

## W1 Introduction

### Overview

1. What is 'Crime'?
  2. What is 'White Collar Crime'?
  3. What is 'Corporate Crime'?
  4. What are the differences between White Collar Crime and Corporate Crime?
  5. Why study Corporate Crime?
  6. What are the causes of corporate crime and white collar crime?
  7. Who is a 'criminal'?
1. What is crime? Are the following crimes? Should they be treated as crimes? Does it depend on the precise facts?
    - Robbery: crime, it is an act to steal and an intention to injure someone in order to steal
    - Negligent or reckless driving causing death: depends, act: killing
    - 'Running' a red light: crime
    - A company failing to comply with OHS laws: crime
    - A company failing to lodge its Annual Return: depends on the facts

#### Difference btwn crime and civil:

- Crime: punishment, prosecutor need to show the act and the intention. Intention to crime account for the highest punishment, e.g. planning to purchase gun before proceeding to kill someone (murder, 1<sup>st</sup> level).
  - Voluntary manslaughter (2<sup>nd</sup> level) is commonly defined as an intentional killing in which the offender had no prior intent to kill, such as a killing that occurs in the "heat of passion." The circumstances leading to the killing must be the kind that would cause a reasonable person to become emotionally or mentally disturbed; otherwise, the killing may be charged as a first-degree or second-degree murder.
  - Involuntary manslaughter (3<sup>rd</sup> level) usually refers to an unintentional killing that results from recklessness or criminal negligence, or from an unlawful act that is a misdemeanor or low-level felony.

- A criminal case happens when the government files a case in court to punish someone (the defendant) for committing a crime. If the defendant is found guilty of a crime, he or she may face jail or prison.
- A civil case happens when one person, business, or agency sues another one because of a dispute between them, usually involving money. If someone loses a civil case, they may be ordered to pay the other side money or to give up property, but they will not go to jail just for losing the case.

#### 2. What is white-collar crime?

##### Offense-based definitions of white-collar crime:

- **Focus on nature of illegal act**
- **Edelhertz (1970)** definition identified 4 types of white-collar crime
  - Personal crimes: e.g. stealing money from shareholders
  - Abuses of trust
  - Business crimes: e.g. insider trading
  - Con games 詐騙集團
- Scholar's defining characteristics of white-collar crime have included:
  - **Violation/abuse of trust (Shapiro)**
  - **Non-occupational, but legitimate, financial activities (Coleman)**
  - **Planned, organized activities during course of legitimate occupational activity, by individuals or corporations (Albanese)**
- Laundering money: making dirty money (illegal ones) becoming clean (legal) money
- Offense-based: focus on the facts!

##### Crime – some classifications

1. Indictable offences: More serious criminal charges v summary offences: a crime in some common law jurisdictions that can be proceeded against summarily, without the right to a jury trial and/or indictment (required for an indictable **offence**).

2. 'Real' crimes (involving a fault element) v strict liability offences: no need to show intention since there is evidence
3. 'Real' crimes v 'victimless' crimes: the person has left the country, e.g. money laundering
4. 'White Collar Crime: crime happened in the corporate v 'Ordinary' or 'Street' crime
5. 'White Collar Crime' v 'Corporate Crime'

*\*Let's now look at the meaning of 'white collar crime' and 'corporate crime', and how those concepts differ.*

#### History of white-collar crime

- White-collar crimes have been around for a long time
  - Aristotle
  - Biblical times
  - Middle Ages
- **Sutherland is considered the modern father of white-collar crime**
  - **Coined the term in 1939**

Sutherland's definition of white-collar crime: offender-based

- **"A crime committed by a person of respectability and high social status in the course of his occupation"**
  - **Referred primarily to business managers and executives**
  - **Excluded crimes not committed in the course of one's occupation**
  - **Involved a violation of regulations on occupational activities**
- Both the status of the offender and the occupational location determine whether it is white-collar crime
- The offence is committed by an individual, often acting alone
- The offence is non-violent and **involves deceit; the offence is intentional**
- The perpetrator will rarely have a criminal record
- The motivation behind the offending is usually simple - to make money (eg due to opportunity, gambling addiction, greed etc.)

- The offence is often **committed secretly** – it may take a long time before the wrongdoing is detected ('business offenders are legitimately present at the scene')
- The **immediate victim of the crime is often a company, government or other large organization** (although the impact of the crime may be felt by many others).
- White-collar crime is discussed in the H.Croall article - <https://www.mheducation.co.uk/openup/chapters/0335204279.pdf>

#### **Are the following crimes? Should they be treated as crimes? Does it depend on the precise facts?**

- Theft by a bank employee (from the bank): white-collar crime
- Looting at the site of a plane crash: not white-collar crime
- Being a director of an insolvent company (means a coy cannot pay off the debts when its due, doesn't mean they don't have assets): depends the facts, e.g. insolvent trading: he/she making the coy insolvent and still go ahead and trade- this is a crime
- Setting up a 'phoenix' company: shell company, crime
- Insider Trading: white-collar crime
- A financial adviser giving negligent advice: depends on the facts
- Signing a statutory declaration which contains false information
- Shooting a cat with an arrow
- An airline company 'cutting corners' on fleet maintenance and pilot training in order to cut costs
- A scientist failing to provide a warning about a future earthquake
- A company moving its assets offshore to avoid liability to injured workers in Australia
- Secretly filming animal cruelty
- A company re-structuring its business to minimise its tax liability in Australia

Controversy over Sutherland's definition

- **Included offenses sanctioned through civil and criminal court proceedings**

## BTF2223 Corporate Crime

- Was not limited to criminal court offenses in part because white-collar criminals had power and position to evade criminal liability
- **Included social status and respectability in the definition**
  - This means that social status cannot be used to explain or predict white-collar crime
  - It also means that social status cannot be used to explain variation in the opportunities to engage in white-collar crime
  - And, it cannot be used to examine how variation in offenders' statuses influence society's reaction to the crime

### Popularity of offense-based definitions

1. **Social status** of offender is allowed to explain or predict white-collar crime
2. **Location of offense** (occupational settings) can be used to explain or predict white-collar crime
3. Researchers can more easily **draw samples of white-collar offenders from official data sources**
  - Offender-based: looking at the offender
  - Offense-based: looking at the facts

### Criticisms of offense-based definitions

- **Miss or ignore the "power" component of white-collar crimes** – samples often include ordinary people who have engaged in minor offenses that have a financial component (e.g., welfare fraud)
- **Focus on money and property ignores harms to people and environment**
- **Samples tend to include mostly middle-class offenders** – highest status and most powerful offenders are not represented

### Implications of white-collar crime definitions

- Offense-based and offender-based definitions are not mutually exclusive – they each have strengths and weaknesses: Using these two definition tgt to capture every details of the crime
- Using an offense-based definition, you likely will find:

- More cases, including minor offenses
- Using an offender-based definition, you likely will find:
  - Fewer cases, more serious offenses
  - More corporations and high-level executives

### Some other key characteristics of white-collar crime:

- Even where white-collar crime is detected, it **may not be reported** to the relevant authorities – employers may be too embarrassed to report it!
- White-collar crime is **technical rather than physical in nature**. Cases often involve complex 'paper trails' that are difficult to establish – those responsible for detecting and prosecuting white collar crime (eg auditors and regulators) need expertise as well as significant resources. Cases take a long time to be prepared and presented in Court.
- White collar crime tends to be **intermingled with legitimate conduct**
- White collar crime cases tend to be **difficult to present in court** in a way that can be readily understood, especially by jurors.
- White collar crime sometimes **transcends national boundaries**.
- The perpetrator(s) will often be able to **afford high legal fees**.

### White-collar crime examples:

- Theft by a bank employee
- Insider Trading
- Misuse of position as a director to derive a financial advantage (eg a kickback)
- A financial advisor giving advice which is motivated by self-interest (and which is contrary to the client's interests)
- Fraud by company accountant
- Tax evasion

### 3. What is Corporate Crime?

- In a narrow sense, '**corporate crime**' is **crime committed by a corporation**.

- **A corporation is a form of legal person. A corporation is an abstract concept – but the law regards it as having the same *capacity* to commit a crime as an individual (s124 *Corporations Act 2001* (Cth)).**
- However, the expression ‘corporate crime’ as used in the literature is usually intended to have a broader meaning:
  - Including a reference to the **criminal conduct of the corporation itself as well as the conduct of persons *acting on behalf of the corporation*, such as directors, officers and employees;**
  - Including a reference to **corporate misconduct which may be sanctioned in ways other than through the imposition of criminal penalties.**

**Examples:** The following sections contain some examples of conduct which *arguably* constitutes corporate crime:

- Accidents involving passengers:
  - The sinking of the ferry MS Express Samina (Aegean Sea, 2000);
  - The crash of Air France Flight 4590 (Paris, 2000);
  - The Southall rail crash (London, 1997);
  - The sinking of the ferry MS Herald of Free Enterprise (Belgium, 1987);
  - The Linate Airport disaster (Milan, 2001)
  - The crash of Air New Zealand Flight 901 (Antarctica, 1979) (most of the wreckage of which remains on **the slopes of Mount Erebus**).
- Accidents involving workers
- Other accidents
- Consumer harm: A further category of arguable crime involves physical harm or death linked to products manufactured by corporations, for example, Asbestos and Thalidomide.
- Financial crime: A further category of potential crime involves misconduct leading to corporate collapse and/or financial loss, for example:

- Misconduct by Commonwealth Bank financial advisors (2006-2010);
- The Visy cartel conduct case (2007);
- The collapse of the HIH insurance company group (2001).

#### Some characteristics of Corporate Crime

- **The existence of a possible crime is often self-evident** (eg a workplace death or a ferry sinking). But proving a criminal charge against a company (or individual) is typically very difficult.
- **Corporate crime usually involves failures** (actions/ inactions) of a number of people. Common themes include inadequate employee training, out-dated (or inoperative) technology and equipment and inadequate safety systems/ risks management systems.
- Where corporate crime has been committed difficult questions often arise **about who can be, or should be, held ‘responsible’** – eg the corporation itself, its directors, senior officers.
- The **harm caused by corporate crime is often non-monetary in nature** – although there may be severe financial ramifications for the victims.
- The **overall level of harm caused by corporate crime is often higher than for ‘traditional’ crimes.**
- **Corporate crime is often unintentional**, but may be reckless or negligent.

#### **The impact of the failure of HIH – quotes from the Royal Commission Report**

1. ‘A 50-year-old school principal who had contributed a portion of his weekly earnings to an income protection insurance policy developed a brain tumour in 1996. Unable to work, he and his family survived on the monthly cheques that came from HIH under the policy. In February 2001 the monthly cheque was dishonoured on presentation; his policy is now worthless.
2. A person who owned a small business and was insured with HIH became embroiled in a legal dispute. Just weeks before its liquidation, HIH encouraged him to settle the claim out of court for \$90 000. The subsequent collapse of the insurer left the business owner liable for the payout.

3. Thousands of holders of professional indemnity, public liability, home warranty and travel insurance policies have found themselves uninsured for claims made by or against them. A family whose HIH-insured home was destroyed in a fire was forced to live in the burnt shell of the house after HIH defaulted on their caravan rental payments.'
4. 'As with most corporate collapses, the employees of HIH were also dealt a bitter blow: one morning in March 2001 about 1000 of them woke to find themselves unemployed; hundreds of others lost their jobs in the ensuing months.
5. A local theatre had to close its doors, with the loss of 70 jobs, because it did not receive sponsorship funds that had been promised by HIH. *HIH was one of Australia's biggest home-building market insurers. Its collapse left the building industry in turmoil. Home owners were left without compulsory home warranty insurance; the owners of residential dwellings have found that cover for defective building work has vanished; builders are unable to operate because they cannot obtain builders' warranty insurance.'*

**4. What are the differences between White Collar Crime and Corporate Crime? Need to identify which it is**

- Corporate Crime is crime committed **by a corporation** – the 'victims' of such crime may include employees, creditors, competitors, investors or the environment. There is no intent in corporate crime.
- By way of contrast, white collar crime is committed **by individuals acting for personal gain** – the victim is the corporation. White Collar Crime is usually **intentional** (ie the perpetrator *meant* to commit the offence). Corporate crime is often said to be 'unintentional', resulting from a **complex web of actions** and inactions.
- White Collar Crime is monetary in nature. Corporate Crime is not always monetary in nature (eg Industrial manslaughter).
- Clearly there is potential overlap between White Collar Crime and Corporate Crime: for example, an individual may set up or utilise a corporation to perpetuate a crime with a view to making personal profit - in which case the crime could be classified as both white collar crime and corporate crime (eg tax evasion).

**5. Why study Corporate Crime?**

As alluded to already, the study of corporate crime potentially encompasses a study of:

1. Crimes committed by corporations;
2. Crimes committed by individuals acting within a corporate context;
3. Corporate misconduct which is not 'criminal' and is not penalized by criminal penalty (such as imprisonment or fine) but which attracts some other legal sanction or consequence (eg civil penalties, damages, disqualification from acting as a director);
4. Corporate misconduct which arguably *should* be penalized or regulated in some way.

The study of corporate crime encompasses a study of the causes and effects of corporate misconduct, how to prevent it and how to punish it (including considering the roles and responsibilities of consumers, auditors, regulators etc.).

**6. What are the causes of Corporate Crime and White Collar Crime?**

The causes vary from case to case. Some factors to consider are as follows:

- Greed/ desperation/ opportunity – the 'corporate environment'
- Inadequate training
- Inadequate technology
- Inadequate safety systems/ risk management systems
- Cost cutting
- Inadequate protection for 'whistleblowers'
- Inadequate regulation/ under-funded regulators?
- Is the conduct perceived to be 'truly' criminal by the perpetrator?
- The corporate veil
- A 'calculated risk': e.g. providing gears for construction workers: gear vs. penalties for workers who got injured/death
  - what benefits arise from the illegal activity?
  - what is the risk of detection and prosecution?
  - what penalties may be imposed (eg imprisonment)?
  - what social stigma would attach to a finding of guilt?  
= reputation

*Question:* How can corporate crime be prevented or reduced?