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# **BUSINESS REGULATION IN AUSTRALIA**

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## PREFACE

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Market-based societies bring with them the need for systems of business regulation both to protect businesses from the excesses of unrestrained competition and to protect the public from business abuses. It is therefore of vital significance that the nature and limits of business regulatory mechanisms be understood. While this has been a long-established concern in countries such as the United States and Britain, there is a paucity of useful Australian literature on this subject. This volume seeks to bridge this void by bringing together for the first time leading Australian lawyers, economists and sociologists who have sought to provide a more sophisticated and more theoretically informed understanding of some central features of this field.

This book offers a fresh approach to a vital aspect of Australian business law, namely, the nature and limits of business regulation. It critically examines some key dilemmas and failures in a number of major Australian approaches to the regulation of business. It also makes various proposals for reform in this area as well as for the improvement of our understanding of its many problems.

The first part of the volume consists of a series of theoretically-oriented studies, looking at legal, economic and sociological mechanisms and ideas. The second part consists of a set of case studies of the regulation of business. These case studies cover such areas as advertising and media regulation, banking and land-use regulation, trade practices and safety regulations, as well as a case study dealing with the regulation of the professions.

*Business Regulation in Australia* will be of interest to informed members of the business community generally, as well as to lawyers, accountants and policymakers. The book will be useful for those studying at post-graduate and advanced undergraduate levels in colleges of advanced education and universities, in such courses as law, economics, business management and administration, where the concern is with the broader aspects of Australian regulatory law and practice.

Most of the essays included in this volume were completed in 1983. The theoretical and policy perspectives offered here continue to be relevant to topical issues.

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## SANCTIONS AGAINST CORPORATIONS: DISSOLVING THE MONOPOLY OF FINES

*Brent Fisse and John Braithwaite*

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## Introduction

Criminal and civil violations by companies occur frequently in Australia as elsewhere, the effect being to impose an inestimable burden on our people and economy. The gravity of this social problem is now publicly obvious, as scandal after scandal continues to unfold (e.g., the meat substitution fraud — Royal Commission into Meat Industry 1982, the corporate tax frauds uncovered by the McCabe-Lafranchi Report 1982 and the Royal Commission on Painters and Dockers 1982, Nugan Hand, and the Appin Mine disaster (*Hopkins*, 1981)). Yet the control of corporate crime in Australia has always lacked teeth, partly because it is much easier said than done to enforce the law against guilty individual officers or employees (*Fisse*, 1978, pp. 371-382), and partly because the punishment of corporations has largely been monopolised by the fine, a sanction of limited deterrent capacity (*Stone*, 1975, Chapter 6; *Braithwaite*, 1984, Chapter 9). These obstacles are well-illustrated by the *Trade Practices Act 1974-1981* (Cth.), a statute often said to symbolise the coming of an Australian New Deal, but lacking the sanctions needed consistently to turn up trumps.

The aim of this chapter is to set out the main reasons why the monopoly of the fine as a punishment or penalty against corporations is unsatisfactory and to outline how the limitations of fines conceivably might be overcome by introducing four additional sentencing options: equity fines, probation, publicity orders, and community service orders. Our focus is upon punitive sanctions against corporations, but it should be realised that equity dilution, probation, publicity, and community service can also be used as civil penalties or civil remedies, depending on the circumstances of their application: just as exaction of money can take the form of fines, monetary penalties or damages, these alternative means of regulation can be deployed as punishments, penalties or remedies, depending on the manner and purposes of their use.

## Limited deterrent threat of fines

The *Trade Practices Act*, like many other business regulation statutes, relies almost totally on fines or civil monetary penalties as the means of sanctioning corporate violators (*Trade Practices Act 1974-1981* (Cth.), sec. 76 and 79, but note that conditional release on bond without conviction is possible under the *Crimes Act 1914-1982* (Cth.), sec. 19B; see *John C. Morish Pty. Ltd. v. Luckman* (1977) 16 S.A.S.R. 143; *Sheen v. Geo. Cornish Pty. Ltd.* (1978) 22 A.L.R. 155). The range of available remedies is much wider, provision being made for injunctions (sec. 80), corrective publicity (sec. 80A), and compensatory and other curative orders (sec. 87). Useful as this array of remedial orders undoubtedly is, effective means of punishment are also required to deter corporations from non-compliance. This is where the law breaks down: heavy reliance is placed on fines or monetary penalties which, although advantageous in some respects (e.g., ease of administration and recoupment of the costs of enforcement), are subject to many severe limitations.

To begin with, fines (or monetary penalties) against corporations are targeted at the corporate entity and not at any personnel who should be held individually accountable for the offence involved. This would matter little if any personnel at fault were brought to justice in proceedings for individual liability under the *Trade Practices Act*, but very few proceedings have in fact been brought against corporate officers or employees (see, e.g., *Trade Practices Commission*, 1978, pp. 72-75 and 77; *Fisse*, 1980, p. 183). Given the limited resources of the Trade Practices Commission, it is inevitable that the main targets of prosecution be corporations, and that individual accountability be attained by pressurising corporate defendants to take internal disciplinary measures. Fines poorly reflect this strategy since they provide no guarantee that a corporate defendant will proceed to take disciplinary action; a disciplinary programme may be too disruptive, too embarrassing for those exercising managerial control, or too fertile a source of evidence for subsequent civil litigation against the company or its officers. In other words, the buck can easily stop with a corporate pay-out, not because of any socially justified departure from the traditional value of individual accountability, but rather because that is the cheapest or most self-protective course for a corporate defendant to adopt.

A second limitation of fines against corporations is that courts and legislatures have rarely been willing to set them high enough to provide a real deterrent. Under the *Trade Practices Act*, the maximum fine (\$50,000 under sec. 79) or monetary penalty (\$250,000 under sec. 76) is low compared with the profits which may flow from misleading advertising or restrictive trade practices. Moreover, account must be taken of the slender risk of prosecution and conviction: as is a matter of public knowledge, the Trade Practices Commission has the resources to launch proceedings only in highly select cases (*Trade Practices Commission*, 1982, pp. 15-18 and 78-80). Accordingly, as many commentators have suggested, why not resort to much higher fines? (See e.g., *Elzinga and Breit*, 1976, Chapter 7.) This solution has severe limits, however, because corporate defendants often do not have the resources to pay fines in the amount required for effective deterrence. As Coffee has explained, fines against corporations are confronted by a "deterrence trap":

"The maximum meaningful fine that can be levied against any corporate offender is necessarily bounded by its wealth. Logically, a small corporation is no more threatened by a \$5 million fine than by a \$500,000 fine if both are beyond its ability to pay. In the case of an individual offender, this wealth ceiling on the deterrent threat of fines causes no serious problem because we can still deter by threat of incarceration. But for the corporation, which has no body to incarcerate, this wealth boundary seems an absolute limit on the reach of deterrent threats directed at it. If the 'expected punishment cost' necessary to deter a crime crosses this threshold, adequate deterrence

cannot be achieved. For example, if a corporation having \$10 million of wealth were faced with an opportunity to gain \$1 million through some criminal act or omission, such conduct could not logically be deterred by monetary penalties directed at the corporation *if the risk of apprehension were below 10%*. That is, if the likelihood of apprehension were 8%, the necessary penalty would have to be \$12.5 million (i.e. \$1 million times 12.5, the reciprocal of 8%). Yet such a fine exceeds the corporation's ability to pay. In short, our ability to deter the corporation may be confounded by our inability to set an adequate punishment cost which does not exceed the corporation's resources" (Coffee, 1981, p. 390).

Third, fines against corporations pose a monetary threat which is not well-tuned to the non-financial decision-making values which pulse through organisations. Although it is often said that corporate activity is normally undertaken to reap some economic benefit and that corporate decision-makers choose courses of actions based on a calculation of financial costs and benefits (see e.g., *Harvard Law Review*, 1979, p. 1,235), non-financial values are also important. Managerial motivation, like human motivation in general, is not confined to satisfaction of monetary want, but includes the urge for power, the desire for prestige, the creative urge, and the need for security. Since fines against corporations touch upon these managerial motivations only obliquely, their sanctioning capacity is necessarily limited. Furthermore, although profit may be the predominant goal of business corporations from an external viewpoint, the profit goal is often overshadowed within a corporation by the immediate micro-goals of organisational sub-units. This phenomenon has been well-described by Stone:

"As corporations become more complex, they tend to subdivide into various departments according to geographical divisions (manufacturing areas and distribution territories), functionally defined groups (finance, sales, advertising, legal) ... The central organisation cannot leave each of those groups at large to realise 'profit' as it sees best. Rather, the farther and farther down the operational ladder one moves, the more the 'profit goal' has to be translated into sub-goals — targets and objectives for the shop, the department, the plant, the division, the subsidiary. It is these sub-goals that define the task environment of the people actually engaged in production at such a plant, not some abstract 'corporate profit'" (Stone, 1975, p. 43).

It should also be remembered that corporate personnel conceive their own ends in terms which may diverge substantially from the goals of their corporation or its organisational sub-units. For instance, lower management may falsify pollution compliance reports to avoid closure of an obsolete plant, not so much to maximise profits for the firm as to save their own jobs or reputation in the local community.

Finally, in theory, fines against corporations are supposed to catalyse reforms but in practice organisational reform need not occur. Corporate managers may decide to treat fines as recurrent business losses for shareholders or workers to bear. Depending upon competitive pressures, those losses might even be passed directly on to consumers. Preventive procedures or policies may be revised, but there is no obligation to react in this way, even where the offence subject to sentence resulted from palpably defective internal controls. In this regard, it is instructive to reconsider the findings of Hopkins' empirical study of the impact of prosecutions and fines under the *Trade Practices Act* (Hopkins, 1978). In the 17 case histories of misleading advertising studied, the offences committed by 15 of the companies were interpreted as largely attributable to defective standard operating procedures after prosecution. Two made minor changes which were less than fully satisfactory. Two further companies made no changes and for the two remaining companies information was unavailable. The conclusion drawn by Hopkins was that:

"[w]here defective operating procedures were involved ... the prosecution can be said to have led to significant organisational improvement in at least 60% of cases. On the face of it the prosecutions have had a substantial preventive effect on the companies concerned" (Hopkins, 1978, pp. 21-22).

However, in approximately 40% of the cases studied, the companies concerned were allowed to get away without putting forward a responsive programme of organisational reform. The further conclusion may thus be drawn that, although fines maximise corporate freedom by trusting corporations to exercise adequate internal control, they are inept where, as unfortunately is far from uncommon, companies cannot be trusted to institute adequate crime-preventive controls.

### *Equity fines*

One possible alternative to fines is equity dilution, an imaginative approach recently proposed by Coffee (1981, pp. 413-424). The proposal, in essence, is this:

"[W]hen very severe fines need to be imposed on the corporation, they should be imposed not in cash, but in the equity securities of the corporation. The convicted corporation should be required to authorise and issue such number of shares to the state's crime victim compensation fund as would have an expected market value equal to the cash fine necessary to deter illegal activity. The fund should then be able to liquidate the securities in whatever manner maximises its return" (Coffee, 1981, p. 413).

This proposal could be fine-tuned to advantage in various ways, as by providing for a statutory list of appropriate beneficiaries of the shares

created (e.g., in the context of environmental offences, the Australian Conservation Foundation; with consumer protection offences, the Australian Federation of Consumer Organisations) but the basic idea — watering-down shares rather than exacting cash fines — is a classically straightforward piece of lateral thinking.

The main advantage of equity fines, as compared with cash fines, is that they would side-step the deterrence trap arising where the liquid assets of a corporation place an upper limit on the fine which is collectable, and where this upper limit is less than the fine required to deter corporate crime. The beauty of the equity fine is that, by appropriating fixed as well as liquid assets, it raises the upper limit of the amount collectable. Moreover, the upper limit is raised further by the capacity of the equity fine to get at future assets in addition to current assets: the public seizes not just whatever cash the company can rake up to pay a fine, but a share in future earnings as well as ownership rights in its plant, equipment and property investments. The basic explanation for this, as Coffee has indicated, is that the market valuation of most companies vastly exceeds their cash resources:

“... the equity fine is a response to the basic precept of the economist that the value of the firm is the discounted present value of its expected future earnings. If one recognizes that this ‘going concern value’ of the firm typically exceeds its ‘book’ or liquidating value, then the real deficiency of cash fines is that they cannot be paid out of expected earnings, but it is precisely this source of value against which the equity fine is levied. To give an example, a young company with excellent prospects may have a very low book value, limited cash resources and little borrowing capacity with financial institutions. Yet, because of its expected future growth, its stock may trade at a high price-earnings multiple. It is essentially immune from high cash fines because it has only modest liquid assets, and thus it may be tempted to risk legal sanctions. But an equity fine permits society to reach its future earnings today by seizing a share of the firm’s equity (which is, of course, equal in value to the market’s perception of the discounted present value of those earnings)” (Coffee, 1981, pp. 419-420).

A related advantage of equity fines over cash fines is that they are borne by shareholders rather than by persons beyond the circle of corporate profit-sharing. Cash fines large enough to achieve deterrence are at risk of being passed on to consumers as higher prices, or to workers through lay-offs or cut-backs in employment opportunities. By contrast, equity fines would not occasion the same unwanted spillovers: shareholders would bear the burden just as other losses are borne on the downside of their decision to invest in shares (Braithwaite, 1981).

Useful as equity fines would be as a means of outflanking the deterrence trap, standing alone they could not be expected to overcome

the other major limitations of cash fines against corporations, namely ~~circumvention of individual accountability~~, lack of congruence with non-financial values in organisational decision-making, and non-assurance of organisational reform.

Because equity fines would bear down more heavily than cash fines on shareholders, securities analysts and stockbrokers might begin to caution against buying into companies with inadequate systems to ensure compliance with the law. To the extent that severe equity fines actually were being imposed, shareholders might also insist upon internal disciplinary measures. Thus, there could be more chance that punishing the corporate entity would result in the disciplining of individuals within the organisation. However, there would be no guarantee of this; shareholders might well decide to cut their losses and let managers get on with the business of making money or, as another option, exit towards other investment opportunities instead of hanging on to express their voice.

As regards congruence with non-financial values in organisational decision-making, equity fines would also fall short. Dilution of equity could have some adverse effects upon corporate and managerial prestige and power, yet the impact of the sanction would remain predominantly financial. Coffee has urged that equity fines would play on managerial fear of hostile take-over bids, the point being that vesting a large marketable bloc of shares in a free agent such as a crime victim compensation fund would make a corporation a more inviting target for a take-over operation (Coffee, 1981, p. 418). However, to the extent that take-overs are not blocked by legal or political constraints upon anti-competitive behaviour, the bloc of shares created by an equity fine would normally have to be very large indeed to create any serious risk of take-over for a large company.

Nor would equity fines assure that corporate defendants take adequate organisational precautions against re-offending. By reason of the greater possible severity of equity fines, corporations could be put under more pressure to take such precautions, but that increase in pressure would stop short of intervention in the internal workings of the organisation. Accordingly, like cash fines, equity fines would not guarantee the correction of violation-prone procedures or policies; the organisation would remain a black box prodded by the law from outside.

### *Probation*

Another prospective alternative to fines against corporations is probation, a sentence used increasingly in the United States but which does not appear to be open under the wording of existing probation legislation in Australian jurisdictions (but note the availability of conditional release on bond without conviction under the *Crimes Act 1914-1982* (Cth.), sec. 19B). Various proposals have been advanced for more extensive reliance upon this option, probation being a convenient

platform upon which to base a number of more particularised sanctions (see e.g., *Coffee*, 1981, pp. 448-459; *Yale Law Journal*, 1979). Of these more particularised sanctions, the main possibilities are probationary orders mandating internal discipline or organisational reform.

Internal discipline orders have been tentatively proposed by the Mitchell Committee in South Australia (*South Australia*, 1977, pp. 361-362), the suggestion being as follows:

“Essentially, internal discipline orders would require a corporation to investigate an offence committed on its behalf, undertake appropriate disciplinary proceedings, and return a detailed and satisfactory compliance report to the court issuing the particular order. In the event of unreasonable non-compliance corporate criminal responsibility would be necessary in some cases, but usually it would be sufficient to impose individual criminal responsibility on those personnel specified in the order as responsible for securing compliance. Unlike the system of Frankpledge, the object of internal discipline orders thus would not be to produce guilty individuals to the prosecuting authorities, but to cast part of the burden of enforcement squarely upon the enterprise on whose behalf an offence has been committed.”

At first blush, this proposal may seem unworkable in so far as it would require corporations to confess wrongdoing on the part of its officers or employees and then administer punishment itself, but the empirical reality is that the approach has been used with some success in the United States, most notably by the Securities and Exchange Commission in its campaign against foreign bribery. The basic strategy is that, if the corporation and nominated managerial personnel are threatened with severe enough sanctions in the event of non-compliance (e.g., equity fines or adverse publicity orders in the case of the corporation; jail or weekend detention in the case of personnel), compliance commends itself as the lesser of two evils. It might also be wondered whether this approach would involve too great a sacrifice of due process for individuals subjected to corporate internal discipline (e.g., non-availability of the privilege against self-incrimination), but it would be a piece of fanatical libertarianism to suppose that internal disciplinary systems should carry the same panoply of procedural protections as the criminal justice system: subjection to internal corporate discipline, serious as it often can be, involves neither the expression of condemnation by the state via the stigmatic clout of a criminal conviction, nor the imposition of the brutish sentence of jail.

Organisational reform orders have been proposed, under various labels, by a number of reform agencies and commentators (see e.g., *American Bar Association*, 1980: 18.162-163, 18.179-184; *Fisse*, 1973; *Stone*, 1977; *Yale Law Journal*, 1979). The basic gist is to require preventive policies or procedures to be modified or introduced where

necessary to guard against repetition of an offence. This approach has recently been recommended under the American Bar Association's *Standards for Criminal Justice* (1980) (18.162-163; 18.179-184) as Standard 18.2.8(a)(v):

“Continuing judicial oversight. Although courts lack the competence or capacity to manage organizations, the preventive goals of the criminal law can in special cases justify a limited period of judicial monitoring of the activities of a convicted organization. Such oversight is best implemented through the use of recognized reporting, record keeping, and auditing controls designed to increase internal accountability — for example, audit committees, improved staff systems for the board of directors, or the use of special counsel — but it should not extend to judicial review of the legitimate ‘business judgment’ decisions of the organization’s management or its stockholders or delay such decisions. Use of such a special remedy should also be limited by the following principles:

- (A) As a precondition, the court should find either (1) that the criminal behavior was serious, repetitive, and facilitated by inadequate internal accounting or monitoring controls or (2) that a clear and present danger exists to the public health or safety;
- (B) The duration of such oversight should not exceed the five- and two-year limits specified in Standard 18.2.3 for probation conditions generally; and
- (C) Judicial oversight should not be misused as a means for the disguised imposition of penalties or affirmative duties in excess of those authorised by the legislature.”

It should be noted that this proposal would not require the probation service to assume onerous new duties of corporate supervision: where supervision is required, reliance would be placed on “an experienced corporate attorney, a firm of auditors, or a professional director” (*American Bar Association*, 1980, 18.182-183). Rather, the main question surrounding the ABA model is whether it goes far enough toward providing an effective sanction: the limitations imposed under Standard 18.2.8(a)(v)(A)(2), and (C) make the sentence of continuing judicial supervision remedial in nature whereas in cases of serious wrongdoing it is difficult to understand why corporations should not be punished in a way which requires them to take more extensive steps than those which can be imposed in the context of injunctive remedies (e.g., why shouldn't an egregious offender be punished by an organisational reform order requiring it to run a few extra miles by instituting innovative compliance controls?). One possible explanation for conservatism on this front is the traditional connotation of probation as a soft sentencing option. If so, provision should be made for explicitly punitive injunctions against corporations as well as for corporate probation.

Were internal discipline and organisational reform orders available as probationary conditions or punitive injunctions, they could be used to overcome the limitations suffered by fines against corporations. First of all, internal discipline orders would enable corporate offenders to be sanctioned in a manner responsive to the problem of maintaining individual accountability for corporate offences: unlike fines, this type of sanction would be targeted directly towards those personnel who had a hand in the offence subject to sentence. Second, the deterrence trap which confronts attempts to impose heavy cash fines would largely be skirted by recourse to internal discipline or organisational reform orders: the deterrent impact of these sanctions would lie largely in financial or non-financial internal disciplinary sanctions and in detraction from corporate or managerial power, consequences which almost invariably can be borne by corporations without sending them into financial ruin. Third, internal discipline and organisational reform orders would be much more congruent with non-financial values in organisational decision-making: corporate and managerial power would be affected directly, corporate and managerial prestige would receive at least a glancing blow, and the micro-goals of organisational sub-units would be immediately relevant to a probationary review of suspect standard operating procedures. Fourth, as far as catalysing organisational reform is concerned, organisational reform orders obviously could be used to insist that corporate defendants react in a manner responsive to any structural or other institutional problems which contributed to the commission of an offence.

Given these advantages over fines, there is a strong case for introducing probation as a sanction against corporations. Numerous points of detail need to be settled and cast in suitable legislative form, but these should not distract attention from the need for a sanction capable of pressing upon the inner nerves of corporate governance.

### Publicity

A third possibility is to make adverse publicity available as a formal court-ordered sanction.

This approach, which goes back to the English Bread Acts of the early nineteenth century, was suggested in 1970 by the United States National Commission on Reform of Federal Criminal Laws (the Brown Commission) (see generally *Fisse*, 1971). Section 405 of the Brown Commission's *Study Draft* provided in relevant part as follows:

"When an organization is convicted of an offence, the court may, in addition to or in lieu of imposing other authorized sanctions, ... require the organization to give appropriate publicity to the conviction by notice to the class or classes of persons or sector of the public interested in or affected by the conviction, by advertising in designated areas or by designated media, or otherwise ..." (*United States National Commission*, 1970).

Although the proposal was never implemented, it has enjoyed considerable support, largely because of a growing realisation that most corporations are highly sensitive about their prestige as an interest over and above (although overlapping with) profits. By contrast, provision has often been made for remedial publicity orders, as under sec. 80A of the *Trade Practices Act*. Section 80A provides that, in the case of contraventions of Pt. V (relating to consumer protection), a defendant can be ordered to disclose information or to publish advertisements pertinent to such contraventions, and although the wording of the section may be broad enough to cover punitive publicity orders, the object behind the provision was to enable corrective disclosure or advertising to be used as a civil remedy along the lines developed in the United States by the Federal Trade Commission (*Tapereil, Vermeesch and Harland*, 1978, pp. 623-624).

Granted that explicitly punitive publicity orders could be made available, in what respects might they help to overcome the limitations of fines?

To begin with, adverse publicity orders against corporate defendants need not be exclusively corporate in orientation but, with the aid of probation, could also help to promote individual accountability. As Coffee has argued (1981, pp. 429-434), there is a valuable hint to be taken from the McCloy report documenting Gulf Oil's slush funds and bribes (*McCloy*, 1976). The report, prepared by an outside counsel in response to SEC enforcement initiatives, not only triggered substantial procedural reforms but also hastened the resignation of officials named in it. Furthermore, the revelations in the report were such as to be picked up by the press, and the report itself became a paperback bestseller. Taking this cue, Coffee has proposed that corporate offenders be required to employ outside counsel to prepare a McCloy-style report which names the key personnel involved and outlines in readable form what they did. Probationary pre-sentence reports would mandatorily be prepared "in considerable factual depth in the expectation that such studies will either find an audience in their own right or, more typically, provide the database for investigative journalism" (*Coffee*, 1981, p. 431).

Second, publicity orders would not fall into the deterrence trap created by limited corporate liquidity: adverse publicity would be used to inflict loss of corporate prestige, without any need to inflict loss of money from cash resources. Sufficient evidence of the importance of prestige to Australian corporations is provided by the growth of corporate image advertising for "quiet achievers" and "big Australians".

Third, publicity orders would be directed primarily toward the infliction of loss of prestige, and hence would achieve congruence with this important non-financial value in organisational decision-making. To the contrary, it is sometimes suggested that the main aim of this type of sanction would be to inflict financial loss by discouraging consumers



from buying the defendant's product (see e.g., *Leigh*, 1969, pp. 159-160). But if this were the only aim, the cash fine would be a more efficient way of achieving it.

Fourth, although adverse publicity orders would not guarantee any organisational reform of procedures or policies likely to result in a corporation re-offending, they could be used in such a way as to put public pressure on a defendant to move in that direction. Most obviously, it would be possible when framing a publicity order to pay explicit attention to the nature of the steps, if any, taken by a corporation to set its house in order after the commission of an offence. The court imposing sentence could follow up with a bout of further adverse publicity if there was no reform, or favourable publicity if there was reform.

Despite these potential advantages, sceptics have thrown doubt on the extent to which corporate prestige is likely to matter to executives, and have raised the spectre of successful counterpublicity and other problems (see e.g., *Pacher*, 1968, p. 361; *Coffee*, 1981, pp. 424-429). We have discussed these questions in some detail elsewhere, on the basis of an empirical study of the impacts of adverse publicity on 17 major American and Australasian companies (*Fisse and Braithwaite*, 1983). Put in a nutshell, the main conclusion drawn from this range of corporate experience was that senior executives were deeply concerned over their perception that corporate prestige had been battered by the publicity even when the publicity had no adverse impacts on profits. The book argues that the objections raised in the past to the idea of using shame and stigma as a means of controlling corporate behaviour are either more fanciful than real or, if real, could be handled by the responsive design and application of formal publicity orders (*Fisse and Braithwaite*, 1983, Chapter 21).

### Community service

Community service has been required as a condition of probation or non-prosecution in several cases in the United States, but in the two best-known instances, *United States v. Allied Chemical Corporation Company* (1976) 420 F Supp. 122 and *United States v. Olin Mathieson (New York Times*, 2 June 1978: D1) payment of money for charitable purposes was involved rather than personal performance of community service by the corporate offender itself. A concrete statutory proposal, together with explanatory comments, has been put forward in another paper by one of the present authors (*Fisse*, 1981). In part, that proposal is as follows:

- (a) Where a corporation is convicted of an offence the court may make a punitive order (here referred to as a "community service order") sentencing the offender to undertake a project of community service in accordance with the subsequent provisions of this section.

- (b) (i) The amount of community service required to be performed shall be quantified in terms of the actual net cost of materials, equipment and labour to be used for the project.
- (ii) Unless provided otherwise, the maximum cost of community service under a community service order shall be the same as the maximum amount of the fine or monetary penalty applicable to the offence for which the order is made.
- (iii) A project of community service shall be performed within two years of the date of sentence unless the court orders otherwise.
- (c) (i) A project of community service may be either a project proposed by the offender and agreed to by the court or a project specified by the Court.
- (ii) A project of community service shall be performed by personnel employed by the offender except where the court is satisfied that the assistance of an independent contractor is necessary to make the best use of the offender's own skills and resources.
- (iii) The personnel by whom a project of community service is to be performed shall include representatives from managerial, executive and subordinate ranks of the offender's organisation irrespective of non-implication in the offence for which a community service order is imposed.
- (iv) An offender subject to a community service order shall specify which persons are to undertake the required project of community service and, in the case of employees, shall indicate their rank within the organisation.

A community service sanction of the kind proposed above would require corporate defendants to undertake a socially-useful programme involving a commitment of time, effort and available skills. Thus, in *Hartnell v. Sharp Corporation of Australia Pty. Ltd.* (1975) ATPR ¶40-003; (1974) 5 A.L.R. 493, the much-celebrated microwave oven case in which Sharp was fined \$100,000 for misleading advertising, a court armed with the option of ordering a sentence of community service could have required Sharp to undertake various measures in aid of consumer protection. Apart from the possibility of deputising the company to monitor the advertising of other firms in specified media over a given period, Sharp might have been called upon to assist the Standards Association of Australia in the research and development of safety standards for microwave ovens, or alternatively, in the testing of competitors' microwave products. Given the specialised talents and innovative capacity for which corporations are deservedly much-praised, little difficulty is likely to be experienced in finding suitable projects even if, as in the examples above, the projects chosen are tied to the particular context of the offence committed.

Community service orders, like the other alternative sanctions canvassed, would be less vulnerable to the previously-stressed limitations

of fines. First, as far as promoting individual accountability is concerned, community service orders might help to stimulate internal discipline because, in being forced to allocate personnel to a project of community service, corporate defendants would be encouraged to ask those persons responsible for getting the company into hot water to perform the necessary acts of rescue. Second, a sentence of personally-performed community service need not slip into the deterrence trap of limited corporate liquidity: a project of personally-performed community service could take up organisational slack rather than absorb cash reserves. Third, community service orders would offer a means of impinging upon non-financial as well as financial motivations; whereas fines require only the payment of money, personally-performed community service would require the expenditure of time and effort. Last, however, most kinds of community service order would lack the ability to provide any guarantee of adequate organisational reform in the wake of an offence. The exception to this would be a combined sentence of community service and probation requiring a defendant to develop innovative compliance controls and to prepare instructions and follow-up reports with a view to their use by other corporations as a freely available guide or model (cf. Hayes, 1980).

The potential snag which looms largest is that community service sanctions would give corporations too much leeway for subterfuge and prevarication. However, this obstacle should not be exaggerated, for two main reasons: first, as in the case of corporate probation, independent special counsel or masters could be used to supervise compliance; and second, it seems implausible to regard corporations convicted of crime as dens of iniquity, or at least most convicted corporations would have enough good faith to want to wipe the slate clean as soon as possible.

### Conclusion

The monopoly of fines as a sanction against corporations under the *Trade Practices Act* could be dissolved by introducing equity fines, probation, publicity orders and community service as additional sentencing options. Over-simplified and fragmentary as our review of these alternatives has been, the important point to be stressed is that all seem promising because they offer ways of angling around the major deterrent limitations of fines. This is not to suggest that fines have no useful role to play: in many instances, especially less serious offences, fines are often an expedient and adequate solution. Nor is it suggested that any one alternative to the fine represents some ideal type of sanction against corporations: to do so would be to adopt the perverse single-mindedness of a Defence Minister who argues against the purchase of new fighters because bombers are better.

Accepting all of this, it will nonetheless be objected that equity fines, probation, publicity and community service are too indeterminate in impact, too inefficient, and too symptomatic of creeping socialism to

justify introduction (see generally Fisse, 1983, pp. 1,215-1,231). Are these bugaboos?

Take first the objection that the impact of probation, adverse publicity and community service would be too uncertain in impact (see e.g., Coffee, 1981, p. 427, on adverse publicity). Much-intoned as this objection is, the quick counterpoint is that the actual impact of fines against corporations is impossible to predict with any exactitude. For example, when the authors interviewed executives at Ford in Detroit about the impact of a \$7 million environmental fine imposed on their corporation in 1973, the answer was that in a period when the demand for their cars was strong the impact was minimal. But if the same fine were imposed on the struggling Ford of the 1980s, we were told that senior heads could roll. Since no one has suggested that fines (or imprisonment) be abandoned on the ground of uncertainty of impact, the objection in question may be rejected as idle.

Consider next the objection that the costs of administering sanctions other than fines would make them inefficient. We do tolerate the extremely high inefficiency of imprisonment because fines of sufficient deterrent gravity usually cannot be paid by individual offenders. The relative inefficiency of alternatives to fines against corporations may be defended on a parallel ground: the deterrence trap created by the limited cash liquidity of corporations forces us either to live with a crime-control system that cannot be expected to work or to resort to means of control which, although regrettably more costly, offer a glimmer of hope.

Finally, would equity fines, probation, publicity and community service subject corporations to some unbearable yoke of state control? There seems little chance of this happening. For one thing, the customary reservation of severe sanctions for serious offences is unlikely to be abandoned. For another, sentencing criteria could and should be devised so as to maximise freedom of enterprise in compliance systems (Fisse, 1980, pp. 194-199); one possibility would be to stipulate that, wherever practicable, corporate defendants be given the opportunity to indicate before sentence what they propose to do by way of restitution, community service and reform of standard operating procedures.

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