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Corporate offending in Australia: The extent of the problem

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Abstract

Corporate crime is increasingly becoming a topic of importance for the Australian Government and public. Recent inquiries have highlighted the extent of wrongdoing by some corporations and within some industries. However, the overall extent of corporate offending in Australia is largely unknown and unable to be ascertained due to the absence of centralised reporting. This study examines 33 of Australia's largest corporations and their subsidiaries over a five-year period. Drawing upon publicly available data, the findings highlight that offending is concentrated in particular industry sectors, with some specific corporations accounting for a substantial proportion of offences. The type and extent of enforcement action taken against those corporations is examined and reveals differences, in part based upon the different enforcement styles of regulators. The findings from this study have important implications for regulatory practice and emphasise the need for a centralised corporate crime data collection in Australia.

Executive summary

In recent years a number of parliamentary inquiries, media reports and the 2018 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services have all served to sharpen Australia's focus upon corporate offending. Much of this has served to reinforce what is known about the criminogenic conditions created by factors such as market conditions, industry or firm characteristics and corporate culture. It has also highlighted the complexity of the regulatory endeavour with our many regulators, whose operations have at times been critiqued. However, despite this previous attention, there is little known about the extent to which Australian corporations offend.

The empirical study presented in this report examines offending by 33 of Australia's largest corporations across a five-year period. Importantly, the study also examines offending by their subsidiary corporations. Drawing on publicly available data, primarily from Australia's four main business regulators—the Australian Securities and Investments Commission, the Australian Competition and Consumer Commission, the Australian Taxation Office and the Fair Work Commission/Fair Work Ombudsman—we examine the offending characteristics of the corporations and the industries in which they are located.

The results indicate that offending is unevenly distributed both across industries and across specific corporations within industries. Of the 11 Global Industry Classification Standard industry sectors, less than half are identified as containing corporations who had offended. Within those industry sectors where offending occurred, variation is observed in the number of corporations that offended and in their frequency of offending. Interestingly, and consistent with what criminologists know about offending in the general population, a comparatively small proportion of offenders account for a disproportionately high number of offences. In most cases those offences fall into three broad categories.

We also explore the enforcement action corporations receive in response to their identified offending. We observe variation between industry sectors; however, we conclude that this is largely due to the enforcement style of different regulators.

A secondary aim of this study was to examine the feasibility of developing a national database of corporate offending across multiple regulators. This would serve to provide a more holistic picture of the extent of corporate crime in Australia. It would also provide visibility of those corporations who offend across multiple regulatory spheres. We find that there is limited consistency between regulators in the public offending and enforcement data they produce. Furthermore, even within individual regulators we observe that the amount and type of information available varies depending upon the type of enforcement action taken. Substantial work may therefore be required to position Australia for a national database. However, we identify this as an opportunity to both improve the current reporting of corporate offending and prepare for a national database by developing standardised public reporting of basic offending and enforcement data.

In the final part of the report we highlight the diverse benefits which would arise from the development of a national database of corporate offending. In particular, we explore how the existence of a national database could improve ethical business practices in Australia. Further, through creating the ability to more comprehensively research corporate crime, we highlight the potential for increasing the effectiveness of regulatory agencies in reducing corporate crime.

Introduction

Crimes committed by or on behalf of corporations are an increasingly prominent concern for governments, the media and the public. In Australia, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Banking Royal Commission), appointed in 2017 only after intense media and public agitation, has exposed the extent of wrongdoing in the financial services sector. Prior studies and inquiries have revealed many other corporate crimes including cartels, money laundering, foreign bribery, abuse of consumer rights, tax avoidance, non-payment of worker entitlements, and environmental harms, among other types of malfeasance (see generally Grudnoff et al. 2016). Submissions to the Senate inquiry into civil, criminal and administrative penalties for white-collar crime depicted a growing 'epidemic of corporate crime in Australia' (Senate Standing Committee on Economics 2017: 3).

The impact of corporate crime can be substantial. In the United States the damage from antitrust violations, tax fraud and health care industry fraud alone has been estimated to be up to $500b annually (Coleman 2006). Additional non-financial costs of corporate crime include physical and psychological harm to people, environmental harm, and harm to creditors, investors, and corporate competitors, as well as the undermining of public confidence in political and economic institutions (Clinard & Yeager 2010; Friedrichs 2013).

Scholars have long noted corporate crime's capacity to cause extensive harms at global, societal and individual levels, yet research on the subject remains relatively scarce, and most criminological research continues to focus on traditional criminal violations (Rorie et al. 2018). Much of the literature that does exist on corporate crime is confined to single cases or narrative accounts (Schell-Busey et al. 2016). In Australia some pioneering studies of corporate crime and regulation from the 1980s and 1990s focused mostly on regulator behaviour, including Grabosky and Braithwaite's ground-breaking study *Of manners gentle* (1986). There have been far fewer studies on the offending behaviours of corporations.

Reasons for the lack of focus on corporate offenders include the limited funding for research, the ability of corporations to influence lawmakers in order to evade regulation, and the lack of centralised databases to track corporate behaviours (Barak 2012; Rorie et al. 2018). The lack of centralised corporate crime databases makes research particularly problematic. For traditional offences, police collect and maintain aggregate offending statistics, and courts and justice departments maintain conviction and sentencing records. But responsibility for corporate regulation and offending is spread across the multiple regulatory agencies responsible for various aspects of corporate behaviour.

In Australia this includes federal-level regulators such as the Australian Securities and Investments Commission (ASIC), the Australian Competition and Consumer Commission (ACCC), the Australian Prudential Regulation Authority, the Australian Taxation Office (ATO), the Fair Work Commission (FWC) and Fair Work Ombudsman (FWO) and many others. States and territories have agencies for consumer protection, environmental protection, workplace safety, liquor regulation, and many other areas where corporations may potentially breach the law. There is no centralised collation of these records, making it almost impossible to measure the true prevalence of corporate offending across these multiple domains (Grudnoff et al. 2016). As such, it is not known, for example, whether some corporations are particularly prolific, offending across multiple areas of regulation, or whether corporate offending is particularly problematic in some industrial sectors.

Understanding patterns of corporate offending is an essential step towards designing effective prevention measures. There has only been one prior attempt to achieve this in Australia (Grudnoff et al. 2016). Our study builds on that earlier attempt with a more systematic approach, using broader sources of data. Uniquely, as well as the parent company, we include corporations' subsidiaries in the unit of analysis, to achieve a more accurate picture of the offending culture within corporate groups.

The next section of this report sets the context by examining what is currently known about corporate crime and key debates in the literature including definitional issues. We then describe our methodology for this cross-sectional study. It examines the extent and nature of offending and regulatory action taken against Australia's largest publicly listed corporations and their wholly owned subsidiaries over a five-year period. As highlighted in the *Results* section, there can be significant delays between when an offence occurs, when it is reported or comes to the attention of regulators, and when regulatory action is finalised. We therefore present the results in two parts: offences occurring in the five-year study period (1 January 2010 to 31 December 2015) and offences finalised during that same time period. In the final section of this report we summarise the main findings of the research. We also identify our key learnings from assembling corporate offending data across multiple regulators and the project limitations. The policy and practice implications of the research findings are then explored with a focus on suggestions for improving regulatory practice, including the construction of a national database to combine information across regulatory agencies. Finally, we highlight directions for future Australian corporate crime research, including research which would draw upon the proposed national database.

Corporate crime: An overview

In this section we provide a brief overview of corporate crime. We draw particular attention to the wide range of illegal behaviours which corporations may engage in. Prior research has highlighted a range of criminogenic conditions which increase the likelihood of a corporation engaging in illegal behaviour. We briefly survey that research before overviewing the regulatory environment in which Australian corporations operate. Having provided that backcloth, we then briefly overview the methodologies which have been applied in international studies to examine corporate offending before outlining the rationale for the current study.

Defining corporate crime

Edwin Sutherland pioneered the study of white-collar crime (1940, 1941, 1949), which he defined as 'a crime committed by a person of respectability and high social status in the course of his occupation', while focusing his empirical research on corporations (Schell-Busey et al. 2016: 389). Clinard and Quinney (1973) and Simpson and Koper (1992) distinguish corporate crime from white-collar crime as crime where individuals are motivated by organisational hierarchy, goals and culture to engage in illegal activity on behalf of the corporation and for the benefit of the corporation. This contrasts with white-collar offending, where offenders primarily act for direct personal gain (Clinard & Quinney 1973).

Subsequent definitional debates have concentrated on the following questions:

- whether the focus should shift from offender to offence characteristics;
- whether to examine corporations only or organisations more broadly;
- whether to include lower-level employees or only higher management; and
- whether corporate crimes should extend beyond the criminal law to also include, for example, civil and administrative regulation violations or morally wrong yet legal behaviours (Friedrichs 2002).

Scholars such as Barak (2012) argue that powerful contemporary corporations are able to shape and influence government laws and regulations to such an extent that they can evade legal responsibility for the wrongs they commit. In a similar vein, Garrett (2014) argues that the response to the 2008 global financial crisis shows that governments consider some corporations 'too big to fail' and overlook their offending behaviours as a result, either by not criminalising their wrongs in the first place, or by not prosecuting to the fullest extent possible.

The lack of consensus on what constitutes corporate crime has led to conceptual variation in the scholarly literature which 'hinders both empirical and policy-related work' (Friedrichs 2002: 245). Rorie et al. (2018) note that not only does the conceptual variation affect understandings of corporate crime but that these understandings, in turn, have affected what is measured and assessed in empirical studies.

For these reasons, the construction of a universal definition of corporate crime has proven to be difficult (Brown & Chiang 1993; Lynch, McGurrin & Fenwick 2004). However, one definition of corporate crime which embodies many of its frequently agreed-upon characteristics is 'illegal or harmful acts, committed by legitimate organizations or their members, primarily for the benefit of these organizations' (van Erp 2018: 1). Drawing upon this definition there are two particular areas which distinguish corporate crime from other types of offending: the motivation and drivers of offending behaviour, and the criminalisation (or otherwise) of those behaviours.

Corporate offences are distinguishable from other white-collar crimes in that the organisational hierarchy, culture and goals act as motivation for individuals to engage in illegal activity on behalf of the corporation, rather than for their own personal, direct gain (Simpson & Koper 1992). In line with that focus, corporate crime is a phenomenon particularly prominent within capitalist economies (Simpson 2002).

Unlike conventional offences, which receive the most research attention (Lynch, McGurrin & Fenwick 2004), most corporate offences are not crimes. Indeed, the majority of illegal conduct engaged in by corporations is not addressed within the criminal law. Moreover, as van Erp (2018) highlights in the above definition, not all corporate acts which cause harm are illegal. Defining corporate crime as both those behaviours which are illegal and those which are harmful but not illegal presents a range of challenges for quantifying corporate crime.

Corporate crime therefore encompasses a broad range of offending. Typologies of corporate offending are extremely broad and are continuously expanding with the growth of globalisation and technological advancements (Friedrichs 2002). Thus, there is a wide range of corporate conduct that breaches various areas of the law, including laws governing taxation, occupational health and safety, companies and securities offences, food standards, telecommunications, environmental offences, offences relating to consumer affairs, restrictive trade practices, competition, economic offences against employees, discriminatory practices, and prudential regulation (Clinard & Yeager 2010).

While most corporate offences in Australia are not criminal offences, in recent years there has been a trend towards criminalising some types of corporate offending. The *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth) criminalises cartel conduct, which is a corporate offence associated with some of the largest penalties in Australia. Subsequent amendments to the *Australian Competition and Consumer Act 2010* (Cth) have criminalised several other anti-competitive behaviours, including misuse of market power, concerted practices, anti-competitive agreements, exclusive dealings, and resale price maintenance. Additionally, model workplace health and safety laws adopted by Australian jurisdictions have criminalised behaviours that result in the death or serious injury of workers.

In this study, while acknowledging the definitional complexities around corporate crime, we focus on acts that are committed by or on behalf of corporations and contravene criminal, civil or administrative laws or regulations. This enabled us to conduct an empirical study based largely on official data from the relevant regulators and so to construct a database focused on corporations that offend across multiple domains. We recognise these corporations may also commit other harms which are not yet unlawful or which are otherwise outside the scope of our study; indeed, we suggest that those corporations which we find are engaging in law-breaking across multiple domains may well be more likely to engage in other, broader harms, and we identify this as a potential issue for future research.

Criminogenic conditions that support corporate offending

Several streams of research have examined whether various factors support and promote corporate offending. Researchers have examined the nexus between offending and the economic and political contexts within which corporations operate. Another focus of scholarly inquiry has been intra-industry and corporation attributes, particularly managerial and cultural characteristics. Among criminologists a popular explanation of corporate crime takes a 'contextual effect' viewpoint, where crime-conducive environments cause 'good' or 'moral' employees to learn and engage in unethical behaviour (Apel & Paternoster 2009). These studies have identified external conditions and internal company characteristics that may tend to increase the likelihood of corporate offending.

Economic, political and structural conditions

Studies examining criminogenic factors have identified several economic, political and structural conditions that support corporate offending. In an early study, Perez examined secondary data sources of trade journals, directors, census surveys, and statistical reports to establish the relationship between the organisational nature of corporations and crime amongst the top 1,000 corporations in the United States. This study found that economic conditions accounted for significant variance in offence type and were the best single predictor of recidivism (Perez 1978). Simpson, similarly, found that anti-trust offences increased under economic conditions of high unemployment and declining stock prices, particularly during Republican administrations (Simpson 1987). Societies where extreme poverty and extreme wealth coexist are particularly vulnerable to corporate crime, as more paths to immunity and from accountability exist (Braithwaite 1991). Specifically, businesses within those societies have the opportunity to take large risks without consequence (Braithwaite 1991).

Scholars have also explored the roles that local, state and federal governments play in facilitating and constraining corporate offending by large corporations. Through this perspective, it is argued that political actions can be strategically enacted to create a regulatory environment and industry structure that facilitates or encourages corporate offending (Tillman 2009). For example, several case studies on environmental crime have highlighted incidents where environmental offences by oil companies have been enabled through cooperation with government (Kramer & Michalowski 2012; Lynch et al. 2011; Smandych & Kueneman 2010). More broadly, governments may also, perhaps at times unwittingly, develop conditions which can increase or decrease the likelihood of corporate crime occurring. Friedrichs (2013) claims that large companies with systemic importance, such as banks, are most likely to offend as they become—and are permitted to become—interconnected with other companies and institutions and, in turn, become too large to challenge.

Industry, firm and managerial characteristics

Specific industry, firm and managerial characteristics have been found to facilitate corporate offending. Industry differences in the rate of corporate crime have been documented by several scholars (Clinard & Yeager 1980, 2010; Jamieson 1987). Simpson (1992) also found industry characteristics to be the strongest influence on future illegality. Early research by Clinard et al. (1979) analysed enforcement action taken across 25 regulatory agencies against 477 large manufacturing firms in the United States. This study found that the oil, pharmaceutical and motor vehicle industries had the highest aggregate-level rate of violations. Conversely, the apparel and beverages industries were found to have the lowest violation rate (Clinard et al. 1979). Simpson (1987) also found the chemical industry contained the most criminogenic corporations in the United States, which supports Jamieson's later findings that the prevalence of corporate offending differs across industries (1994).

Other studies have identified criminogenic company characteristics. Using event history analysis, Baucus and Near developed and tested a model of illegal corporate behaviour over a 19-year period to identify patterns in corporate offending and criminogenic characteristics. The study found firms with dynamic environments and scarce resources were more likely to offend (Baucus & Near 1991). More recently, Connor (2010) empirically assessed characteristics of 389 recidivist companies that were engaged in international price fixing over 20 years and found rapid increases in the overall rate of corporate recidivism over time. Further, the companies who most frequently engaged in international price fixing were highly diversified, multinational companies located in northern Europe and Japan (Connor 2010). Additional company attributes identified as risk factors for corporate offending have included decentralisation, complexity and intensive specialisation (McKendall 1990; Vaughan 1983), and declining or lowering profits (Shover & Bryant 1993).

Conversely, larger, well-resourced and better-managed firms were more likely to comply with regulatory standards (Parker & Nielson 2011). Jamieson's study of antitrust violations found industry profitability to be a higher predictor of corporate criminality than economic conditions (1994). However, Jamieson's findings are limited by the study's cross-sectional design that collected data over a five-year period, compared with Simpson's (1987) longitudinal study that collected data over 55 years. Arguably, one of the best predictors of future criminality of a corporation is a prior history of offending (Simpson & Koper 1997; Sutherland, Geis & Goff 1983); in particular, a history of more than three prior violations (Baucus & Near 1991).

Some studies have examined the role that managers, directors and chief executive officers (CEOs) play in facilitating corporate offending. Managerial characteristics found to be associated with corporate criminality include weak moral inhibition (Paternoster & Simpson 1996; Simpson & Piquero 2002) and desire for control (Piquero, Exum & Simpson 2005). CEOs with a background in finance and administration have been found to be more likely to engage in corporate misconduct than CEOs with other backgrounds (Daboub et al. 1995; Simpson & Koper 1997). Conversely, high turnover of managerial positions has been found to decrease the likelihood of offending (Simpson & Koper 1997).

It has been argued that corporate offending is solely the result of processes and decisions made by individual executives, managers and agents who should be held accountable, while others contend individuals should not be criminally liable (Friedman 2000; Khanna 1996). This debate acknowledges that individuals within corporations make decisions which are influenced by the broader organisational operating context. This means that holding an individual criminally liable in those circumstances may present both legal and moral difficulties. Most scholars therefore strike a balance between the two positions, maintaining that, while managerial factors do play a role in facilitating corporate crime, corporations have an identifiable persona that is separate to their employees, managers, and directors and needs to be considered (van Erp 2018).

Crime-conducive corporate culture

A crime-conducive corporate culture has been suggested to be the leading criminogenic factor for corporate offending (Colvin & Argent 2016; Hawkins 2002; Shover & Hochstetler 2006; Tomasic 2018). Poor corporate culture also emerged as a prevailing theme in the 2018 Banking Royal Commission. Corporate culture is defined as the behavioural regularities and shared values and goals of a firm (Deal & Kennedy 1982) and the shared beliefs as to how companies can best attain these goals (Reidenbach & Robin 1992). Through this perspective, each corporation has its own identifiable character that determines its conduct and is shaped by that particular corporation's culture, ethics, goals, policy and practices (Fisse & Braithwaite 1993).

Braithwaite (1989) claims that industries and organisations develop either a 'culture of compliance' or a 'culture of resistance' in response to regulatory obligations. A culture of resistance within industries or firms can signify a criminogenic culture, which is developed through sets of norms or cultural proscriptions that encourage and provide normative approval of noncompliance (Apel & Paternoster 2009). Within criminogenic industries and companies, there often exists a structure of incentives that reward and encourage adherence to crime-conducive cultural norms (Apel & Paternoster 2009; Faberman 1975; Vaughan 1996, 1998). An example of corporate incentives that have encouraged misconduct is evident in the HIH Insurance case in Australia, where the Royal Commission into HIH Insurance (2002) revealed employees were gifted luxury watches, corporate credit cards and other generous reward packages for reaching performance benchmarks.

Variations in norms, ethical values, company policy and incentives can therefore explain why some companies hold exemplary compliance records and why other companies are habitual offenders (Braithwaite 1989; Fisse & Braithwaite 1993; Gray 2013; Shover & Bryant 1993). Studies of criminogenic industries and companies identified several crime-facilitative components of corporate culture. These include: large companies that set unrealistic performance quotas (Faberman 1975); high performance pressures (Baucus 1994; Finney & Lesieur 1982; Mishina, Dykes & Block 2010); high pressure by parent companies on their subsidiaries (Clinard et al. 1979); and poor employment practices (Nana 2009). Most of these studies have examined criminogenic corporate culture at an industrial level.

Currently, few studies have assessed criminogenic norms within large-scale companies. Further, there has been little examination of how the norms of parent companies might impact on the rate of offending by their subsidiaries. Most scholars believe that corporate offending is the result of a combination of economic conditions, industry structure, firm and managerial characteristics, and corporate culture (Ashforth et al. 2008; Nielsen & Parker 2011; van Erp 2018).

Regulating corporate crime in Australia

Internationally, the global financial crisis starting in 2008 led to renewed interest in the conduct of corporations, including how they could best be regulated and policed among global economies (Shover & Grabosky 2010; Simpson & Yeager 2015). Within Australia there has been a trend towards increased federal regulation of corporate crime. Historically, corporate crime in Australia was predominantly policed by myriad state regulators, each of whom had responsibility for specific areas of corporate offending. Significant developments in Australian public administration were initially brought about in the 1990s with the introduction of specialised federal regulatory agencies, including the ACCC, the Australian Prudential Regulation Authority, and ASIC (Berg 2008). Since that time, the creation of additional key national regulators—such as the Fair Work Ombudsman and the Australian Communications and Media Authority—has increased the number and scope of federal regulators. However, in addition to these federal regulators, a number of state- and territory-based regulatory agencies remain to regulate specific industries and business activities.

Australian corporations are now subject to a broad range of both federal and state/territory regulatory obligations. While some corporate obligations are universal, such as compliance with the *Corporations Act 2001*, others are dependent upon the nature of the corporation's business activities. Australia's regulatory landscape is therefore complex, with the level of complexity varying between industries and across jurisdictions.

Australian regulators vary in their approaches to detecting, preventing and responding to corporate crime. Increasingly, responsive regulation has underpinned the approaches taken by regulators to secure compliance and enforce regulatory requirements (Braithwaite 2006). This strategy is supported by Simpson's (2002) findings that criminal penalties alone are unlikely to deter corporate offending. However, when used in combination with other strategies, such as those suggested by the responsive regulation 'enforcement pyramid', the deterrent effect is increased.

In line with responsive regulation's principle of regulators having a range of graduated sanctions through which they can escalate to secure compliance, there are various administrative, civil and criminal enforcement options available for responding to corporate offending. The *Regulatory Powers (Standard Provisions) Act 2014* (Cth) and the Australian Consumer Law set out a framework of standard regulatory powers available to Commonwealth regulatory agencies in Australia. Enforcement options available to Commonwealth regulators include informal and formal warnings; notices and directions; infringement notice penalties; enforceable undertakings; recalls; public warning and remedial notices; compensation orders; asset freezing; and orders to vary, suspend, cancel or place conditions on a licence. However, the range of available enforcement powers varies across agencies (Renouf & Balgi 2013) and may be even broader, depending upon the specific legislation administered by a regulator.

Measuring the extent of corporate offending

Ascertaining the extent to which corporations commit offences is challenging. This is largely due to a lack of scholarly attention in the field of corporate crime and to an absence of uniform and centralised reporting. Reasons suggested for the lack of scholarly research include the complexity of corporations, difficulty acquiring funding for research, class bias, prior political orientation, and media focus (Clinard & Yeager 2010; Cullen & Benson 1993; McGurrin et al. 2013; Schichor 2009). More fundamentally, the absence of reporting by central sources and the inconsistent reporting across regulatory agencies has restricted the development of a comprehensive database of corporate offending (Simpson & Yeager 2015).

Partly as a consequence of the challenges inherent in studying corporate crime, the 'dark figure' of corporate crime is estimated to be extremely high (Blankenship 2013; Gibbs & Simpson 2009; Simpson, Harris & Mattson 1993), with existing data likely to depict only the tip of the iceberg. Clinard and Yeager (1980) projected the occurrence of corporate crime to be underestimated by as much as one-third. So, despite scholarly recognition of the conditions associated with criminal corporations and growing political, public and academic concern, there is a substantial gap in knowledge regarding the true nature and extent of corporate crime (Benson, Kennedy & Logan 2016).

In an attempt to overcome the lack of centralised, uniform reporting of corporate crime, scholars have undertaken a number of studies with varied methodologies. In Australia, research has tended to focus on offences within the jurisdiction of a single regulator (eg the 2016 study by Hedges et al. of offences prosecuted by the Australian Securities and Investments Commission). Internationally, a small number of studies have sought to more comprehensively examine corporate crime, both to understand the patterns and characteristics of corporate offending and to examine the effectiveness of existing regulatory approaches and enforcement. Those studies have constructed datasets of violations by large corporations to examine offending patterns over varying periods of time. The methodology for three of the most comprehensive studies is outlined below; however, all have methodological limitations (mainly due to the availability of data) which served to undercount corporate offences.

Sutherland (1983) used case and offence data reported by federal agencies to examine violations by 70 of the 200 largest non-financial-sector companies in the United States. This study used formal decisions, orders and settlements of court and regulatory agencies against a company to measure offences of misrepresentation in advertising, unfair labour practices, financial fraud and restraint of trade. Data were therefore primarily collected from administrative, civil and criminal documents. The offence-counting rules adopted in the study served to mask the true extent of offending. For example, decisions or charges which incorporated multiple offences occurring over an extended period of time were counted as one offence (Sutherland 1983). This limited the accuracy of Sutherland's dataset by undercounting offences (Simpson & Yeager 2015). Further, if an offence was brought in different legal divisions, multiple decisions were counted (Sutherland 1983). This may have resulted in over-counting of corporate offences (Simpson & Yeager 2015).

In a similar vein, Clinard et al. (1979) conducted the first large-scale, comprehensive investigation of corporate violations. Examining 582 of the largest US companies listed in the Fortune 500 and their wholly owned subsidiaries, the study analysed all obtainable data about enforcement actions imposed by 24 federal regulatory agencies between 1975 and 1976. The types of violations examined included administrative, financial, environmental and manufacturing violations, along with unfair trade practices (Clinard et al. 1979). The range of offences included in this study was much broader than that selected by Sutherland (1983) and included all initiated cases and enforcement action taken against a corporation. Characteristics of the case, the firm, the offence and the market were included in the data collected. Clinard et al. also developed a classification scheme that ranked offences based on seriousness (serious, moderate or minor). The offence seriousness classification was determined by numerous factors including harm to victims, threatening actions by offending companies, length of the violation, recidivism for the same offence, and refusal to comply (Clinard et al. 1979).

This study had several limitations that affected the comprehensiveness of the data. First, the study did not examine the extent to which parent and subsidiary companies operate autonomously, or whether pressures from subsidiary companies might influence the illegal behaviour of parent companies. Second, several potential predictors of offending, such as industry concentration, were excluded due to statistical limitations. Finally, creating a starting and ending point for the study created a censoring effect, where information about misconduct outside of this study's time period were not collected. This is particularly problematic as the study examines a brief period of time.

In a corporate deterrence study by Simpson and Koper (1992) event analysis was used to examine criminal, civil and administrative actions for antitrust offences committed by 52 US companies between 1927 and 1981. Companies included in the sample were those who had at least one serious antitrust case brought against them during the selected time period, and were randomly selected from seven manufacturing industries (Simpson & Koper 1992). Data for antitrust offences were collected from two government sources, the *Federal Trade Commission Decisions* and the *Commerce Clearing House Trade Cases*. Cases brought against companies were tracked through to sanctions and any appeals. The data collected for each case included date of offence, offence type, sanction type (administrative, civil, criminal), case outcomes (eg guilty verdict, divestiture, consent agreement, cease and desist order, injunction, dismissal), industry type, date of offence, and date of regulatory outcome. Data were also collected on contextual variables including offender net income, value added by manufacturer, stock price and unemployment rates (Simpson & Koper 1992). Two categories of offence seriousness were created: serious and trivial. Serious violations included price-fixing, cartel activity and illegal mergers, while trivial violations included unfair advertising and warranty violations.

Some studies have gone beyond formal sanction data and used other methodologies. Bussmann and Werle (2006), for example, conducted a global survey of over 5,500 companies. They examined economic crimes by combining data from victimisation surveys, company data, documents on business ethics and company procedure, and interviews with top company managers. Bussmann and Werle's (2006) study included a focus on corporations as victims of economic crime—hence the appropriate use of victimisation surveys. However, that methodology is generally only suited to studies focused on non-corporate white-collar offending (Simpson & Yeager 2015). In fact, the use of victim surveys in studies measuring corporate crime is discouraged, as victims are less likely to recognise and report offending (Simpson & Yeager 2015). Other studies have surveyed potential or actual corporate actors, such as managers and executives, to examine decision-making processes (eg Braithwaite & Makkai 1991). While understanding why and how corporate offending occurs is important for prevention, it does little to elucidate the extent of corporate offending.

While studies such as those conducted by Sutherland (1983), Clinard et al. (1979) and Simpson and Koper (1992) have focused on corporate crime across industry sectors, it is far more common for scholars to focus on specific types of offending within particular industries. A meta-analysis by Rorie et al. (2018) of corporate deterrence studies reported that 83 percent of corporate deterrence studies that examined regulatory offences focused on violations of environmental law. Three-quarters of the studies examined specific industries, with 68 percent analysing corporate crime using official data sources (Rorie et al. 2018).

Overall, most studies attempting to measure corporate offending and deterrence have focused on specific industries and have relied on publicly available data sources to build their databases (Karpoff, Lott & Wehrly 2005; Rorie et al. 2018). Simpson and Yeager (2015) recently assessed strengths and weaknesses of currently available data on white-collar violations of administrative, civil, and criminal law in the United States (Simpson & Yeager 2015). They noted that the quantity, consistency and mix of reported data varies across regulatory agencies. They argue for a consolidated database across regulators in order to accurately capture and examine the occurrence of offending and resulting regulatory responses.

In Australia, Grudnoff et al. (2016) attempted to respond to this need by consolidating administrative data about corporate offending across five federal regulatory bodies: the ACCC, ASIC, the ATO, the FWO and the FWC. While their study was innovative to the extent that it examined multiple regulatory domains, it did not track offending behaviour by corporations across those domains to examine the extent to which corporations might be versatile offenders, breaching different types of regulations. Their study helps establish the extent of corporate wrongdoing in Australia, but further research is needed that focuses specifically on the offending behaviour of particular corporations.

Scholars also argue that in developing a consolidated database of corporate offending it is important to link parent and subsidiary corporations. Few studies in the existing literature have measured parent and subsidiary companies as one entity. Ting (2014) supports the importance of treating parent and subsidiary companies as one entity to produce effective measures of corporate offending.

Context of the current study

The focus on corporate wrongdoing in Australia has increased over the past decade and is arguably now at unprecedented levels. In the past 10 years, Australian governments have responded to allegations of corporate offending and unethical corporate behaviour with parliamentary inquiries, legislative changes, a royal commission and, in some cases, a heightened focus on specific forms of conduct.

In response to the inquiries into corporate offending and pressure from bodies such as the OECD, recommendations have been made, and in some cases implemented, to boost regulatory controls in a number of key areas. For example, in its report into corporate tax avoidance, the Senate's Standing Committee on Economics recommended policy reforms and a strengthened regulatory framework. In some instances, legislative changes have been introduced to increase detection, deterrence and punishment for corporate crime. For example, in 2012 the OECD raised serious concerns regarding the absence of foreign bribery convictions in Australia and called for allegations to be pursued more vigorously. In response, the Australian Parliament enacted amendments to the federal Criminal Code prohibiting both individuals and corporations from bribing government officials. In turn, the Australian Federal Police nominated foreign bribery as one of its key strategic focus areas.

At the time of the 9 May 2016 double dissolution of the Australian Parliament, the following six Senate inquiries stemming from allegations of corporate wrongdoing were in progress:

- Scrutiny of financial advice;
- Corporate tax avoidance;
- Foreign bribery;
- Criminal, civil and administrative penalties for white-collar crime;
- Anti-competitive conduct in the retail wine industry and ACCC's role; and
- Causes and consequences of the collapse of listed retailers in Australia.

While these inquiries lapsed with the 2016 dissolution and not all were re-established afterwards, pressure continued to build. In the financial services sector that pressure ultimately led to the establishment of the Banking Royal Commission in December 2017, after this study had commenced. The report of the Banking Royal Commission highlighted significant instances and patterns of offending within the industry.

Despite the increased focus on corporate offending in Australia, the extent and nature of the problem remains unknown. Australia's regulatory landscape is a rich tapestry of federal, state and territory agencies that operate and report independently. The extent and nature of offending by Australian corporations and industries cannot be known, which has implications for the development and implementation of policy and for the efficacy of regulatory agencies. Understanding patterns of corporate offending—such as knowing which industry sectors or corporations present the highest risk, and which types of offending they engage in—has the potential to improve how a regulator's limited resources are targeted and to assist agencies to better engage in networked regulation.

Aims of this study

The current study is the first to comprehensively examine the frequency, nature and context of offending by Australian corporations. While similar studies have been conducted in other countries, particularly the United States, there has been no previous exploration of the extent to which Australian corporations offend or of whether they do so across multiple regulatory domains. Through treating parent and subsidiary companies as one entity, we also seek to assess the prevalence and characteristics of offending by corporate groups.

A secondary aim of the research is to examine the feasibility of developing a larger central database of corporate offending across multiple regulators. This project therefore serves as a pilot study for developing such a database by identifying the opportunities, challenges and barriers to establishing a larger database upon which future research projects could draw.

Methodology

This cross-sectional study examines offending by and regulatory action against Australia's largest publicly listed corporations over the period from 1 January 2010 to 31 December 2015.

Identifying corporate offending and resulting outcomes over a defined period presents a number of challenges. First, corporate offending can occur over a lengthy time period rather than on a single day. Second, considerable periods of time can elapse between each of the following:

- when breaches of regulatory requirements are identified by or reported to the regulator;
- when regulators initiate action against corporations for identified or reported breaches; and
- when enforcement action taken by a regulator is finalised.

To overcome these challenges, the study examined instances of both offending and regulatory action for offending between 1 January 2010 and 31 December 2015.

The Australian business regulatory landscape includes many national, state and territory regulators. However, the scope of offending examined in this study is limited to publicly available information for offences regulated by the four primary national business regulators, along with any offending or regulatory action identified as being within the remit of other federal or state-based regulators. The four primary national regulators are:

- the Australian Securities and Investment Commission (ASIC);
- the Australian Competition and Consumer Commission (ACCC);
- the Australian Taxation Office (ATO); and
- the Fair Work Commission and the Fair Work Ombudsman (FWC/FWO).

Most if not all of the corporations in the sample are regulated by all four of the primary business regulators. By virtue of having a corporate business structure, each corporation is regulated by ASIC, which is also the financial services industry regulator. Similarly, each corporation is subject to the competition provisions of legislation administered by the ACCC, with additional consumer protection obligations being placed upon those which directly provide goods or services to the public. All corporations are also subject to the national taxation regime administered by the ATO, which is also the regulator for the national compulsory superannuation scheme for employees. Most corporations with employees are also within the remit of FWC/FWO.

Sampling frame

The sampling frame for the study consists of publicly listed corporations within the Australian Securities Exchange's ASX200 index at as June 2015 and their wholly owned Australian subsidiary corporations. The ASX200 contains the 200 largest public companies by market capitalisation listed on the Australian Securities Exchange.

To ensure equal representation across industry sectors, the sampling frame was stratified by the Global Industry Classification Standard (GICS). The GICS is an industry taxonomy jointly developed by S&P Dow Jones Indices and MSCI (ASX 2018). It classifies corporations into one of 11 sectors: consumer discretionary, consumer staples, energy, financials, health care, industrials, information technology, materials, real estate, communication services and utilities.

Based on market value, the top three ASX200 corporations within each of the 11 GICS sectors comprised the study's sample of 'parent corporations'. The sample was augmented with their wholly owned subsidiary corporations, as identified in the parent corporation's annual reports. The inclusion of wholly owned subsidiaries is important, as companies may structure their affairs to locate higher-risk activities in subsidiary companies to protect the parent company. Wholly owned subsidiary corporations were identified through the 2011 and 2015 annual reports of each corporation. Where an annual report listed corporations in which the parent corporation has a significant interest—in lieu of listing wholly owned subsidiary corporations—those companies were included in the sample as if they were wholly owned subsidiaries. This was done on the basis that some of those listed would be wholly owned subsidiaries and others would be subject to substantial influence on their operations by the parent corporation, due to its significant interest in them. There was variation between parent corporations, and, in some cases, within the same parent corporation, in how they reported their wholly owned or significant interest subsidiaries in 2011 and 2015. This limited the ability to sample only those which were listed in both 2011 and 2015. Moreover, restricting subsidiaries to only those owned or controlled in both 2011 and 2015 would mean that new subsidiaries registered or acquired through mergers during that time period would be excluded. Similarly, those deregistered during that time would also be excluded. To address these issues, a wholly owned subsidiary corporation was included in the sample if it had been owned by the parent corporation in either 2011 or 2015.

The final sample contained 1,941 corporations (33 parent corporations and 1,908 subsidiary corporations). Table 1 outlines the number of corporations by GICS industry sector included in the sample. Together, each of the 33 parent corporations and its respective wholly owned subsidiary corporations form a 'corporate group'. It is these 33 corporate groups which are the focus of this study.

Table 1: Total number of corporations by industry sector (*n*)	
Industry sector	**Number of corporations (parent and subsidiaries)**
Consumer discretionary	93
Consumer staples	559
Energy	144
Financials	127
Health care	161
Industrials	106
Information technology	61
Materials	241
Real estate	119
Communication services	122
Utilities	208
Total	**1,941**

Data collection

A process of triangulation of publicly available data was used to identify offending and resulting outcomes for each corporation over the study period. Data on offending and regulator enforcement action were obtained from the websites of each of the four regulators, the Australasian Legal Information Institute database (AustLII), the Factiva news database and company annual reports. To be included in the study, the offending had to be investigated and finalised by a regulatory action.

Regulator sources

Information about enforcement action by each of the four national business regulatory agencies was sourced from their publicly available infringement notice registers and enforceable undertaking registers and from media releases. Each source was searched for details of offending by and enforcement action finalised against each corporation in the sample during the study period.

In some cases, enforcement action for alleged offending was finalised between the regulator and corporation on a 'no admissions' basis, a 'without prejudice' basis, or both (eg where a corporation entered into a voluntary enforceable undertaking without admitting to the alleged offences). Where that occurred, for the purpose of this study the subject behaviour was deemed to be an offence and was included in the dataset. This was done on the basis that, first, the regulator had sufficient evidence to initiate the enforcement action and, second, the matter was resolved through the taking of that enforcement action.

Australasian Legal Information Institute (AustLII) Database

AustLII provides access to Australian legal information including legislation, case law, journals, law reform reports and treaties. The names of each parent corporation and each of their wholly-owned subsidiaries were searched in AustLII to identify:

- details of offences prosecuted by ASIC, ACCC, ATO and FWC/FWO not identified through regulator sources; and
- any other offences, with a specific focus on state-based workplace health and safety, and environmental offences.

Similar to the rationale for selecting the four national regulators, workplace health and safety and environmental offences were selected as the focus due to the potential for all parent corporations to engage in those types of offences.

Factiva

Global news database Factiva was also searched, using the same process outlined for AustLII. The purpose of searching Factiva was to identify specific instances of offending, or specific details of relevant offences, that were not captured through AustLII and regulator sources but which may have been disclosed by media sources.

Company annual reports

Annual reports of parent corporations were also examined for any disclosures of offending and prosecution action which may have been initiated or finalised during the study period.

For each unique offence, identified data from the various sources was triangulated to obtain the variables required for the study. In some instances details from multiple sources were combined in order to obtain the minimum data requirements. Where any inconsistency existed between data sources, the most authoritative data source—typically court decisions, followed by material published by the regulator—was taken as being correct.

Search strategy

The names of each parent corporation and each of their wholly-owned subsidiaries were systematically searched in regulator sources, AustLII and Factiva. The search strategy was to maximise the probability of locating any details of offences committed by and prosecutions against each corporation. For example, separate searches of proprietary limited corporations were conducted using different combinations of search terms. Searches included using the corporation name only (without any reference to the corporate structure) and using the name plus one of the terms ‘Pty’, ‘Pty Ltd’ and ‘Pty Limited’.

Analytic strategy

The research methodology enables the offending to be analysed in two ways. The first is an analysis of offences that were both committed and finalised between 1 January 2010 and 31 December 2015. The second is an analysis of offending based upon all finalisations in that period, regardless of when the offence was committed. This approach to analysis addresses the data availability issues discussed below, accounts for the sometimes lengthy time taken to finalise enforcement actions, and provides an opportunity to analyse a greater number and broader range of offending behaviours.

Identifying offences committed within the study period was complicated by two factors. First, some corporations had offending episodes—where materially similar behaviour was committed over a period of time—which (a) occurred over an extended period of time, with some commencing before the study period but continuing into the study period, and (b) did not have publicly disclosed commencement or conclusion dates. Second, it was not always possible to ascertain either the details of specific offences or the number offences committed in a given offending episode. This was particularly the case where regulators did not initiate legal proceedings and undertook other kinds of enforcement actions.

Where an offending episode commenced before 1 January 2010 and extended past that date, it was treated as having occurred in the period 1 January 2010 to 31 December 2015. For all instances where that occurred, the number of offences within the offending episode was not able to be ascertained. The offending episode was therefore counted as a single offence. This will necessarily result in a significant undercounting of offences committed by those corporations.

In reporting the results we have anonymised the data by replacing corporation names with unique identifiers. While all the data reported are in the public domain, we have done this for two reasons. First, we seek to keep the focus upon corporate offending more broadly, without diverting attention to specific corporations. Second, some offences have been resolved by a regulator on a ‘no admissions’ basis and without the prosecution evidence being tested. While for the purpose of this study those cases are treated as confirmed cases of offending, we respect that strict legal position.

Results

Analysis of offences occurring in the five-year study period

Over the period between 1 January 2010 and 31 December 2015, 27.2 percent of the 33 corporate groups (parent corporations and their subsidiaries) offended at least once. All offending corporate groups traded in one of only four industry sectors: financial, utilities, communication services and consumer staples. That is, 36.4 percent of industry sectors had at least one corporate group where offending was identified in the five-year period.

Examining the number of offending groups by industry sector found differences between industries. Of the four sectors in which offending occurred, the financial services sector was the only sector where all three of the sampled corporate groups in the sector had offended during the study period (Table 2).

Table 2: Proportion of offending corporations by industry sector (%)

Industry sector	% of parent corporations with offences (including offences by subsidiaries)
Financials	100
Utilities	66
Communication services	66
Consumer staples	66

In total, offences were recorded for 21 corporations (six parent corporations and 15 subsidiary corporations). There was substantial variation across industries and corporate groups as to whether offending was committed by a parent corporation or a subsidiary, and in the number of subsidiaries which offended. For the nine offending corporate groups, Table 3 shows whether the parent corporation offended, along with the number of subsidiaries who offended.

In almost half (44%) of offending corporate groups, offences were committed by both the parent corporation and at least one subsidiary corporation. For all financial sector corporations, offending was distributed across the parent corporation and at least one subsidiary. For 33 percent of parent corporations, offending was limited to a subsidiary corporation only.

Table 3: Offending by parent and subsidiary corporations by industry			
Industry sector	**Parent corporation**	**Parent corporation offended**	**Number of offending subsidiaries**
Financials	F1	Y	4
	F2	Y	1
	F3	Y	1
Utilities	U1	Y	3
	U2	N	2
Communication services	T1	Y	0
	T2	N	1
Consumer staples	C1	Y	0
	C2	N	3

Offending behaviour

A total of 161 offences were identified as having occurred during the five-year study period. For those parent companies which offended, the number of offences ranged from one to three offences. Across all corporate groups (parent corporations and their subsidiaries) the number of offences ranged from one to 52 offences (*M*=8, *SD*=13.2).

Three corporate groups (F1, U1 and C2), or 33.3 percent of offending corporate groups, accounted for 76.4 percent of offences (Table 4). As Table 4 shows, almost all (92.5%) offences by corporate groups were committed by subsidiary corporations.

Table 4: Number of offences by parent corporation and subsidiary, by industry sector (*n*)			
Industry sector	**Parent corporation**	**Number of parent corporation offences**	**Number of subsidiary corporation offences**
Financials	F1	3	57
	F2	2	2
	F3	2	2
Utilities	U1	1	37
	U2	0	17
Communication services	T1	1	0
	T2	0	9
Consumer staples	C1	3	0
	C2	0	25
Total		**12**	**149**

The number of offending episodes is perhaps a better indicator of the level of offending by a corporate group than the number of offences. This is because the number of offences is substantially understated, for two primary reasons. First, some offending episodes have an undisclosed number of offences and are therefore treated as single offences. Second, many materially similar offences could arise from a single offending episode lasting from several days to years.

For the purpose of analysis, whether a single or cumulative penalty was imposed determined whether or not offences were considered to form part of an offending episode. Where a cumulative penalty was applied across a number of offences, this was deemed to be a single offending episode. This is because the data indicate that regulatory agencies often took an enforcement action in relation to a specific type of (mis)conduct—with that type of conduct possibly occurring multiple times over a defined period and possibly including a variety of offences related to that conduct. As the focus of a single offending episode is one specific type of conduct, it is possible for a corporation to have multiple concurrent offending episodes, each relating to a different type of conduct.

Thirty-eight unique offending episodes were identified. The number of offending episodes per corporate group ranged from one to 12 (*M*=4, *SD*=3.3). Examining offending episodes by industry sector revealed that the majority (52.6%) of offending episodes were in the financial sector (20 episodes), followed by consumer staples (nine episodes), utilities (seven episodes) and communication services (two episodes). Table 5 shows that two of the nine corporate groups (F1 and C2) account for almost half (47.4%) of offending episodes, with one financial sector corporate group accounting for almost a third (31.6%) of offending episodes.

Table 5: Offending episodes by corporate group and industry sector

Industry sector	Parent corporation	Offending episodes per corporate group
Financials	F1	12
	F2	4
	F3	4
Utilities	U1	3
	U2	4
Communication services	T1	1
	T2	1
Consumer staples	C1	3
	C2	6

Offending largely fell into one of three broad categories:

- breaches of market integrity (including cartel offences);
- misleading or deceptive conduct (including making false or misleading representations); and
- unconscionable conduct.

Together these three categories of offending accounted for 78.8 percent of identified offences (Table 6).

Breaches of market integrity accounted for 35.4 percent of all offences, including three cartel-related offences. Both of the corporate groups in the consumer staples sector had a cartel offence, as did one corporate group in the utilities sector. The remaining 55 offences related to stock trading, with 52 of those offences committed by a single corporate group (F1).

Eight of the nine offending corporate groups, or 24.2 percent of all corporate groups studied, had engaged in conduct which was misleading or deceptive, or had made false or misleading representations.

Two of the nine corporate groups, or 6.1 percent of all corporate groups studied, had engaged in unconscionable conduct. These were in the consumer staples and utilities sectors, with the consumer staples corporate group accounting for 94.1 percent of unconscionable conduct offences.

Five of the nine corporate groups, or 15.2 percent of the all corporate groups studied, had engaged in other forms of offending. All offending corporate groups in the consumer staples and utilities sectors, and one of the three financial sector corporate groups, engaged in other offences. There was a wide variety of offences within other offence categories; however, most related to sales and marketing tactics and honouring agreements with customers.

Table 6: Offences by offence type and industry (*n*)

Industry sector	Market integrity offences (including cartel offences)	Misleading, deceptive or false statements	Unconscionable conduct	Other	Total
Financials	54	6	0	8	**68**
Utilities	1	29	1	24	**55**
Communication services	0	10	0	0	**10**
Consumer staples	2	8	16	2	**28**
Total	**57**	**53**	**17**	**34**	**161**

Enforcement action for offending

A range of enforcement actions were taken by regulators in response to offending by corporate groups in the five-year period. Given the frequent use of cumulative penalties for offending episodes, enforcement actions were analysed by offending episodes (each of which may incorporate a number of related offences). In a number of cases, particularly where civil court proceedings were initiated, offending episodes were finalised through multiple sanctions—for example, a monetary penalty and an enforceable undertaking.

Enforcement action was taken in 89.5 percent of the 38 offending episodes. In the remainder of episodes, while no enforcement action was taken, the corporation either refunded customers or took other remedial action. In cases where the regulator took enforcement action (N=34) the number of enforcement actions taken per offending episode ranged from one to five (M=1.8, SD=1.2). In 61.8 percent of offending episodes a single enforcement action was taken. Table 7 shows the mean number of enforcement actions per offending episode. A Kruskal–Wallis test shows a significant difference between industry sectors ($\chi^2(3)=9.52$, p=0.023), with financial services having a mean 1.3 enforcement actions per offending episode, compared with 3.0 in the utilities sector.

Table 7: Enforcement actions per offending episode by industry sector (*n*)		
Industry sector	**Offending episodes where enforcement action taken**	**Mean enforcement actions per offending episode**
Financials	18	1.28
Utilities	7	3.00
Communication services	2	3.00
Consumer staples	8	1.88

For the purpose of further analysis, the study examined the most serious outcome for each offending episode, including those resolved through no action. Regulators finalised corporate offending episodes either through administrative actions (55.3%) or civil court proceedings (34.2%) or with no enforcement action being taken (10.5%; Table 8). Over half (57.1%) of administrative actions resulted in the issuing of an infringement notice, with the remainder being finalised by way of enforceable undertakings. Infringement notices ranged in value from $10,200 to $130,000. For enforceable undertakings which were time-limited, the duration of the undertakings ranged from 20 months to 60 months.

Table 8: Offending episodes by most serious enforcement method			
Parent corporation	**Number of offending episodes**	**Offending episode enforcement method (most serious outcome)**	**%**
Financials sector			
F1	12	**No action**	**8.3**
		Remedial/refund	
		Administrative action	**91.6**
		Infringement notice	41.6
		Enforceable undertaking	16.7
		Licence condition	33.3
F2	4	**Administrative action**	**100**
		Infringement notice	
F3	4	**No action**	**50**
		Remedial/refund	
		Administrative action	**50**
		Infringement notice	
Utilities sector			
U1	3	**Civil court proceedings**	**100**
		Monetary penalty	
U2	4	**Civil court proceedings**	**100**
		Monetary penalty	

Table 8: Offending episodes by most serious enforcement method (cont.)			
Parent corporation	**Number of offending episodes**	**Offending episode enforcement method (most serious outcome)**	**%**
Communication services sector			
T1	1	**Administrative action**	**100**
		Infringement notice	
T2	1	**Civil court proceedings**	**100**
		Monetary penalty	
Consumer staples sector			
C1	3	**No action**	**33.3**
		Negotiated change of practice	
		Civil court proceedings	**66.6**
		Declaration	33.3
		Enforceable undertaking	33.3
C2	6	**Administrative action**	**50**
		Enforceable undertaking	
		Civil court proceedings	**50**
		Enforceable undertaking	16.6
		Monetary penalty	33.3

Civil court proceedings were initiated against the majority (55.5%) of offending corporate groups. The financial sector was the only industry sector without at least one corporate group being subject to civil court proceedings during the study period. Civil court proceedings resulted in a pecuniary penalty in 76.9 percent of cases. These monetary penalties ranged from $35,000 to $3.1m. The remaining 23.1 percent of civil court proceedings were finalised through enforceable undertakings (15.4%) or declarations as to the unlawfulness of the conduct in question.

Ten percent of offending episodes were finalised without enforcement action. Two corporate groups in the financial services sector and one in the consumer staples sector had offending episodes finalised in this manner. In those cases the corporation resolved the matters by remediating or refunding affected customers, or by negotiating an outcome with the regulator.

The majority (77.7%) of corporate groups committed offences within the jurisdiction of a single regulator. More than half (56.5%) of offences were within the jurisdiction of the ACCC. Two of the nine offending corporate groups had offences spanning more than one regulator. Interestingly, both of these corporate groups were in the consumer staples sector.

Timeliness of enforcement

Due to the paucity of data for the dates on which offending episodes ended and enforcement action was initiated, the timeliness of enforcement has been analysed as the number of months between the date of commencement of an offending episode (or an approximation of this date) and the date the matter was finalised. For cases where only the month of offending episode commencement was known, the date was calculated as the first day of that month. Similarly, in cases where the finalisation date was only given as a month, the finalisation date was calculated as the last day of that month.

On average, infringement notices were the most timely means of enforcement, ranging from two months to 56 months (*M*=16.9, *SD*=14.5). All infringement notices except one were issued to financial sector corporations. The single infringement notice issued to a communication sector corporation was issued within two months of the offending episode commencement date.

For matters finalised by enforceable undertaking, there was substantial variation in the timeliness of the enforcement action. Timeliness depended on the duration of the offending episode and on whether the enforceable undertaking was an administrative action or part of the finalisation of a civil court proceeding. Corporate groups within the consumer staples sector had the majority of enforceable undertakings, 60 percent of which were entered into as an administrative action. The length of time for entering into enforceable undertakings that were administrative actions ranged from 14 months to 69 months (*M*=40.3 *SD*=27.3). Within the consumer staples sector, two enforceable undertakings were entered into, taking 15 months and 16 months respectively. Two enforceable undertakings in the financial sector took, respectively, two months and 98 months to finalise from the commencement of the offending episode (*M*=53.5, *SD*=62.9).

The time taken to finalise civil court proceedings which resulted in a monetary penalty ranged from 24 months to 63 months (*M*=35.1, *SD*=11.9). Overall there was little variation in the timeliness of court proceeding finalisations across industry sectors.

Analysis of offences finalised in the five-year study period

Ten corporate groups (30.3% of the sample) across five industry sectors had 259 offences finalised during the study period (Table 9). As was the case with offending during that period, the financial services sector was the only sector where all of the parent corporations sampled in that sector had offences finalised.

In total 26 corporations (seven parent corporations and 19 subsidiary corporations) had offences finalised. Seventy percent of parent corporations had offences finalised, with the number of offences ranging from one to 82 offences (*M*=14.9, *SD*=29.7). Offences were more evenly distributed between parent corporations (40.2%) and subsidiary corporations (59.8%) compared with the distribution for those offences committed and finalised in the study period. However, this result is an artefact of one parent corporation (T1) having 82 offences finalised but not committed during the five-year period.

Similar to the analysis of offending finalised within the study period, 30.3 percent of offending corporate groups (F1, U1 and T1) accounted for almost three-quarters (72.2%) of offences. Interestingly, F1 and U1 were also in the top three corporate groups for offences that were committed within the study period. However, the third corporate group in the top three changed—rather than being in the consumer staples sector, it was in the communications sector. Again, this is an artefact of including offences that were committed prior to but finalised within the study period.

Table 9: Offences by parent and subsidiary corporations (*n*)				
Industry sector	**Parent corporation**	**Number of parent corporation offences**	**Number of offending subsidiary corporations**	**Number of subsidiary corporation offences**
Financials	F1	8	4	58
	F2	4	3	4
	F3	4	1	2
Utilities	U1	1	3	37
	U2	0	2	17
Communication services	T1	82	1	1
	T2	2	1	9
Consumer staples	C1	3	0	0
	C2	0	3	26
Health care	H1	0	1	1
Total		**104**	**19**	**155**

Offending behaviour

Again, offending largely fell into one of three broad categories:

- breaches of market integrity (including cartel offences);
- misleading or deceptive conduct (including making false or misleading representations); and
- unconscionable conduct.

Together these three categories of offending accounted for 72.2 percent of identified offences (Table 10).

Table 10: Offences by offence type and industry (*n*)					
Industry sector	**Market integrity offences (including cartel offences & misuse of power)**	**Misleading, deceptive or false statements**	**Unconscionable conduct**	**Other**	**Total**
Financials	54	8	0	18	**80**
Utilities	1	29	0	24	**55**
Communication services	54	13	0	27	**94**
Consumer staples	2	8	16	3	**29**
Health care	1	0	0	0	**1**
Total	**112**	**58**	**17**	**72**	**259**

Breaches of market integrity accounted for 43.2 percent of all offences, and included a range of offences including misuse of market power and cartel-related offences. The majority (94.6%) of market integrity offences were attributable to two corporate groups and related to stock market trading (F1) and a communication sector corporate group (T1) unlawfully denying competitors access to infrastructure.

Nine of the 10 offending corporate groups, or 27.2 percent of all corporate groups studied, had engaged in conduct which was misleading or deceptive, or had made false or misleading representations.

Eight of the 10 offending corporate groups, or 24.2 percent of all corporate groups studied, had engaged in other forms of offending. There was a wide variety of offences within the 'other offences' category; however, most related to sales and marketing tactics and honouring agreements with customers. Over one-third (37.5%) of other offences related to breach of licence conditions by a single corporate group within the communication services sector.

The majority (80%) of corporate groups committed offences within the jurisdiction of a single regulator. Over two-thirds (67.9%) of offences were within the jurisdiction of the ACCC. The same two corporate groups identified in the previous analysis as having offences spanning more than one regulator continued to be the only corporate groups where that was identified. Both were in the consumer staples sector.

Enforcement action for offending

The 259 offences were contained within 57 offending episodes (Table 11). The number of offending episodes per corporate group ranged from one to 18 (*M*=5.6, *SD*=4.9). Examining offending episodes by industry sector, the majority (57.1%) of offending episodes were in the financial services sector (Table 11).

Table 11: Offending episodes by corporate group (*n*)

Industry sector	Parent corporation	Offending episodes per corporate group
Financials	F1	18
	F2	8
	F3	6
Utilities	U1	3
	U2	5
Communication services	T1	3
	T2	3
Consumer staples	C1	3
	C2	7
Health care	H1	1

Enforcement action was taken in 73.7 percent of offending episodes. In the remainder, no enforcement action was taken but the corporation either refunded customers or took other remedial action. In cases where the regulator took enforcement action (*N*=42) the number of enforcement actions taken per offending episode ranged from one to five (*M*=1.6, *SD*=1.1). In 71.9 percent of offending episodes a single enforcement action was taken. Table 12 shows the mean number of enforcement actions. While the financial services sector had a lower mean number of enforcement actions per offending episode, there was no statistically significant difference between industry sectors.

Table 12: Enforcement actions per offending episode by industry sector (*n*)

Industry sector	Offending episodes where enforcement action taken	Mean enforcement actions per offending episode
Financials	18	1.39
Utilities	8	2.75
Communication services	6	1.83
Consumer staples	9	1.78

Regulators finalised all corporate offending episodes either through administrative actions (45.6%), or civil court proceedings (28.1%), or with no enforcement action being taken (26.3%; Table 13). Over half (53.8%) of administrative actions resulted in the issuing of an infringement notice, with the remainder being finalised by way of enforceable undertaking (30.8%) or licence variation (15.4%). Infringement notices ranged in value from $6,600 to $130,000. For enforceable undertakings where the time was identifiable and limited, the duration of the undertakings ranged from 20 months to 60 months (*M*=38.5, *SD*=19.6).

Civil court proceedings were initiated against half of offending corporate groups. Civil court proceedings typically resulted in a pecuniary penalty in 75 percent of cases. These monetary penalties ranged from $35,000 to $26.57m. The remaining 25 percent of civil court proceedings were finalised through enforceable undertakings (50%) or declarations as to the unlawfulness of the conduct in question (50%).

Over a quarter (26.3%) of offending episodes were finalised without enforcement action. All three financial sector corporate groups and one consumer staples sector corporate group had offending episodes finalised in this manner. In those cases, the corporate group resolved the matters by refunding or otherwise remediating affected customers, or by negotiating an outcome with the regulator.

Table 13: Offending episodes by most serious enforcement method

Parent corporation	Number of offending episodes	Offending episode enforcement method (most serious outcome)	%
Financials sector			
F1	18	**No action**	**33.3**
		Remedial/refund	66.6
		Negotiated change of practice	16.7
		Public advice	16.7
		Administrative action	**66.6**
		Infringement notice	27.8
		Enforceable undertaking	16.7
		Licence condition	22.2
F2	8	**No action**	**50**
		Remedial/refund	
		Administrative action	**50**
		Infringement notice	
F3	6	**No action**	**66.6**
		Remedial/refund	
		Administrative action	**33.3**
		Infringement notice	
Utilities sector			
U1	3	**Civil court proceedings**	**100**
		Monetary penalty	
U2	5	**Civil court proceedings**	**100**
		Monetary penalty	
Communication services sector			
T1	3	**Administrative action**	**33**
		Infringement notice	
		Civil court proceedings	**66**
		Monetary penalty	33
		Declaration	33
T2	3	**Administrative action**	**66.6**
		Infringement notice	
		Civil court proceedings	**33.3**
		Monetary penalty	

Table 13: Offending episodes by most serious enforcement method (cont.)			
Parent corporation	**Number of offending episodes**	**Offending episode enforcement method (most serious outcome)**	**%**
Consumer staples sector			
C1	3	**No action**	**33.3**
		Negotiated change of practice	
		Civil court proceedings	**66.6**
		Declaration	33.3
		Enforceable undertaking	33.3
C2	7	**Administrative action**	**57.1**
		Enforceable undertaking	
		Civil court proceedings	**42.9**
		Enforceable undertaking	14.3
		Monetary penalty	28.6
		Health care sector	
Health care sector			
H1	1	**Administrative action**	**100**
		Enforceable undertaking	

Timeliness of enforcement

As with the previous analysis, timeliness of enforcement has been analysed as the number of months between the commencement date of the offending episode (or an approximation of this date) and the date the matter was finalised. The timeliness of finalisation data could be calculated for 44 offending episodes.

On average, infringement notices were the most timely means of enforcement, ranging from two months to 56 months (M=16.9, SD=14.5). All infringement notices except one were issued to corporate groups in the financial services sector. The single infringement noticed issued to the communication sector corporation was finalised within two months of the commencement date of the offending episode.

For matters finalised by enforceable undertaking, there was substantial variation in the timeliness of the enforcement action. This depended upon the duration of the offending episode and on whether the enforceable undertaking was an administrative action or part of the finalisation of a civil court proceeding. Corporations in the consumer staples sector had the majority (60%) of enforceable undertakings, 66 percent of which were entered into as an administrative action. Almost one-third (30%) of enforceable undertakings were in the financial services sector.

The length of time from first offence to the finalisation of an enforceable undertaking ranged from two months to 98 months (*M*=36.7, *SD*=32.4). Within the consumer staples sector, two enforceable undertakings were part of a civil court finalisation and were entered into within 15 months and 16 months respectively. Within that sector, enforceable undertakings that were administrative actions took between 14 months and 69 months to be finalised (*M*=34.2, *SD*=25.6). The three enforceable undertakings in the financial services sector were finalised within two months, 40 months and 98 months.

Overall, civil court proceedings which resulted in a monetary penalty took between 24 months and 63 months to be finalised (*M*=34.2, *SD*=11.1). Overall there was little variation between industry sectors in the timeliness of court proceedings being finalised.

Discussion

This study set out to construct a database of offending committed by Australia's largest corporations and their wholly owned subsidiaries, stratified by industry sector. The data explore the frequency of corporate offending, the characteristics of that offending including whether offences were committed by subsidiaries, the types of offences committed, and the enforcement actions taken in response to that offending. This data analysis also delivers some useful findings for the construction of future databases on corporate offending in Australia.

Summary of key findings

The results of this study indicate that corporate crime is patterned and not evenly distributed. Consistent with the findings of previous international studies of corporate crime, we find that corporate offending is concentrated in specific industry sectors, with a comparatively small number of corporations and corporate groups engaging in offending. Furthermore, of those corporate groups that do offend, approximately one-third account for around three-quarters of offences.

Where the findings of this study diverge from those of previous similar research is in the industry sectors where most offending occurs. This study suggests that in Australia the financial, utilities and consumer staples sectors account for a disproportionate number of corporate offences. This is in contrast to previous studies from the United States, which have found that corporate offending is concentrated in the oil, automobile and manufacturing industries (Bradshaw 2015; Clinard & Yeager 1980).

This study has also highlighted the need to examine offending by wholly owned subsidiaries in order to understand the frequency and patterns of offending by Australian corporations. The majority of offences were committed by wholly owned subsidiary corporations rather than by their parent corporations. This diverges from the finding by Clinard and others that parent corporations were substantially more likely than a subsidiary to have been sanctioned (Clinard et al. 1979). However, as Beare points out, subsidiaries can be used to 'form a protective wall' around the parent corporation (Beare 2003: 199). It may therefore be that corporations are using subsidiaries as part of a risk management strategy.

While variation was observed in the types of offences committed by corporate groups, the most frequently occurring offences related to market integrity and misleading and deceptive conduct (including making false or misleading representations). Importantly, the study found that within the relatively narrow time period of five years, there were cases of cartel conduct, one of the most serious corporate offences in Australia. However, the larger issue appears to be the general business strategies used by corporations, with misleading and deceptive conduct, general sales tactics and, to a lesser extent, unconscionable conduct being common strategies used by the offending corporate groups.

A key finding of the research is that some corporations commit offences which come within the jurisdiction of more than one regulator. While the data show only a small number of identified instances of such offences, this highlights the value of constructing a database to monitor and report corporate offending across multiple regulators. This is particularly the case where a corporation operates across multiple industry sectors spanning jurisdictions that are within the bailiwick of different regulators. Had comprehensive administrative data been drawn directly from a broad range of regulators, it is likely that more instances of offending across multiple regulatory areas would have been observed.

We conducted analyses in two ways across the study period:

- offences both committed and finalised during that period (see *Analysis of offences occurring in the five-year study period*); and
- offences finalised during that period, regardless of when the offence was committed (see *Analysis of offences finalised in the five-year study period*).

The results highlight the need to observe corporate offending over an extended period of time. Observing offending in these two ways yielded a small increase in the number of offending corporations that were identified. However, it also revealed a 60.1 percent increase in the number of offences and a 50 percent increase in the number of offending episodes. These differences are predominantly driven by the length of time taken to identify offending and resolve enforcement action, which is partly a function of the method of enforcement adopted by a regulator in response to the specific offences committed.

Enforcement action taken in response to offending varied by industry sector. Consumer staples, communication services and utilities were the only industry sectors where civil proceedings were initiated in response to offending. This variation, however, is more a reflection of different regulatory styles being applied by the primary regulators of those industries, as these industry sectors where civil proceedings were initiated are all predominantly regulated by the ACCC. In comparison, the financial services industry is regulated by ASIC and no civil proceedings were initiated, despite it being the industry sector with the most instances of offending. That is not to imply that enforcement taken by any specific regulator is disproportionate to the offending (whether too lenient or too severe). We simply observe, in line with the responsive regulation principle of having a suite of enforcement tools of varying severity available to respond to offending (Ayres & Braithwaite 1992), that the regulators have those tools. However, there appears to be variation, based upon a regulator's operating style, in how likely it is that corporations will receive a particular enforcement response.

On a related note, the results indicate that a number of different regulatory sanctions have been applied to instances of corporate offending. This is an important finding from a regulatory perspective, as it reveals that regulators and courts are using a range of regulatory tools to remedy wrongdoing. This is consistent with Howlett's observation that, in practice, a mix of instruments is required to achieve the desired regulatory outcome (Howlett 2015).

Learnings from dataset construction

A secondary aim of this project was to examine the feasibility of developing a larger national database of corporate offending across multiple regulators. After undertaking this study, our key learnings for that process are as follows:

- Regulators publish their enforcement data in multiple ways (eg infringement notice registers, enforceable undertaking registers, and media releases). This in turn leads to variation depending on the information source and on the extent to which details of specific offences and outcomes can be ascertained. At times, extensive triangulation of data was needed to obtain the most basic of offence and enforcement information.
- Within the same regulator and enforcement action type, there is at times variation in the information available to complete a minimum dataset. This is particularly the case where there were negotiated outcomes—including taking no action in response to a corporation refunding or otherwise remediating affected customers—and, in some cases, administrative actions, such as enforceable undertakings. Again, at times, extensive triangulation of data was needed to ascertain basic details of the offending.
- Within regulators, when enforcement action relates to an offending episode (where the same or similar conduct occurred over an extended period of time) data on the number of specific counts of offences committed within that offending episode are often not published. The exception to this is where the matter proceeds to court, is contested, and the regulator is successful in that prosecution. In those cases, detailed offence information can be obtained from the court judgement. It is acknowledged that, in those cases, the regulator may be prosecuting only a select number of offences for which they have sufficient evidence, which therefore may not represent the total number of offences committed in the offending episode. However, this more accurately reflects the number of offences than having to count the offending episode as a single offence, as was the case in some instances.
- There is limited consistency between the data items published by different regulators about offending and resulting enforcement action. For example, ASIC's infringement notice register provides a copy of the infringement notice, which details the date, place and circumstances of the alleged offending, and the cost of the infringement notice. On the other hand, the ACCC's infringement notice register provides only the infringement notice number, the date on which the notice was paid, and the section of the relevant Act contravened.
- The most comprehensive information available on specific offences tended to come from matters where court proceedings were instituted and defended. In those cases the court tended to particularise in detail each specific offence for which the proceedings were instituted.

Together these findings indicate that, to construct and maintain a national database of corporate offending, data should be drawn directly from regulatory agencies but also that extensive preparatory work may be required. As a first step a minimum dataset would need to be identified. Without the benefit of familiarity with each regulator's data collection systems, counting rules and so forth, it may be that existing systems and processes would require modification to be standardised. Protocols for information sharing would also be required, along with government investment in required infrastructure and operating expenses. However, as outlined below, that investment would produce a number of benefits.

As a final observation we note that, in constructing a national database, the opportunity also exists to limit the extent to which a regulator's regulatory framework and operating style can mask offending. It was observed that the FWO dealt with breaches of some regulatory obligations through means other than enforcement action—for example, in a number of cases of unfair dismissal that were identified in the data collection process. However, those cases were pursued in civil proceedings by the aggrieved employee, rather than being subject to prosecution by the regulator. This placed them outside the scope of this study. Similarly, employees may elect to initiate civil proceedings in response to a workplace injury as an alternative to making a formal complaint to the responsible regulatory agency. The net effect of this behaviour is that any corporate wrongdoing in these cases may not proceed to formal investigation and enforcement action by the regulator. On the other hand, some forms of wrongdoing may be more likely to be reported to regulatory agencies as this is the most viable option for employees, consumers or competitors to seek redress in those cases. This variation is similar to that found in non-corporate crime data, where rates of victim reporting to police vary across offence types (Hart & Rennison 2003; Tarling & Morris 2010). However, in corporate crime the opportunity exists to partially expose the 'dark figure' of crime by including in a national database those civil judgements in cases where employees, consumers or competitors have successfully addressed corporate wrongdoing that breaches legislative obligations. Consideration could be given to developing strict criteria for including relevant civil judgements, which would provide a more holistic reflection of each corporation's offending behaviour.

Limitations of the project

While the methodology used does address some limitations identified in previous studies, three primary methodological limitations remain. First, the level of offending within the sample may not reflect the broader pattern for all Australian corporations and industries. The sample in this study contained the three largest corporations in each sector, who are likely to have substantial market share. Slapper and Tombs (1999) highlight the relationship between corporate crime and a corporation's profitability and market share. This is consistent with our finding that many offences related to obtaining or retaining market share or to marketing and sales strategies. However, it is not clear whether the corporations in the sample would be more or less likely to offend than smaller competitors.

Second, the methodology did not capture all of the offending reported to or finalised by regulators. Regulatory agencies and media outlets are selective in which matters they report, and their reports do not always contain sufficient detail to enable collection of the required data. However, it is reasonable to anticipate that the most serious matters are more likely to be publicised and reported. Capturing this breadth of offences enables the research questions to be addressed in a meaningful manner, despite the data not providing a complete history of offending.

Third, well-resourced regulators may be more efficient in detecting and successfully processing corporate offenders than under-resourced regulators. The implications are that, while results may indicate higher levels of offending in some spheres, in actual fact this may be the consequence of a well-resourced regulator engaging in higher levels of surveillance and enforcement.

Despite the broad data collection strategy, the data largely reflect offences regulated and enforcement taken by ASIC and the ACCC. A small number of offences within the jurisdiction of the FWC/FWO were identified. However, as outlined above, there were also a number of civil actions taken by former employees that came within the jurisdiction of the FWC/FWO. These matters were resolved through civil proceedings initiated by the former employees and were thus outside the scope of the study. None of the offences or enforcement actions against the corporations studied were identified as being initiated by the ATO or other regulators. Instances were identified where some corporations were in dispute with the ATO about whether they had met their legislative obligations. However, those matters were predominantly resolved through corporations initiating civil proceedings challenging the ATO (eg challenging an ATO tax liability assessment). That is not to say that the ATO did not identify and initiate enforcement proceedings against any of the corporations. It may be the case that the absence in the data of identified offending and enforcement action by the ATO results from the way ATO enforcement actions are taken and publicised. An alternative explanation is that, when it comes to tax obligations, large corporations seek to comply with the law and have well developed systems and processes for doing so (Braithwaite 2003). The results of this study may therefore be an artefact of the practices of the specific regulators from which the data were drawn.

While in theory most corporations are regulated by all four of the national business regulators from which data were primarily drawn, those regulators by their nature tend to focus more on particular industries. For example, while ASIC is the regulator for all corporations law regulatory obligations, it is also the conduct regulator for the financial services sector. Similarly, the ACCC has a key role in regulating corporations' dealings with the public. The public are more likely to regularly interact with corporations in the consumer staples, utilities and communication sectors, with ASIC regulating consumers dealing with corporations in the financial services sector. This may mean that those corporate groups come under more regulatory scrutiny from the ACCC than from other regulators.

Implications for policy and practice

Over the past decade there has been an increased focus on corporate crime in Australia. Parliamentary inquiries, research by Grudnoff et al. (2016), and the 2019 report from the Banking Royal Commission have all served to further sharpen that focus. Against that backcloth, the current research has significant implications for policy and practice, both in the regulation of corporate offending in Australia and in providing transparency as to the level of offending and regulator response. We will first outline policy implications arising from the research findings, then present the case for establishing a national database of corporate offending.

The high concentration of corporate offending in specific industries would tend to indicate that some industries provide greater opportunity structures for offending, and are therefore worthy of concerted regulator attention. However, at the national level there appears to be little coordination of resources across regulatory agencies to high-risk industries. Regulatory agencies are separately funded and set their own strategic and enforcement priorities. Despite a specific focus by some individual regulators on certain high-risk industries (and corporations), other regulators may be blind to the criminogenic nature of those industries. Given that the results have demonstrated that some corporate groups offend across multiple regulatory spheres, having a coordinated national approach to corporate regulation which identifies and targets those industries and corporations with the greatest opportunity to offend would most likely result in a significant decrease in corporate crime and associated harms.

The findings show that some corporate groups are recidivists for whom the norm is to receive a relatively low-level and delayed regulatory response which is unlikely to deter further offending. There is some research evidence that the responsive regulation approach of having, and in a specific case applying, multiple enforcement options tailored to corporate offending is effective in preventing further wrongdoing (Benson & Simpson 2018). However, we found that in some industries, particularly the financial sector, regulatory action tends to be limited to lower-level sanctions even for repeated offending. Deterrence theory holds that the severity, certainty (likelihood) and celerity (swiftness) of sanction determines whether the undesirable behaviour will be continued or repeated. In the corporate crime sphere, research on deterrence tends to find mixed results. While some studies (eg Simpson & Koper 1992) have found that sanction severity is more important than certainty and celerity, industry characteristics are also a significant contributing factor as to whether offending will continue. In general the law has been found to have a modest deterrent effect upon corporate crime, with punitive sanctions having limited utility (Simpson et al. 2014). As Sparrow (2000) points out, regulatory practice is a craft, with Ayres and Braithwaite (1992) highlighting that it needs to be responsive to the context in which the offending is occurring. The answer, then, is not simply to ratchet up penalties. The results of this research highlight that opportunities exist to improve regulatory practice in much more sophisticated and theoretically driven ways.

In addition to improving regulatory practice around enforcement, regulators could focus attention on the opportunity structures present in specific types of commonly occurring offences. For example, the high incidence of misleading and deceptive conduct offences could be a specific target. Benson and Simpson (2018) highlight that regulatory strategies may be adopted to increase transparency and therefore make it more difficult to commit such offences. Through an analysis of the types of misleading and deceptive conduct offences which occur within specific industry sectors (eg those facilitated by telephone and door-to-door marketing and sales), regulatory measures could be put in place to reduce the likelihood of these kinds of offences being committed, and to increase the chances that, if they are committed, they will come to the attention of the regulator.

The high incidence of offending by wholly owned subsidiary corporations raises significant policy issues. From a commercial perspective, engaging in high-risk (and, it would appear, unlawful) activities through a wholly owned subsidiary corporation is logical as it protects the parent company both from any adverse publicity which may arise from the wrongdoing and from any subsequent prosecution action which may follow. In a criminological sense, the use of a subsidiary allows the parent corporation, its directors and executives to morally disengage from the offending by laying the blame upon the subsidiary. This is despite the fact that the parent company exercises, or has the ability to exercise, control over the subsidiary. If it were possible to hold a parent corporation wholly or partly responsible and liable for offences committed by a subsidiary corporation, this would reduce the benefits of using a subsidiary corporation for activities which are likely to result in offending behaviours. Similar to the recent trend of holding directors personally liable for some offences committed by the corporation, holding the parent corporation liable would place increased pressure upon that corporation to ensure it is appropriately discharging its obligations. This policy suggestion would require reforms to corporations legislation, which could take some time to achieve. In the interim period, regulators could, as a matter of practice, routinely and prominently highlight the parent corporation when publicising regulatory complaints or action taken against a wholly owned subsidiary corporation.

Aside from the policy and practice implications which arise directly from the findings, this research has highlighted the benefits of establishing a national database which combines information across regulatory agencies. This study combined offending and enforcement data, predominantly from a small number of large regulatory agencies. Extending that data collection to a broader range of federal and state/territory regulatory agencies would provide a richer exploration of the extent and nature of corporate offending in Australia. However, as mentioned above, extensive work would undoubtedly be required to develop and administer a national database.

This study, along with previous research, has identified the minimum data needed from regulators to begin to establish a central database of corporate offending. In addition to basic offence details such as date, place, offence type, enforcement action type and outcome, this study has highlighted the benefit of linking data from parent corporations and their wholly owned subsidiaries. As a precursor to enabling corporate crime data to be meaningfully combined, standardised public reporting of minimum data on offending and enforcement could be implemented for national regulators. By agreement with the Council of Australian Governments, that could be extended to state and territory regulators to provide consistent reporting by all Australian regulators.

The benefits of establishing minimum data collection and reporting standards for regulatory agencies and a national database of corporate offending are threefold. First, it would permit the extent of identified corporate offending to be ascertained and monitored. Second, it would provide intelligence on corporate offending, which could be used to guide resource allocation to regulatory agencies. Third, it would provide for improved regulatory and judicial responses to corporate crime.

In recent years the increased public and political focus on corporate crime has led to a range of parliamentary inquiries and other fact-gathering activities to better understand the extent and nature of corporate offending. While the rich contextual data—from testimony provided by corporate executives, regulatory agency officials and victims—were required to understand the context in which corporate offending occurs and harm is done, the ability to easily provide basic yet holistic offending data across industries, corporations and corporate groups is currently limited. Establishing minimum reporting standards for offences and enforcement action, and, ideally, establishing a national database, would be important steps towards quantifying the extent and nature of corporate offending and, in turn, developing more informed public policy responses.

Corporate regulators are typically under-resourced (Cameron 2002; Steen, McGrath & Wong 2016). Regulators have adopted a range of strategies for prioritising enforcement resources, including targeting those corporations which present the greatest risk of offending or harm to the community (Black 2010). The ability to identify corporate offending across a range of regulators provides agencies with an enhanced ability to assess the potential risk of offending and harm across multiple regulatory domains. For example, a range of big data analytic strategies could be employed to conduct risk assessments of corporations and corporate groups operating across multiple sectors and regulatory jurisdictions. Applying the responsive regulation principle of networked regulation (Braithwaite 2006), the finite regulatory resources could then be applied to more efficiently target those corporations or offences which produce the greatest offending or harm.

Similarly, enforcement policies among Australian regulators are largely centred on responsive regulation, which entails first selecting the appropriate regulatory tool or tools to secure compliance, and then escalating the severity of sanction when dealing with ongoing failure to comply (Ayres & Braithwaite 1992). If regulators had access to a central database detailing a corporation's offence history, the intensity of enforcement actions imposed upon that corporation could be escalated over time to more severe sanctions—for example, court proceedings—rather imposing a more lenient administrative action, such as an infringement notice. In this way, regulators could also have regard to the corporation's overall history of compliance with regulatory obligations.

On a related note, the absence of a central database of corporate crime may be undermining court-imposed regulatory sanctions. A principle of punishment is that continued offending will result in increasing severity of sanctions to deter offending (Ayres & Braithwaite 1992; Gunningham 2007). However, the absence of a central database recording all instances of corporate crime means that judicial decisions are made without knowledge of a corporation's history of offending under other regulatory regimes. That is, when regulatory agencies make sentencing submissions at present, they typically only refer to contraventions and penalties within the prosecuting agency's remit, as those arising from other regulatory spheres are not known to them. The court's lack of knowledge of prior offending in other domains is likely to affect any penalty imposed upon corporate offenders, with offending sometimes being erroneously viewed as a one-off breach, when in actual fact a corporation may have an extensive history of violating regulatory requirements administered by other regulators. The net result is that corporate reoffenders are likely to receive a more lenient sentence, thereby undermining regulator efforts to secure future compliance.

A national database of corporate offending would also serve to generally improve transparency and drive ethical business practices in Australia. There is an increasing focus on businesses operating ethically. For example, Australian Government departments have implemented the Commonwealth Procurement Rules to require corporations tendering for government contracts to disclose whether they have been subject to judicial decisions about employee entitlements, or engaged in practices that have been found to be dishonest, unethical or unsafe (Department of Finance 2017). A national database of corporate offending would enhance the ability of government and commercial partners to undertake due diligence in awarding contracts. Moreover, with an increasing focus in supply chain risk (Zsidisin & Ritchie 2009), an increased ability for corporations to complete due diligence upon commercial partners may assist in generally increasing the ethical operations of Australian businesses. Potential commercial partners, employees and consumers in the United States now have the ability to examine the offending history of corporations and subsidiaries, with the introduction in 2016 of Violation Tracker (Good Jobs First 2016), a central database bringing together corporate offence data from a number of regulatory agencies.

A national database would also enhance performance monitoring of regulatory agencies, with benchmarking against similar regulators and across different jurisdictions. Benchmarking is a useful strategy for helping to drive performance (Kouzmin et al. 1999; Voss, Ahlstrom & Blackmon 1997). However, in the context of regulatory agencies it would need to be done carefully to ensure regulators continued to appropriately consider the context which they operate in, along with the corporations they regulate. Other performance measures, such as time to recidivism, may therefore be more appropriate than looking at offence counts or the proportion of particular enforcement actions undertaken. However, one benefit of consistently reporting and comparing specific enforcement actions taken against large corporations is that this may assist in reducing the likelihood of regulatory capture.

Overall, then, the development of a central database of corporate offences across regulatory agencies would be significant both for corporate crime research and in advancing regulatory practice, strengthening corporate governance and, ultimately, reducing corporate offending in Australia.

Directions for future research

The results of our study indicate three primary recommendations for future research. These are:

- to link all offence and enforcement action data (not just publicly available data) across the four primary national business regulators—this would also be a pilot for establishing a national database;
- having linked the data from the regulators, to undertake analyses to examine the patterns of enforcement and tool use which have the greatest ability to reduce corporate crime; and
- to then establish the level of harm caused by corporate offending.

A research project in which the four national business regulators are partners would be ideal for undertaking the preliminary work required for a national database. The initial phase of the project would examine data collection systems, processes and counting rules. Protocols could then be co-designed with the regulatory agencies to enable the data to be effectively linked, subject to information-sharing agreements.

Having linked the data across the four regulators, the opportunity would then exist to develop empirically based strategies to identify the most effective means of regulating specific corporations and industries. For example, future research could establish which specific enforcement tools and combinations of enforcement tools yield the greatest decreases in offending. A key principle of responsive regulation is that regulators initially respond to offending with the least punitive sanction relative to the offending in order to secure compliance (Ayres & Braithwaite 1992; Braithwaite 2011). However, to date there has been little empirical research to aid regulators in determining which of the least punitive enforcement tools, or combinations of tools, are likely to reduce offending—in other words: what works for whom and when? Linking the data across the four regulators would be an important first step in addressing that question.

While we have established the frequency of offending by the corporations and corporate groups in our sample, we have not established the level of harm caused by that offending. Not all offending is equal (Sherman, Neyroud & Neyroud 2016); some offences cause more harm to consumers, employees and markets than others. In the non-corporate crime sphere, there is an increasing recognition that the harm caused by offending is more important than the number of offences. Crime harm indices have been developed in a number of international jurisdictions, including the United Kingdom and the United States (Ratcliffe 2015; Sherman, Neyroud & Neyroud 2016). However, the methodologies used to develop those crime harm indices are not feasible in the Australian context (see Ransley et al. 2018). Further research is required to develop and test methodologies for developing a corporate crime harm index in Australia. The approach adopted by Ransley et al. (2018) may hold promise in that regard. In combination with a national database of corporate offending, the development of a corporate crime harm index would increase the ability of regulators to target resources to those offences which are most harmful to the community.

Concluding remarks

The research presented in this report is an important first step towards understanding and in turn effectively controlling corporate offending in Australia. While an array of parliamentary inquiries, previous research and a royal commission have identified offending by our nation's largest corporations, this is the first empirical study to systematically examine corporate crime across multiple industry sectors and multiple regulators and the first to include offending by subsidiary corporations. The results are important for painting a picture of corporate crime in the Australian landscape and considering how to address it. However, perhaps the most important findings of this study are the clear opportunities and benefits presented by establishing a national database of corporate offending.

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