJ at CL and Harrison agreed, described the purpose of the provisions in Part 7.10 , including s.1041G as follows:

> *"[72] In relation to the Corporation Act offences, it has been observed (at para [4.9.220] of The Law of Australia, TLA):*
>
> > *Part 7.10 of the Corporations Act 2001 (Cth) is aimed at protecting the integrity of*
> > *dealings in Australian primary and secondary financial markets. It does this by creating statutory liability for certain conduct in relation to financial products or services. Conduct prohibited by Pt 7.10 of the Act includes:*
> > 1. *manipulating a financial market;*
> > 2. *trading falsely on a financial market;*
> > 3. *disseminating statements about the price of financial products affected by prohibited conduct;*
> > 4. *making false statements to induce dealings in financial products;*
> > 5. *improperly inducing dealings in financial products;*
> > 6. *engaging in dishonest conduct;*
> > 7. *misleading or deceptive conduct in connection with financial products or services; and*
> > 8. *insider trading.*

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[59] Sections 206B(1)(b)(i) & 206B(2) of the *Corporations Act 2001*.
[60] Section 206G of the *Corporations Act 2001*.
[61] (2008) 68 ACSR 539 at 552 (Tab 39)

The Law of Australia, TLA [4.9.2200]
[73] Part 7.10 of the Corporations Act, which incorporates s 1041G, forms part of Ch 7 — Financial Services and Markets. In Pt 7.1, s 760A sets out the objects of Ch 7 in the following terms:

> *760A Object of Chapter*
> *The main object of this Chapter is to promote:*
> *(a) confident and informed decision-making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services; and*
> *(b) fairness, honesty and professionalism by those who provide financial services; and*
> *(c) fair, orderly and transparent markets for financial products; and*
> *(d) the reduction of systemic risk and the provision of fair and effective services by clearing and settlement facilities.*

[74] Section 1041G of the Corporations Act 2001 (Cth), accordingly, can be seen as one of several provisions in Ch 7 directed to reinforcing the requirement for integrity in the financial services industry by imposing criminal and civil penalties for conduct which is "dishonest" as defined in the section."

56. Attached to these submissions is a schedule setting out a short summary of previous authorities where sentences have been imposed for offences under s1041G of the Corporations Act 2001 and various state offences relating to the misappropriation of moneys. In drawing the Court's attention to these cases, the Crown does not suggest that any of them are comparable to this case. In deed the Crown submits that this is a case which indicates a very high degree of criminality not previously encountered by Australian Courts.

57. In addition, as recently recognized by the High Court in ***Hili v R; Jones v R***[62] (see also ***R v Rivkin***[63]), there is often not much benefit gained by an attempt to draw a comparison with sentences imposed in other cases having regard to the difference in the objective and subjective circumstances involved and the need for any such exercise to assume that the other decisions were correct, or are such as to provide guidance for later cases.

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[62] [2010] HCA 45 at [53]-[55] (Tab 13)
[63] (2004) 184 FLR 365 at [415] per Mason P, Wood CJ at CL and Sully J. (Tab 40)

SENTENCE

58. Given the objective seriousness of the offence the Crown submits that the requirements of s17A of the *Crimes Act 1914* are satisfied and that a sentence of imprisonment is the only appropriate sentence. For the same reasons that a term of imprisonment is called for, a significant part of that imprisonment should be required to be served. The Crown submits that the objective criminality demonstrated in this case approaches the very worst category of offences of their nature.

Dated: 4 May 2011

Tony Payne SC
Counsel for the Crown

Comparative sentences in regards to s.1041G *Corporations Act* 2001 (Cth) offences

NO.	CASE	LOCATION	CHARGES	PLEA AND RESULT	REMARKS
1.	BASSILI, Robert	District Court – Sydney 30 July 2008	Section 1041G *Corps Act* x 1 Section 178A *Crimes Act* NSW x 2	Guilty plea Max: 3yrs 3mths Min: 1yr Max: 2yrs 9mths Min: 2yrs Total effective sentence: Max: 3yrs 3 mths Min: 2yrs	Sentencing remarks attached.
2.	BRAUN, Peter	NSW CCA (appeal upheld) 19 November 2008	Section 1041G *Corps Act* x 4 Section 300(1) *Crimes Act* NSW x 2 Section 1041G *Corps Act* x 2	Guilty plea Max: 2yrs 6mths Min: 18mths Max: 9mths Max:18mths Total effective sentence: Max: 1yr 8 mths	Decision attached *Braun v R* [2008] NSWCCA 269
3.	HIGGINS, John	NSW CCA (appeal dismissed) 19 May 2006	Section 1041G *Corps Act* x 3 Section 178A *Crimes Act* NSW x 15	Guilty plea Max: 2yrs Min: 2yrs Accumulated Max: 8yrs Accumulated Min: 5yrs Total effective sentence: Max: 8yrs Min: 5yrs	Decision attached *John Michael Higgins v R* [2006] NSWCCA 38

4.	JOSCELYNE, Simon	County Court – Melbourne 10 May 2005	Section 1041G *Corps Act* x 1 Section 911A(1) *Corps Act* x 1 Section 82 *Crimes Act* VIC x 1	<u>Guilty Plea</u> Fine: $6,000 Fine: $3,000 Max: 3yrs Min: 0yrs (suspended) Total effective sentence: Fine: $9,000 3yr suspended sentence	Sentencing remarks attached.
5.	MICHALIK, Andre	District Court – Sydney 23 May 2006	Section 1041G *Corps Act* x 6	<u>Guilty Plea</u> Max: 2yrs Min: 7mths	Sentencing remarks attached.
6.	NATHAN, Gregory	District Court – Sydney 19 September 2008	Section 1041G *Corps Act* x 5 Section 17BB *Crimes Act* NSW x 4	<u>Guilty Plea</u> Accumulated Max: 5yrs Accumulated Min: 3yrs Accumulated Max: 3yrs Accumulated Min: 3yrs Total effective sentence: Max: 7yrs Min: 5yrs	Sentencing remarks attached.
7.	SCOTT, James	County Court – Melbourne 10 November 2006	Section 1041G *Corps Act* x 15 Section 911A(1) *Corps Act* x 1	<u>Guilty Plea</u> Community Service: 250hrs Fine: $5,000 Total effective sentence: Community Service: 250hrs Fine: $5,000	Sentencing remarks attached.

8.	STANLEY, Mark	County Court – Melbourne 12 June 2008	Section 1041G *Corps Act* x 1 Section 74 *Crimes Act* VIC x 2 Section 29D *Crimes Act* CTH x 1 Section 184(2)(a) *Corps Act* x 1	<u>Guilty Plea</u> Max: 1yr Min: 1yr Max: 4yrs & 2 yrs respectively Min: 4yrs & 2yrs respectively Max: 3yrs Min: 2yrs Max: 2yrs Min 2yrs Total effective sentence: Max: 5yrs 6mths Min: 3yrs 6mths	Sentencing remarks attached.
9.	WESTON, Scot	District Court – Sydney 10 October 2008	Section 1041G *Corps Act* x 4	<u>Guilty Plea</u> Accumulated total: Community Service: 300hrs Good behaviour bond for 2 years	Sentencing remarks attached..

R v Bassili

Section 1041G charge – Bassili, on behalf his company, offered an investor an opportunity to purchase shares in a different company, Green Pacific Energy, which he stated he was acquiring with a view to immediately reselling for substantial profit. Bassili obtained $200,000 from the investor for his stated purpose but did not in fact invest the money in this way or return the money to the investor.

Section 178A charges – Bassili enticed two individuals to invest a total of $105,000 for the purposes of purchasing property in a property development scheme. The scheme was a sham. He did not invest the money on the terms for which he obtained the funds.

R v Michalik

Section 1041G charge - Michalik was a financial advisor who made fraudulent representations to super funds to obtain monies lodged with them. He did not retain all the monies for himself, but provided an unlawful mechanism for the release of monies prior to their legal entitlement. He retained a 26% commission on all monies he was able to roll over out of the legitimate superannuation funds.

R v Nathan

Section 1041G charges – Nathan was the sole director and shareholder in a company known as BRG. BRG operated a unit trust fund for investors where their funds were pooled and invested on their behalf by Nathan for BRG. Monthly reports were provided to investors telling them the current value of their investment. These reports were false in that they showed that profit was being made when it was not. In total, investors lost approximately $3.5 million.

Section 178BB charges – Nathan produced a false and misleading brochure to three sets of investors, which stated that the BRG unit trust fund had $22 million under management when the total the fund ever had under management was less than $5 million. He also sent an email to a group of investors outlining the success of the fund and encouraging further investment, even though the fund was performing very poorly.

Nathan had no prior criminal convictions but evidence was available on sentence to show that he had a gambling addiction. Evidence from Star City Casino showed more than $1 million had been converted to gaming chips in the relevant period.

R v Weston

Weston was employed as an insurance broker's agent. He engaged in the process of obtaining public liability insurance for four Go-Kart operators for coverage of $30 million. This was required by the Go-Kart operators in order to retain their licenses. Weston did not in fact obtain the entirety of this insurance, but only obtained $5-10 million for each operator. He falsely told the operators that he had obtained coverage of $30m and provided them with false insurance policy documentation. They paid premiums on these larger amounts of coverage, most but not all of which has been recovered as it was never in fact owed by them. Weston's personal gain was that he was paid commissions of a few thousand dollars for arranging this coverage.

COMPARATIVE SENTENCES s.178BA CRIMES ACT 1900

No.	Name	Date	Court	Maximum	Minimum	Remarks
10.	Cruz, A D [2010] NSWCCA 333	30-Nov-10	NSW CCA	6 years	4 years	Dishonesty offences - Obtaining financial advantage by deception Appeal against severity of sentence - Sentencing judge properly determined appropriate sentences for each offence - Additional penalty not appropriate in respect of charge of knowingly dealing with proceeds of crime as appellant simply gained access to funds subject of fraud - Appeal allowed Circumstances: Female; Transferred employers' funds into own accounts; Transferred funds from own accounts to overseas account; Large part of money dissipated and not recovered; Addressing gambling issue; Significant criminality. *Held*: Appeal against sentence of 6 years 9 months' imprisonment (non-parole 4 years 6 months) allowed - Sentence of 6 years' imprisonment (non-parole 4 years) substituted.
11.	Kumar, A [2010] NSWCCA 138	19-Aug-10	NSW CCA	5½ years	3 years 9 months	Identity fraud scheme - money laundering - passports offences - claim of involvement in criminal enterprise because of financial difficulties - whether sentence discount should have allowed for assistance to authorities - doubt as to whether evidence given in assistance reliable or beneficial - attempt to carry $126,500 to India for syndicate chief - whether sentence on money laundering count manifestly excessive - discount found to be appropriate - additional material concerning co-operation with ICAC inquiry tendered in support of appeal not considered as relating to events occurring after sentencing - appeal dismissed

12.	Golubovic, J [2010] NSWCCA 39	4-Mar-10	NSW CCA	3 years	1 year 6 months	Dishonesty offences — Obtaining property by deception - Appeal against severity of sentence - Obtaining property by deception (x 6); (NSW) Crimes Act 1900 s 178BA(1) Sentences not manifestly excessive but approached manifest inadequacy - Accumulation of sentences considerably more favourable to appellant than unfavourable - Sentencing judge's decision to allow discount of 40% for plea, remorse and assistance to authorities within appropriate range - No error in sentencing judge's approach to statements of agreed facts in circumstances - Appeal dismissed Circumstances: Male; Guilty plea; Offender dishonestly obtained 4 plasma televisions, hair products, air travel tickets and motor vehicle finance; 34 Form 1 offences; Offended over 1 year; Assistance to authorities. *Held*: Appeal against sentence of 3 years' imprisonment (non-parole 1 year 6 months) dismissed.

13.	Stevens, G J (2009) 262 ALR 91; [2009] NSWCCA 260	28-Oct-09	NSW CCA	8 years 6 months	6 years 3 months	Dishonesty offences - Obtain benefit by deception - Appeal against severity of sentence Sentencing judge did not allow totality principle to distort sentencing exercise or conclude sentences product of endeavour to impose appropriate total sentence - Open to sentencing judge to group offences before pronouncing sentences for each group reflecting concurrence and accumulation of groups for reasons of totality - Evidence appellant sought to tender not fresh evidence - Sentencing judge's indication appellant breached bail rather than at large insignificant as sentencing judge aware appellant failed to appear and bench warrant issued - Sentencing judge's findings on appellant's involvement clearly open - Sentencing judge correctly identified sum fraudulently obtained as appellant's criminality not dependent on whether funds successfully recovered. Discount of 10% for guilty plea within sentencing judge's discretion as plea not entered at earliest opportunity - Neither individual sentences nor total sentence beyond permissible range of sentencing judge's discretion - Appeal dismissed Circumstances: Male; Guilty plea; Offender cashed stolen cheque; Possessed three passports in different names; Withdrew funds sourced from unauthorised internet transfers; Repeatedly used internet to transfer funds; 139 separate occasions of dishonest conduct; Criminal history; Failed to appear; Fled overseas; Offended over lengthy period. *Held*: Appeal against sentence of 8 years 6 months' imprisonment (non-parole 6 years 3 months) dismissed.

14.	JOD [2009] NSWCCA 205	25-Aug-09	NSW CCA	6 years	2 years	Dishonesty offences - Fraud Appeal against severity of sentence - Central facts and matters differentiating respective offending meant parity principle had no strict application to appellant's case - No justifiable sense of grievance between overall sentences of by reason of parole period - Appeal dismissed Obtain money by deception (x 26); Use false instrument (x 22); Obtain benefit by false statement; Use of forged Commonwealth document (x 15); Dishonestly obtain or deal in personal financial information (x 2); Open account in false name (x 7); (NSW) Crimes Act 1900 ss 178BA, 300(2) and 178BB; (CTH) Criminal Code Act 1995 s 145.1(5) and 480.4; (CTH) Financial Transaction Reports Act 1988 s 24(1) Circumstances: Male; 20; Guilty plea; Offender member of organised crime syndicate which used false identities to perpetrate fraud on financial institutions; Offended over 2 years 2 months; Obtained $86,588 and attempted to obtain $121,246.17; Criminal history; Breached good behaviour bond; Drug abuse; Gambling addiction; Good prospects of rehabilitation; Remorse; Assistance to authorities; Special circumstances; Near to role of principal; Multiple corporate and financial victims; Instructed co-offenders. *Held*: Appeal against sentence of 6 years' imprisonment (non-parole 2 years) dismissed.
15.	Blundell, P 70 NSWLR 660 [2008] NSWCCA 63	25-Mar-08	NSW CCA	18 months	9 months	Corporations offences - fraudulent misappropriation of $146,000 - lapse of 5 years between offending and sentencing - guilty plea - Community Service Order and periodic detention not available as applicant living interstate - offender devious - seeking to conceal criminal activity - failure to appear in court a breach of conditions of bail granted pending appeal - principle of parsimony - no error found in sentencing - severity appeal dismissed - custodial term to be served

COMPARATIVE SENTENCES s.178BB CRIMES ACT 1900

	Name	Date	Court	Maximum	Minimum	Remarks
16.	Tsakanos, D 197 A Crim R 581 [2009] NSWCCA 258	22-Oct-09	NSW CCA	6 years	4 years 6 months	**Dealing in proceeds of crime - Appeal against severity of sentence** - Making false statement with intent to obtain financial advantage; (NSW) Crimes Act 1900 ss 193B(1) and 178BB(1) Sentencing judge did not take prior convictions into account as aggravating factors despite reference to them as such as other aggravating factors outweighed significance of prior convictions - Sentence severe but not beyond range available in proper exercise of sentencing judge's discretion - Open to sentencing judge to decline to make finding of special circumstances - Appeal dismissed Circumstances: Male; 36; Guilty plea; Offender opened bank account in false name; Account credited with $1,570,000 obtained by fraud; Attempted to withdraw large sum of money from account; Criminal history; Breached conditional liberty; Drug use; Planning; Suffered heart attack in custody. *Held*: Appeal against sentence of 6 years' imprisonment (non-parole 4 years 6 months) dismissed.

17.	Suleman, K [2009] NSWCCA 70	20-Mar-09	NSW CCA	6 years 4 months	4 years 9 months	Dishonesty offences - False statements - Appeal against severity of sentence Whether discount for plea should have been greater - Whether sentencing judge erred finding breach of trust - Whether sentencing judge erred regarding sentencing principles - Whether sentencing judge failed to consider appellant's previous sentence. *Held*: Appeal allowed - Discount generous because appellant made late guilty pleas and no evidence of co-operation - No particular relationship between appellant and victim which created position of trust - Sentencing judge's failure to determine appropriate sentence for each offence individually constituted error - Sentencing judge failed to consider appellant had already served custodial sentence for offences occurring in same period of time as present offences. Criminal Law — Sentencing — Dishonesty offences — Make false statements (x 15); Use false instrument (x 11) Circumstances: Male; 46; Guilty plea; Offender induced investment by false documents; Falsely stated investments would be repaid by income from trolley collection agreements; Falsely represented investor would receive specified monies each month; Representations resulted in significant gain for offender and loss for investors; Prior criminal history for dishonesty offences. *Held*: Appeal against sentence of 7 years 4 months' imprisonment (non-parole 5 years 6 months) allowed - Sentence of 6 years 4 months' imprisonment (non-parole 4 years 9 months) substituted.
18.	Cooper, B [2009] NSWCCA 57	11-Mar-09	NSW CCA	8 years	5 years	Dishonesty offences — Obtaining money by false or misleading statements (x 7); Corrupt commissions or rewards (x 6); (NSW) Crimes Act 1900 ss 249B(2) and 178BB(1) Bribery and false statements - complex arrangements to acquire unjustified or accelerated payment - no error by sentencing judge in assessment of sentence for individual sentences - submissions of lack of parity and consistency rejected *Held*: Appeal against sentence of 8 years' imprisonment (non-parole 5 years) dismissed. Circumstances: Male; Not guilty plea; Offender paid series of bribes to executive functionary in exchange for authorisation of payments benefiting offender; Made 4 false statements in pursuit of duplicated payment of claim for sponsorship of seminars not taking place; Made 2

						false statements relating to value of shares; Made false statement relating to purpose of shares purporting to identify purchase price in Australian rather than United States dollars; High degree of objective criminality; General deterrence.

19.	Burnard, N 193 ACrimR 23 [2009] NSWCCA 5	10-Feb-09	NSW CCA		12 months suspended sentence and fine of $50,000	Crown appeal against inadequacy - False representations misleading investors in Westpoint - totality in sentencing - multiple offences - whether verdict unreasonable - whether sentencing errors - Crown inadequacy appeal upheld but court exercising its discretion not to intervene - Respondent sentenced to one year imprisonment (suspended) and fined $50,000 - Whether sentencing judge applied totality principle - Whether sentencing judge erred in findings on impact of false statements. *Held*: Appeal dismissed. Open to jury to be satisfied appellant conveyed and intended to convey director of existing registered bank, no such bank existed and appellant knew no such bank existed - Sufficient evidence for jury to infer appellant authorised false publications as no bank existed and appellant knew no bank existed.

NO.051 Media Release of 13/04/2011

FINANCIAL ASSISTANCE TO TRIO'S SUPERANNUATION FUND INVESTORS

Over 5,000 victims of fraud from the collapse of Trio Capital Limited (Trio), will be compensated for their loss, following a Government decision announced today.

Assistant Treasurer and Minister for Financial Services and Superannuation, Bill Shorten today announced his decision to provide a grant of approximately $55 million in financial assistance to benefit the members of four superannuation funds that were formerly under the trusteeship of Trio.

"Investors in APRA regulated funds deserve to be compensated by the Government when they lose their investments through fraud or other malfeasance by super fund trustees. I'm very pleased to be able to offer Trio investors this compensation," Mr Shorten said.

The assistance to the trustee, granted under Part 23 of the *Superannuation Industry (Supervision) Act 1993*, is for the Astarra Superannuation Plan, the Astarra Personal Pension Plan, the My Retirement Plan and the Employers Federation of NSW Superannuation Plan (the superannuation funds).

"Based on the application from the Australian Prudential Regulation Authority (APRA)-appointed acting trustee of the four superannuation funds, ACT Super Management Pty Limited, and advice from APRA, I am satisfied the four superannuation funds have suffered an eligible loss under the Act and the public interest requires a grant of financial assistance be made," Mr Shorten said.

Previous government practice was that only 90 per cent of the eligible loss was paid under Part 23.

"The Gillard Government considers it vital that members of the community have complete confidence the framework surrounding superannuation is robust. To ensure consistency with the Financial Claims Scheme, I am pleased to announce the Government will grant assistance for 100 per cent of the eligible loss."

"The events surrounding Trio have cemented my belief that conflicted remuneration structures have no place in financial advice and underscore the need for our Future of Financial Advice reforms, which will be announced soon."

Investigations into Trio by the Australian Securities and Investments Commission (ASIC) and APRA are continuing.

The grant of financial assistance will be recovered by way of a levy on regulated superannuation funds under the *Superannuation (Financial Assistance Funding) Levy Act 1993*.

Superannuation fund members can obtain further information relating to their fund on Trio's website at www.triocapital.com.au.

CANBERRA
13 April 2011