

REPORT 102

**Sentencing:
corporate offenders**

June 2003

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NEW SOUTH WALES LAW REFORM COMMISSION

Letter to the Attorney General

To the Honourable Bob Debus MLC
Attorney General for New South Wales

Dear Attorney

Sentencing: corporate offenders

We make this Report pursuant to the reference to this Commission dated 12 April 1995.

A handwritten signature in black ink, appearing to read 'M Adams', with a stylized, cursive script.

The Hon Justice Michael Adams
Chairperson

Dr Duncan Chappell

The Hon Justice Greg James

Her Hon Judge Angela Karpin

The Hon Gordon Samuels AC CVO QC

Professor Michael Tilbury

June 2003

TABLE OF CONTENTS

Terms of reference	ix
Participants.....	x
Recommendations	xi
 1. INTRODUCTION	 1
OVERVIEW	2
THE COURSE OF THE COMMISSION'S REFERENCE	2
CORPORATE OFFENDERS.....	2
CORPORATE CRIME	3
The bifurcation of corporate crime	4
SENTENCING IN THE CONTEXT OF CORPORATE CRIME.....	10
THE INCIDENCE OF CORPORATE OFFENDING.....	10
Local Courts.....	11
Higher Courts.....	13
 2. CORPORATE CRIMINAL LIABILITY	 17
THE CURRENT LEGAL REGIME	18
Identification doctrine.....	19
Vicarious liability	21
FURTHER BASES OF LIABILITY	22
Aggregation model.....	22
Corporate fault	25
IS THE PRESENT LAW SATISFACTORY?.....	27
The models of corporate criminal liability	27
Corporate liability for death and injury.....	27
The Commission's view	29
THE JUSTIFICATION OF CORPORATE CRIMINAL LIABILITY	30
Is corporate criminal liability appropriate?.....	30
Why prosecute the corporation?	36
 3. SENTENCING OBJECTIVES	 43
INTRODUCTION.....	44
DETERRENCE.....	45
RETRIBUTION AND DENUNCIATION	48
REHABILITATION AND INCAPACITATION	50
OTHER MATTERS.....	52
Recognition of victims	52
Reparation	52
APPLYING SENTENCING OBJECTIVES TO CORPORATE OFFENDERS	53

4. FACTORS RELEVANT TO SENTENCING	55
FACTORS OF GENERAL APPLICATION	56
FACTORS RELEVANT TO SENTENCING CORPORATE OFFENDERS	57
Objective seriousness of the offence	57
THE OFFENDER'S CIRCUMSTANCES	63
A LEGISLATIVE RESTATEMENT	73
Aggravating factors	73
Mitigating factors	74
5. RANGE OF SENTENCES	77
THE LAW IN NEW SOUTH WALES	78
Fines	78
Probation	79
Other penalties	81
THE LAW IN OTHER AUSTRALIAN JURISDICTIONS	81
RECOMMENDATIONS AS TO OTHER OPTIONS	82
Use of terminology	84
Separate provision	85
Separate, non-exclusive orders	85
6. FINES	87
IS THE FINE AN APPROPRIATE PENALTY?	88
Ineffectiveness in deterring corporate crime	88
Ineffectiveness in rehabilitating offenders	89
Ineffectiveness in denouncing corporate offences	90
Adverse effects on third parties	90
Difficulty of enforcing fines	92
The Commission's view	92
SETTING FINES	94
The level of fines	94
Consistency in fines	95
Optimal penalties model	97
The US Guidelines on sentencing organisations	100
Relevance of US Guidelines in New South Wales	103
7. EQUITY FINES	105
DEFINITION	106
SUGGESTED BENEFITS	106
Avoidance of the "wealth ceiling"	106
Spillover	107
Compensating victims	108
Greater deterrence	109

CRITICISMS.....	110
Unfair burden on shareholders	110
Insufficient deterrence or rehabilitation	111
Gravity of corporate crime not reflected	112
Difficulties in administration	112
Limited in application	113
THE COMMISSION'S VIEW	113
8. INCAPACITATION.....	115
DISQUALIFICATION	116
Prevention of commercial activities.....	117
Revocation or suspension of licences.....	118
Disqualification from contracts	119
Freezing of profits	119
The Commission's view	120
DISSOLUTION OF CORPORATIONS	121
Direct dissolution.....	121
A fine to divest all assets of a company	126
9. CORRECTION ORDERS	129
PROBATION ORDERS	130
Specific types of corporate probation.....	131
Evaluation of corporate probation	137
Adopting forms of corporate probation.....	141
PUNITIVE INJUNCTIONS.....	143
Forms of punitive injunction	143
Appropriateness of punitive injunctions.....	146
Availability of punitive injunctions.....	147
10. COMMUNITY SERVICE ORDERS	149
THE NATURE OF COMMUNITY SERVICE ORDERS	150
APPLICATION TO CORPORATE OFFENDERS.....	150
USE OF COMMUNITY SERVICE ORDERS	152
United States	152
Australia	152
MISCELLANEOUS ISSUES.....	153
Funding community projects	153
Involving the corporation's personnel and resources in the community project	155
Using a community service order in combination with other penalties.....	157
The maximum cost of the community service project	158
Securing compliance and supervision.....	158

11. PUBLICITY ORDERS	159
THE RATIONALE OF PUBLICITY ORDERS	160
Threat to the corporation's good reputation	161
Adverse effects on the corporation's business	162
A threat to the corporation's autonomy	163
USE OF PUBLICITY ORDERS	163
United Kingdom	163
New Zealand	164
United States	164
Australia	164
PARTICULAR ISSUES	165
Publicity order may have uncertain effects	165
Courts as propagandists	166
Getting the attention of the intended audience	167
Counter-publicity	168
Imposing the penalty selectively	169
12. REPARATION	171
NEW SOUTH WALES PROVISIONS	173
RESTITUTION FOR GROUPS OF VICTIMS	174
The position in the United States	174
The position in New South Wales	175
CONCLUSION	176
13. A COMPREHENSIVE SENTENCING REGIME	177
JURISDICTIONAL LIMITS	178
DURATION OF ORDERS	180
SUPERVISING PERFORMANCE	181
ENFORCEMENT	183
Offence attracting further penalty	183
Contempt of court	184
Re-sentence or change the existing order	184
Enforcing fines	186
Enforcement by punishing individuals	187
14. PROCEDURAL ISSUES	189
PRE-SENTENCE REPORTS	190
The current law	190
Submissions to the Issues Paper	190
Providing information to the court	191
VICTIMS	192
Who are victims of corporate crime?	193
Victim impact statements	193

REQUIRING OFFICERS OF THE CORPORATION TO BE PRESENT AT SENTENCING	196
Current position in New South Wales	197
United States Sentencing Commission's Guidelines	197
Introducing attendance provisions in NSW	199
The Commission's view	200
15. PENALTIES IMPOSED ON RELATED OFFENDERS	201
THE PENALTY IMPOSED ON THE OWNERS OF A DEFENDANT CORPORATION.....	202
DETERMINING THE PENALTIES FOR CLOSELY RELATED CORPORATIONS.....	203
THE COMMISSION'S CONCLUSION.....	205
APPENDICES	207
Appendix A: Selected NSW statutes containing offences that carry specific penalties for corporations	208
Appendix B: Submissions.....	228
Appendix C: Consultations and seminar	229
TABLES	231
Table of legislation	232
Table of cases	236
Bibliography.....	240
Index	251

TERMS OF REFERENCE

Sentencing: corporate offenders

In a letter to the Commission dated 12 April 1995, the Attorney General, the Hon J W Shaw QC MLC referred the following matter for inquiry:

To inquire into and report on the laws relating to sentencing in New South Wales with particular reference to:

- (i) the formulation of principles and guidelines for sentencing;
- (ii) the rationalisation and consolidation of current sentencing provisions;
- (iii) the adequacy and use of existing non-custodial sentencing options with particular reference to home detention and periodic detention;
- (iv) the adequacy of existing procedures for the release of prisoners by the Offenders Review Board and the Serious Offenders Review Council and the benefits that might accrue from the review of the decisions of the Offenders Review Board and the Serious Offenders Review Council by judicial officers; and
- (v) any related matter.

In undertaking this reference, the Commission should have regard to the proposals in relation to sentencing contained in the Australia Labor Party policy documents formulated in Opposition.

PARTICIPANTS

Division Members

Pursuant to section 12A of the *Law Reform Commission Act 1967* (NSW) the Chairperson of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

The Hon Justice Michael Adams (Commissioner-In-Charge)

Dr Duncan Chappell

The Hon Justice Greg James

Her Hon Judge Angela Karpin

The Hon Gordon Samuels AC CVO QC

Professor Michael Tilbury

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RECOMMENDATIONS

Refer to the pages listed below for a full discussion of the Recommendations.

RECOMMENDATION 1 | see page 30

Consideration should be given to the adoption of the relevant provisions of Part 2.5 (Corporate Criminal Liability) of the *Criminal Code Act 1995* (Cth) as part of the law of New South Wales.

RECOMMENDATION 2 | see page 53

The *Crimes (Sentencing Procedure) Act 1999* (NSW) should expressly provide that the objectives of sentencing in section 3A apply to corporate offenders.

RECOMMENDATION 3 | see page 75

Legislation should provide that, in addition to the factors listed in section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) that are relevant to the sentencing of corporate offenders, a court is to take into account the following matters in determining the appropriate sentence for a corporate offender:

Aggravating Factors:

- (a) the corporation could have reasonably foreseen the occurrence of the offence and any harm caused or likely to be caused;
- (b) individuals who have substantial control of the organisation, or who have a substantial role in policy making, participated in, condoned, or were wilfully ignorant of the offence;
- (c) tolerance of the offence by members of management and others who exercise a substantial measure of discretion in acting on behalf of the corporation was pervasive throughout the corporation;
- (d) the corporation did not have, at the time of the offence, an effective compliance program designed to prevent and detect violations of the law.

Mitigating Factors:

- (a) the financial circumstances of the corporation;
- (b) the corporation had, at the time of the offence, an effective compliance program designed to prevent and detect violations of the law;
- (c) the corporation stopped the unlawful conduct within a reasonable time of its discovery;
- (d) the effect of the penalty on services to the public.

The matters referred to above should be in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law.

RECOMMENDATION 4 | see page 86

In sentencing a corporation, a court, in addition to or instead of imposing a fine, should be able to make one or more other orders that it considers will best achieve the objectives of sentencing. These orders are:

- (a) orders for incapacitation;
- (b) correction orders;

- (c) community service orders; and
- (d) publicity orders.

Each order should be capable of being a separate, non-exclusive sanction.

The orders should form part of the general sentencing regime but should be expressed to apply only to corporations.

The orders should not detract in any way from existing legislative provisions and common law that are applicable to the sentencing of corporations.

RECOMMENDATION 5 | see page 114

Equity fines should not be a sentencing option.

RECOMMENDATION 6 | see page 120

As part of an order for disqualification a court may, among other matters:

- prevent the corporation from engaging in certain commercial activities;
- revoke or suspend a licence held by the corporation;
- disqualify the corporation from entering specified contracts;
- deny the corporation the use of its profits for a fixed period of time.

RECOMMENDATION 7 | see page 124

A provision relating to the dissolution of corporations should contain a statement to the following effect: “to extent necessary to do so, this provision is declared a Corporations legislation displacement provision”.

RECOMMENDATION 8 | see page 126

In ordering the dissolution of a corporation a court should have the power to order that shareholders and directors cannot reincorporate in certain circumstances, including where the new corporation is intended to carry on the same activities as the dissolved corporation.

The court may also order that the directors and shareholders of the dissolved corporation cannot have any beneficial interests in a corporation that substantially conducts the same activities as the dissolved corporation.

Such an order should be imposed only once any other person bound by it has been given an opportunity to be heard by the court prior to sentencing.

RECOMMENDATION 9 | see page 148

A court should have the power to make a correction order on such terms and subject to such conditions as it sees fit, including, but not limited to:

- (a) internal discipline orders;
- (b) organisational reform orders; and
- (c) punitive injunctions.

RECOMMENDATION 10 | see page 155

Where a court orders a corporate offender to fund a community project, the project should bear a reasonable relationship to the offence and/or the objectives of the sentence.

RECOMMENDATION 11 | see page 157

Before sentencing a corporation to community service, the court must give any individual named in the order an opportunity to be heard.

RECOMMENDATION 12 | see page 167

The court should have the power to order that:

- (a) the corporate offender itself carry out a publicity order;
- (b) the assistance of any relevant government agency be enlisted for this purpose.

The costs of the publicity order should be borne by the offender.

RECOMMENDATION 13 | see page 168

The courts should have the power to stipulate in a publicity order:

- (a) the target audience of the publicity;
- (b) the content of the publicity, including the fact of conviction, the nature of the offence, its consequences, the nature of any punishment imposed and such other information the court deems relevant;
- (c) the media to be used, or other method of implementation.

RECOMMENDATION 14 | see page 169

The court should have the power to restrain the publication or continued publication of any material that may have the effect of countering the intended effects of a publicity order.

RECOMMENDATION 15 | see page 179

The cost to a corporation of carrying out any sentencing orders together with the cost of any fine should not exceed the maximum amount of the fine applicable to the offence.

In any case, a Local Court may not impose orders the cost of which exceeds the maximum amount for which the General Division of a Local Court has jurisdiction.

RECOMMENDATION 16 | see page 181

A court may fix such a period as it considers necessary or expedient for carrying out the terms of an order, subject to the following:

- (a) orders issued by Local Courts shall have effect for a maximum period of 3 years;
- (b) orders issued by higher courts shall have effect for a maximum period of 3 years, except when the court considers there is good reason for a longer period (and has provided reasons in writing);
- (c) any order may be discharged at any time before the time limit fixed by the court when the corporation provides proof of satisfactory compliance.

RECOMMENDATION 17 | see page 183

Courts should have a wide discretion to order the management, control, administration and supervision of their sentencing orders, including the appointment of suitable persons or organisations to supervise and/or report on a corporation's compliance.

Courts should have the power to order that the corporate offender pay the costs of the supervision.

RECOMMENDATION 18 | see page 186

Upon breach of an order, the corporation should be brought before the sentencing court to be re-sentenced. The court may do any of the following:

- (a) continue or extend the term of the order;
- (b) impose additional or more restrictive conditions on the order; and
- (c) revoke the order(s) and re-sentence the corporation.

RECOMMENDATION 19 | see page 186

The court may authorise a relevant regulatory agency to:

- (a) do anything that is necessary or expedient to carry out any action that remains to be done under the order;
- (b) publicise the failure of the corporation to comply with the order; and
- (c) recover from the corporation any cost the agency incurs in taking these actions.

RECOMMENDATION 20 | see page 187

Penalties that apply specifically to corporations should be included in the enforcement procedures in the *Fines Act 1996* (NSW), namely orders for incapacitation, community service orders and correction orders.

RECOMMENDATION 21 | see page 187

It should be an offence for individual corporate officers and employees to impede compliance with the terms of any order.

RECOMMENDATION 22 | see page 192

In cases where professional assessment of a corporation's characteristics is required, a court should have the power to appoint a suitable person or persons to prepare a report on the corporation.

The Court should also be able to order that the corporation pay the costs of preparing the report.

The Court should be able to consider all relevant information prior to the sentencing of a corporation including, where relevant, the criminal records of its high-level personnel.

RECOMMENDATION 23 | see page 200

The court should be able to require the attendance at the sentencing proceedings of any of the officers of a corporation it considers appropriate in the circumstances.

"Officers of the corporation" include its directors, company secretary and executive officer.

1. Introduction

- Overview
- The course of the Commission's reference
- Corporate offenders
- Corporate crime
- Sentencing in the context of corporate crime
- The incidence of corporate offending

OVERVIEW

1.1 This Report makes recommendations about the sentencing of “corporate offenders”.¹ It is part of the Commission’s reference on sentencing law. The Report raises issues concerning the sentencing of corporations, in particular the range of sentencing options that are available for this group of offenders.

THE COURSE OF THE COMMISSION’S REFERENCE

1.2 On 12 April 1995, the then Attorney General, the Hon Jeff Shaw QC, referred the reform of sentencing law to the Law Reform Commission.² In 1996, the Commission released a discussion paper and a report on the general principles of sentencing as the first phase of its inquiry.³ The Commission is currently undertaking the second phase of its inquiry, which involves consideration of sentencing issues affecting specific groups of offenders, including corporate offenders.⁴ The Commission published an Issues Paper (“Issues Paper 20”) on corporate offenders in November 2002.⁵ This Report reflects the further work of the Commission and the views received in submissions and consultations.⁶

CORPORATE OFFENDERS

1.3 This Report uses the term “corporate offender”. This is commonly understood to mean one of two things: either, a corporation that commits a criminal offence, or a person who commits an offence of a business or commercial nature, often on behalf of, or against, a corporation.⁷ In this Report, the term “corporate offender” is used in the former sense, to refer to a corporation that has committed a criminal offence.

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1. See para 1.3-1.5 for a definition of “corporate offender”.
 2. The terms of reference are set out on page ix.
 3. See NSW Law Reform Commission, *Sentencing* (Discussion Paper 33, 1996), (Report 79, 1996).
 4. As part of this phase, the Commission has also issued a report on the sentencing of Aboriginal offenders: see NSW Law Reform Commission, *Sentencing: Aboriginal offenders* (Report 96, 2000); and a discussion paper on the sentencing of young offenders: see NSW Law Reform Commission, *Sentencing: young offenders* (Issues Paper 19, 2001).
 5. See NSW Law Reform Commission, *Sentencing: corporate offenders* (Issues Paper 20, 2002).
 6. The lists of submissions and consultations are in Appendix B and C.
 7. See Australian Law Reform Commission, *Sentencing: penalties* (Discussion Paper 30, 1987) at para 283; H Croall, *White collar crime: criminal justice and criminology* (Open University Press, Buckingham, 1992) ch 1; compare M Bagaric and J du Plessis, “Expanding criminal sanctions for corporate crimes – deprivation of right to work and cancellation of education qualifications” (2003) 21 *Company and Securities Law Journal* 7.

1.4 A corporation is an artificial entity that the law treats as having its own legal personality,⁸ separate from and independent of the persons who make up the corporation. This means, for example, that a corporation can own and sell property, sue or be sued, or commit a criminal offence. But, because a corporation is not a natural person and cannot be subject to one of the most important sentencing options, namely, imprisonment, it requires special consideration in an inquiry into sentencing law.

1.5 In New South Wales, an entity generally⁹ becomes a corporation on registration in accordance with the requirements of the *Corporations Act 2001* (Cth).¹⁰ “Corporation” does not include other forms of organisations such as unincorporated associations, partnerships and government bureaucracies (other than statutory corporations).¹¹ In unincorporated organisations, liability falls on the individual members, partners or officers.¹² The entity itself is not considered a separate legal personality and is not subject to criminal liability, unless legislation specifically provides for this.¹³ It may, however, be argued that these organisations are capable of cultivating environments or cultures that lead to violations of the law. The issue of whether or not the law should generally impose criminal liability on organisations other than corporations is beyond the terms of this reference on sentencing.

CORPORATE CRIME

1.6 Sentencing corporate offenders is one aspect of the more general problem of corporate crime. Corporate crime means “the conduct of a

8. See *Corporations Act 2001* (Cth) s 124. The term “company” is often used interchangeably with “corporation”. “Corporation” is the wider term. The *Corporations Act 2001* defines “corporation” to include a company, as well as any body corporate and unincorporated body that may sue or be sued, or hold property in the name of its secretary or an officer of the body duly appointed for that purpose: see s 9, 57A. “Company” is defined generally as any company registered under the *Corporations Act 2001*: see s 9. See also *Halsbury’s laws of Australia* (Butterworths, Sydney, 1993) vol 7 at [120-1].

9. Incorporation may also be conferred by statute, which is often done with State or Commonwealth corporations, such as the Australian Broadcasting Corporation: see *Australian Broadcasting Corporation Act 1983* (Cth).

10. See *Corporations Act 2001* (Cth) s 119.

11. Examples are ministerial corporations, such as the Health Administration Corporation and the Water Administration Ministerial Corporation in NSW. These statutory bodies, like other corporations, may incur criminal liability. They are therefore covered by the term “corporate offenders” in this Report.

12. See B Fisse, *Howard’s criminal law* (5th ed, Law Book Company, Sydney, 1990) at 595.

13. For example, pursuant to the *Trade Practices Act 1974* (Cth) s 45DC, liability may be imposed on an “organisation of employees” for breach of the secondary boycott provisions of the Act.

corporation, or of employees acting on behalf of a corporation, which is proscribed and punishable by law".¹⁴ In this sense, "corporate crime" refers to the imposition of criminal liability on either the corporation or its employees and agents.¹⁵ The latter is also referred to as white-collar crime.¹⁶ A further aspect of "corporate crime" is that it can encompass any act of the corporation that violates criminal, civil or administrative law.¹⁷

The bifurcation of corporate crime

1.7 Legal and social definitions of corporate crime tend to divide prohibited behaviour into two categories: regulatory offences (such as breaches of licence requirements) and conventional crimes (that is, laws of general application, such as fraud). These categories essentially correspond with *mala prohibita* ("quasi" crime) and *mala in se* ("real" crime).¹⁸ The choice of assigning proscribed conduct to one or other of these categories obviously reflects the State's moral agenda from time to time. Regulatory offences commonly involve minor breaches of the criminal law, while corporate misconduct incurring criminal liability is generally regarded as more serious. Whether corporate criminal behaviour is considered regulatory or conventionally criminal in nature is usually

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14. J Braithwaite, *Corporate crime in the pharmaceutical industry* (Routledge and Kegan Paul, London, 1984) at 6, cited in S Simpson, *Corporate crime, law, and social control* (Cambridge University Press, New York, 2002) at 7.
 15. The persons who commit corporate crimes are often of high social standing using their occupational positions to infringe the law: S Simpson, *Corporate crime, law, and social control* (Cambridge University Press, New York, 2002) at 6, citing E H Sutherland, *White-collar crime* (Dryden Press, New York, 1949). On the other hand, people who commit conventional crimes are typically from a low socio-economic background: see R Kramer, "Corporate criminality: the development of an idea", ch 1 of E Hochstedler (ed), *Corporations as criminals* (Sage Publications, California, 1984) at 25.
 16. Edwin Sutherland, one of the pioneers of corporate criminology, coined the term "white-collar crime" in the first half of last century. See E H Sutherland, *White-collar crime* (Dryden Press, New York, 1949), cited in R Kramer "Corporate criminality: the development of an idea", ch 1 of E Hochstedler (ed), *Corporations as criminals* (Sage Publications, California, 1984) at 22-23.
 17. See S Simpson, *Corporate crime, law, and social control* (Cambridge University Press, New York, 2002) at 7, citing J Braithwaite, *Corporate crime in the pharmaceutical industry* (Routledge and Kegan Paul, London, 1984) at 6. See also R Kramer, "Corporate criminality: the development of an idea", ch 1 of E Hochstedler (ed), *Corporations as criminals* (Sage Publications, California, 1984) at 24, (who also cites M Clinard and P Yeager, *Corporate crime* (Free Press, New York, 1980) at 16) at 23.
 18. C Wells, *Corporations and criminal responsibility* (2nd ed, Oxford University Press, 2001) at 12.

determined by reference to the administrative process that attends its detection and punishment.¹⁹

1.8 In New South Wales, the distinction generally correlates with the jurisdictional divide between the police and corporate regulatory agencies. That is, regulatory agencies typically enforce regulatory laws, whereas the police are responsible for bringing those who violate the conventional criminal law before the State's criminal courts. Police procedures are based on an enforcement model of deterrence, whereas regulatory agencies operate on the basis of a model of compliance. That is, where an offender is identified, the police generally prepare a case for prosecution of that party. On the other hand, prosecution is often a discretionary matter for regulatory agencies, liability and punishment of offenders possibly being traded off for co-operation with investigations or promises of future compliance.

1.9 The manner by which an offence is detected and prosecuted inevitably impacts on perceptions of its nature and seriousness.²⁰ In practice, the vast majority of corporate offences are regulatory in nature,²¹ many involving strict or absolute liability. This can lead to the unfortunate perception that corporate crime is less violent or socially harmful than conventional crime,²² perhaps even that such conduct is not really "criminal" in any traditional sense.²³ The perception is strengthened by the way in which corporate crime is sometimes described in language that does not reflect its seriousness (for example, where corporate negligence causing death is typically labelled an "accident" rather than "corporate manslaughter"); or the way in which corporate offences are usually defined in "inchoate mode" rather than in relation to specific harm such as causing personal injury (for example, health and safety offences which prohibit the failure to guard a machine without referring to the harm which the unguarded machine might cause).²⁴ The seeming reluctance of courts and legislatures to impose

19. S Simpson, *Corporate crime, law, and social control* (Cambridge University Press, New York, 2002) at 7, citing E H Sutherland, *White-collar crime* (Dryden Press, New York, 1949) at 9.

20. C Wells, *Corporations and criminal responsibility* (2nd ed, Oxford University Press, 2001) at 4.

21. See para 1.21-1.33.

22. Wells at 5.

23. Consider, generally, Wells at 7, 11.

24. Wells adverts to the importance of language in establishing and maintaining the illusory distinction (with respect to the degree of moral reprehensibility) between conventional crime and corporate crime. She notes that colloquial terms correspond with formal legal meanings and substantive procedures and consequences. Wells asserts that the social vocabulary reserved for describing corporate crime is significantly underdeveloped in comparison to the general public's highly able articulation of descriptions of conventional crime. See Wells at 6-11.

criminal liability on corporations also reinforces the perception that corporate crime is less serious than conventional crime.²⁵

1.10 Whatever the numerous and complex reasons for the perception that corporate crime involves acts that are somehow less morally blameworthy or socially damaging than conventional crime,²⁶ the Commission is firmly of the view that corporate crime, whether attributed to a corporation or to an individual offender, can be just as morally reprehensible as conventional crime and should, therefore, be subject to the regulation of the criminal law in appropriate cases. This acknowledges that:

- corporate criminal behaviour can have a seriously harmful impact on the public that is not addressed by merely identifying particular individuals as responsible for the behaviour; and
- the systematic prosecution and punishment of corporate crime is likely to accord with the expectations of the community.

The impact of corporate crime on society

1.11 The pervasive presence of corporations in a wide range of activities in our society, and the impact of their actions on a much wider group of people than are affected by individual actions, means that the economic and physical harms caused by corporate misconduct are substantial and cannot be ignored.

1.12 For example, in the area of workplace safety, statistics from New South Wales WorkCover Authority²⁷ reveal that there were a total of 139 reported work-related fatalities in New South Wales in the financial year 2000/01.²⁸ This figure is the lowest in any given year for the period between 1987/88-2000/01, when the total number of work-related deaths was 2,209.²⁹ In the financial year 2000/01, there were 39,995 employment injuries, 25.8% of which (10,300) were reported as permanent disability cases.³⁰ The overall cost of employment injuries for that year was \$804 million,³¹ rising from \$304 million in 1991/92.³²

25. See Chapter 2.

26. See further discussion on this point in J Clough and C Mulhern, *The prosecution of corporations* (Oxford University Press, Melbourne, 2002) at 10-12.

27. See NSW WorkCover, *Statistical bulletin 1998/99, NSW Workers Compensation* at 4. It should be noted that, by 1998/99, the number of employment injuries had actually been decreasing for the last four years at a rate of 3% each year. Of course, not all employers in these cases would have been corporations. The figures do no more than provide a general idea of the incidence and cost of corporate misconduct in this one particular area.

28. NSW WorkCover, *Statistical bulletin 2000/2001* at para 2.1.

29. NSW WorkCover, *Statistical bulletin 2000/2001* at para 2.1.

30. NSW WorkCover, *Statistical bulletin 2000/2001* at para 3.1.

31. NSW WorkCover, *Statistical bulletin 2000/2001* at para 3.2.3.

1.13 According to an Ernst & Young global-wide survey in 2000, white-collar crime costs companies in excess of A\$16 billion each year.³³ Violation of taxation laws, which comprise the majority of corporate convictions in New South Wales,³⁴ imposes significant costs, the most obvious and direct cost being the loss of revenue the government needs to finance, among other things, services to the community. There is no readily available or recent data on the cost of tax violations but the Federal Treasury's 1985 Draft Paper estimated revenue losses of \$3 billion per year arising from tax fraud.³⁵

1.14 It should be noted that, in addition to the economic and human costs, there are serious social or moral implications that flow from corporate misconduct. It is arguable that because some corporate crimes violate the public trust, they create public distrust and lower social morale, producing large-scale social disorganisation.³⁶ Such offences undermine public confidence in the standards that regulate corporate activities and hence, have the potential to cause more widespread harm to the community.³⁷ For example, a prominent case of insider trading or securities fraud may erode investor confidence in the integrity of the market and cause a general downturn in stock values.³⁸ Further, corporate offending may encourage lawlessness by instilling a culture of criminality in individuals who work in the corporate world.

The public perception of corporate crime

1.15 Early studies in the US indicated that the public viewed corporate crime with indifference or ambivalence, and less seriously than most forms of conventional offences.³⁹ Given the apparent lack of public concern and moral condemnation of these offences, it was argued that resources for

32. NSW WorkCover, *Statistical bulletin 2000/2001* at para 3.1.2.

33. See "Cracking the paper trail" *Sydney Morning Herald* (8 August 2001), My Career at 3.

34. See para 1.24.

35. See P Grabosky and J Braithwaite, *Corporate crime in Australia* (Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice No 5, 1987) at 1.

36. R Gruner, *Corporate crime and sentencing* (2nd ed, Business Laws Inc, Chesterland, Ohio, 1997) at 1.007. The Commission thanks Professor Gruner for providing it with a copy of this book, which has proved invaluable in work on this reference.

37. See Australia, The HIH Royal Commission, *The failure of HIH Insurance* (Final Report, 2003) Vol 1 at xiv-xvi. See also M Westfield, *HIH: The inside story of Australia's biggest corporate collapse* (John Wiley & Sons Australia Ltd, Milton, Queensland, 2003) at 232-234.

38. See Gruner at 1.006-1.008.

39. E H Sutherland, *White-collar crime* (Dryden Press, New York, 1949); G Geis, "Deterring corporate crime" in R Nader and M Green (ed), *Corporate power in America* (Grossman Publishers, New York, 1973); P Rossi, R Waite, C Bose and R Berk "The Seriousness of crimes: normative structure and individual differences" (1974) 39 *American Sociological Review* 224.

crime control should remain focused on conventional crime rather than corporate crime.⁴⁰

1.16 However, more recent overseas studies show that a majority of the public view corporate crime as a serious matter, and deserving of more severe punishment than some conventional crimes.⁴¹ In particular, some studies have shown that corporate crimes which result in injuries or deaths (such as selling contaminated food) are regarded as quite serious, while those with more diffuse economic impact (such as fixing prices of machines to businesses) tend to be considered less serious.⁴² Members of the public appear to evaluate both conventional and corporate crimes in terms of impact. They not only consider corporate crimes with physical impact to be far more serious than those with economic impact, but they also rate such corporate crimes as equal in seriousness to a range of conventional crimes.⁴³

1.17 The results of a survey carried out in Brisbane are consistent with those obtained in the overseas studies. The Brisbane study confirmed that corporate crimes in general are considered serious matters, and that the ranking in degree of their seriousness depends on their impact on victims.⁴⁴ Offences that threaten or involve physical harm to victims were rated as very serious. For example, selling contaminated food, manufacturing/selling drugs harmful to others, causing the death of an employee by neglecting to repair machinery, and manufacturing/selling automobiles known to be dangerous, were ranked among the most serious of corporate crimes.

40. J Wilson, *Thinking about crime* (Basic Books, New York, 1975); R Brown, "The new criminology" in E Kamenka, R Brown and T Erh-Soon et al (ed) *Law and society* (St Martin's Press, New York, 1978).

41. P Grabosky, J Braithwaite and P Wilson, "The myth of community tolerance toward white collar crime" (1989) 19 *Australian and New Zealand Journal of Criminology* 33. See also the US and UK studies cited in S Simpson, *Corporate crime, law and social control* (Cambridge University Press, New York, 2002) at 2-4. In 1999, the National White Collar Crime Center conducted a survey designed to measure public attitudes in the US regarding white-collar crimes. The results of the survey showed that "the public is sensitive to the ever-increasing threat of white collar crime and strongly supports the existence and enhancement of control programs as well as stronger and more stringent punishment of those convicted of white collar crimes": D Deem, M Murray, M Gaboury and C Edmunds, "Financial crime" *National Victim Assistance Academy Textbook* (Office of Victims of Crime, 2002).

42. L Schrager and J Short, "How serious a crime? perceptions of organisational and common crimes" in G Geis and E Stotland (ed), *White collar crime* (Sage Publications, Beverly Hills, 1980) at 14. Other similar studies done in the US and Canada are discussed in R Holland, "Public perceptions of white collar crime seriousness: a survey of an Australian sample" (1995) 19 *International Journal of Comparative and Applied Criminal Justice* 91.

43. Schrager and Short in Geis and Stotland at 26.

44. Holland. See also Simpson at 2-4.

1.18 In 1986, the Australian Institute of Criminology conducted a survey of the public attitude towards a wide range of offences. The study, which the AIC claimed to be “the most comprehensive overview of public attitudes to crime which Australia has yet seen”,⁴⁵ showed that stabbing a person to death and the trafficking of heroin were perceived as the first and second most serious offences among the crimes tested by the study.⁴⁶ However, water pollution by a factory that caused a person to die was ranked third, and failure by an employer to provide safety measures that resulted in a serious injury (leg amputation) to a worker, was ranked fourth. These two offences, which are more likely to be committed by corporations than by individuals, were ranked ahead of armed robbery (ranked 5th), child-abuse (6th), domestic violence (7th), social security fraud (8th), income tax evasion (9th), and Medicare fraud (10th). Both these Australian and overseas studies challenge the early belief held by some criminologists, policy-makers and law enforcement agencies that the public condones or is indifferent toward corporate crime.⁴⁷

1.19 As the Australian studies were conducted many years ago, it is possible that the public perception of corporate crime has changed since that time. Recent media reports on corporate scandals, such as those relating to the collapse of HIH and One.Tel and the recall of products manufactured by Pan Pharmaceuticals, have re-ignited debates about corporate regulation.⁴⁸ The ongoing proceedings and media coverage of these events have heightened the public’s awareness of corporate wrongdoing⁴⁹ and may, in turn, increase the seriousness with which the public perceives corporate crime since media publicity about certain offences heightens public opinion about them.⁵⁰

45. P Wilson, J Walker and S Mukherjee, *How the public sees crime: an Australian survey* (Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice No 2, 1986).

46. The survey asked how much more serious are 13 specified offences compared to stealing a bicycle. The 13 offences in the survey were: stabbing to death, heroin trafficking, industrial pollution that kills, industrial negligence injury, armed robbery, child-abuse, wife-abuse, social security fraud, income tax evasion, Medicare fraud, male homosexuality, break and enter, and shoplifting.

47. See P Grabosky, J Braithwaite and P Wilson, “The myth of community tolerance toward white collar crime” (1989) 19 *Australian and New Zealand Journal of Criminology* 33 at 43.

48. See R Tomasic, “Corporate collapse, crime and governance – Enron, Anderson and beyond” (2002) 14 *Australian Journal of Corporate Law* 183.

49. Public awareness of corporate crime is growing. According to an Ernst and Young survey, the average number of newspaper headlines (Reuters) referring to corporate fraud has doubled over the past 10 years; “Fraud – the unmanaged risk” (2003 Global Risk Survey), available at «www.ey.com».

50. See R Holland, “Public perceptions of white collar crime seriousness: a survey of an Australian sample” (1995) 19 *International Journal of Comparative and Applied Criminal Justice* 91 at 104.

SENTENCING IN THE CONTEXT OF CORPORATE CRIME

1.20 The criticism is frequently made that sentences in the context of corporate crime, whether imposed on corporations or individual offenders, are too lenient.⁵¹ To the extent that this is an issue involving the proper exercise of judicial discretion, it has been reviewed in the first stage of the Commission's inquiry. To the extent that this view calls into question the maximum penalties applicable to relevant offences, it is an aspect of sentencing that will be examined in the third stage of the Commission's sentencing inquiry, which will examine statutory maximum penalties for offences in New South Wales.⁵² To the extent to which, it raises the issue of whether or not minimum penalties should be imposed on such offenders, it will be addressed in the Commission's forthcoming discussion paper on legislative sentencing, which is expected to be published in 2003.

THE INCIDENCE OF CORPORATE OFFENDING

1.21 A description of the nature and incidence of crimes committed by corporate offenders in New South Wales is clearly desirable as a preface to the issues canvassed in this Report. Owing to a lack of comprehensive statistical data on corporate offending in New South Wales, the following section gives a brief overview of the types of matters that come before the State's courts for sentencing, only hinting at the incidence and nature of crimes committed by corporate offenders. That is, without further statistical information, the Commission can only gain an idea of what kinds of offences are being punished, not all those that are actually being committed or prosecuted. Where law enforcement and prosecution authorities are unable to detect or prosecute offences, the situation is even more uncertain. Given the lack of readily available data on the issue, the Commission relied on a number of submissions and statistics from the following:

- NSW Bureau of Crime Statistics and Research,
- NSW Land and Environment Court,
- NSW Environment Protection Authority,
- NSW Office of the Director of Public Prosecutions,
- Commonwealth Office of the Director of Public Prosecutions, and
- Judicial Information Research System (JIRS).⁵³

51. For recent reports in the media, see, for example A Fels, "Jail would hurt more than fines" *Canberra Times* (5 July 2001) at 11; T O'Loughlin, "Hit crooked bosses much harder: Fels" *Sydney Morning Herald* (3 July 2002); L Tingle and G Jacobsen, "Price-fixing executives deserve jail, says Fels" *Sydney Morning Herald* (25 April 2002) at 1; Australian Associated Press, "Jail over false ads: Fels" *West Australian* (11 July 2001) at 14.

52. See NSWLRC DP 33 at para 1.13-1.20.

53. Statistics supplied by the Judicial Commission of NSW.

1.22 The following discussion considers convictions for the various kinds of corporate crime in New South Wales. When reading the statistics, it is important to keep in mind that the figures are likely to represent only a fraction of the number of corporate crimes that are actually committed, given the possibility that many corporate offences go undetected.⁵⁴ Where possible, the Commission has provided comparative figures of overall convictions so as to illustrate the ratio of corporate to individual offending.

Local Courts

1.23 In the nine years from 1993-2001, a total of 2,784 corporations were found guilty of criminal offences in the New South Wales Local Courts.⁵⁵ In the same period, the Local Courts convicted a total number of 1,390,592 defendants.⁵⁶ Hence, the number of corporate bodies represents just 0.2% of the overall number of criminal convictions handed down by the courts in that period; a small portion of the aggregate amount.⁵⁷

1.24 The majority of the corporate convictions (approximately 71%) throughout this period involved taxation offences, mostly in breach of Commonwealth laws. For example, the failure to provide information or lodge forms as required under taxation law.⁵⁸ The next largest category (amounting to 12% of all convictions), related to offences in the area of transport and motor vehicle regulation. For example, having an

54. Gruner suggests several reasons as to why corporate crime is difficult to detect. He adverts to the isolation of corporations from detailed scrutiny by law enforcement agencies and public bodies, corporate secrecy for crime concealment or legitimate competitive reasons and uncooperative information sources or individuals within the corporation as factors that may contribute to corporate crime going unnoticed; R Gruner, *Corporate crime and sentencing* (2nd ed, Business Laws Inc, Chesterland, Ohio, 1997) at 1.006.

55. NSW Bureau of Crime Statistics and Research, "Defendant is a corporate body" *NSW Local Criminal Courts Statistics 1993-2001*.

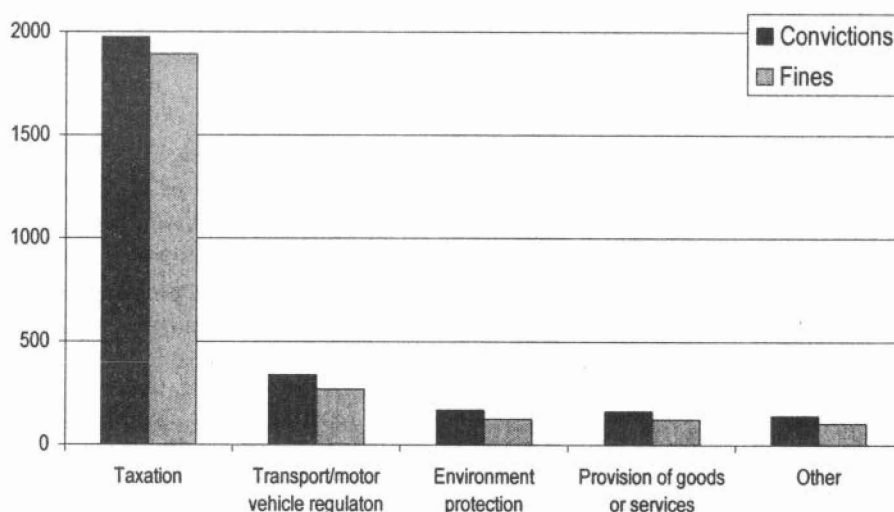
56. NSW Bureau of Crime Statistics and Research, "Outcome for all charges in finalised appearances" *NSW Local Criminal Courts Statistics 1993-2001*.

57. This number can be compared with figures gathered by the United States Sentencing Commission in relation to the United States federal criminal justice system. In the four years from 1984-1987, only 1,569 corporate defendants were identified out of approximately 220,000 criminal defendants in the United States District Courts. These 1,569 charges resulted in only 1,221 convictions in that four-year period; JS Parker, "Criminal sentencing policy for organizations" in United States Sentencing Commission, *Discussion materials on organizational sanctions* (1988) at 5.

58. *Taxation Administration Act 1953* (Cth) s 8C(1)(a). See also *Income Tax Assessment Act 1936* (Cth) s 221F(5J)(a) (failure to send in a group certificate) and *Taxation Administration Act 1953* (Cth) s 8H(1) (failure to comply with an order to comply with requirements under taxation law).

unregistered vehicle⁵⁹ and exceeding the speed limit.⁶⁰ Two other categories comprised 6% each of the total. The first involved regulatory offences relating to environmental protection. For example, selling a pollution emitting vehicle⁶¹ and causing water pollution.⁶² The second involved regulatory offences relating to trade and the provision of various types of goods and services, for example, the sale of adulterated or falsely described food.⁶³ The remainder of the total number of corporate offences (approximately 5%) varied widely in nature and included infringements of planning, customs and property laws, as well as business and corporate regulations.

TABLE ONE
NSW LOCAL COURTS – CORPORATE OFFENCES PROVED (1993-2001)



1.25 Of the convictions involving corporations, 2,515 (approximately 90%) resulted in the imposition of a fine. The imposition of a fine as the most frequent corporate sanction corresponds with a study of United States District Court matters in the period 1984-1987, which shows that the predominant sentence for corporate offenders in that jurisdiction is the fine, either alone or in conjunction with an order for restitution.⁶⁴

59. *Traffic Act 1909* (NSW) s 6(1)(c)(v).

60. *Traffic Act 1909* (NSW) s 4A(1).

61. *Clean Air Act 1961* (NSW) s 21B(a).

62. *Clean Waters Act 1970* (NSW) s 16(1); *Protection of the Environment Operations Act 1997* (NSW) s 120.

63. *Food Act 1989* (NSW) s 9(3).

64. J S Parker, "Criminal sentencing policy for organizations" in United States Sentencing Commission, *Discussion materials on organizational sanctions* (1988) at 6.

Environmental offences

1.26 Separate statistics have also been kept for environmental offences heard in the Local Courts. In the four-year period from July 1998 to June 2002, the Local Courts finalised 227 cases involving environmental offences.⁶⁵ Of these proceedings, 189 (83%) resulted in a fine, 37 (16%) in the charges being dismissed⁶⁶ and one with the conditional discharge of the corporation subject to a good behaviour bond.⁶⁷ The vast majority of the cases (84%) involved breaches of environmental protection laws,⁶⁸ while the remaining 16% involved the violation of planning laws.⁶⁹

Higher Courts

1.27 There is a notable absence of data regarding criminal matters involving corporate defendants in the New South Wales Supreme and District Courts. The Commission obtained limited statistics⁷⁰ that suggest that the vast majority of such matters are predominantly brought before the Local Courts and specialised Courts and Tribunals. The Office of the New South Wales Director of Public Prosecutions conducted just 11 prosecutions against corporate bodies in the 10-year period from 1993-2002,⁷¹ which suggests that the higher courts rarely hear corporate criminal matters. To complicate matters further, there are no available statistics regarding the incidence of prosecutions or convictions under the *Fair Trading Act 1987* (NSW), as breaches of that Act are considered civil offences and as such, are not recorded by the New South Wales Bureau of Crime Statistics and Research.⁷²

65. Statistics supplied by the Judicial Commission of NSW. They relate to corporate offenders only.

66. Under *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(1)(a).

67. Under *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(1)(b).

68. Under the *Clean Air Act 1961* (NSW); *Clean Waters Act 1970* (NSW); *Protection of the Environment Operations Act 1997* (NSW); and the *Water Act 1912* (NSW).

69. Under the *Environmental Planning and Assessment Act 1979* (NSW).

70. The NSW Bureau of Crime Statistics and Research informed the Commission that from 1993-2001, the NSW higher Criminal Courts finalised just 9 allegations of criminal conduct that involved a corporate defendant. As the statistics did not distinguish between individual cases, the Commission cautions that the 9 determinations by the court may have been components of the one case: NSW Bureau of Crime Statistics and Research "Defendant is a corporate body: charges by act and section, outcome, penalty, quantum of penalty" *NSW higher criminal courts statistics 1993-2001*.

71. Information supplied by N Cowdery, Director of Public Prosecutions (29 July 2002). However, note that details regarding whether these 11 cases were heard in the Higher Courts were not provided.

72. Information supplied by V Korabelnikoff of the NSW Bureau of Crimes Statistics and Research (4 February 2003).

1.28 The high number of prosecutions and convictions obtained in the New South Wales Land and Environment Court and the Industrial Relations Commission (both of which are discussed later) support an inference that the serious offences typically committed by corporations are in the area of environmental protection and occupational health and safety. As the Land and Environment Court and the Industrial Relations Commission each have the same status as the New South Wales Supreme Court,⁷³ corporate prosecutions relating to matters that come within either body's jurisdiction will be prosecuted before them as opposed to the District or Supreme Court. However, appeal may lie from certain decisions of the Land and Environment Court.⁷⁴

New South Wales Land and Environment Court

1.29 As the Land and Environment Court maintains its own database on prosecutions and convictions, the Commission has been able to form a relatively good idea of the number of matters involving corporate defendants heard in that court. In the six-year period from 1996-2002,⁷⁵ the Court convicted 735 defendants, 289 of which were corporations. Of these corporate convictions, approximately 90% of the defendants (260) were penalised with the imposition of a fine.

1.30 The quantum of the fines imposed ranged from relatively small amounts to hundreds of thousands of dollars. For example, one corporation was fined \$8,500 for the deposit of 7,167 tonnes of waste water on land,⁷⁶ while another was fined \$240,000 for causing contamination to an open dam.⁷⁷ To date, the biggest fine imposed by the Court is \$510,000, which was in relation to the accidental discharge of oil by a ship into the waters of Sydney Harbour.⁷⁸

73. The respective jurisdiction of these bodies is set out in the *Land and Environment Court Act 1979* (NSW) and the *Industrial Relations Act 1996* (NSW).

74. Decisions made in the NSW Land and Environment Court can be appealed on a question of law before the NSW Court of Appeal or the NSW Court of Criminal Appeal, depending on whether the matter is civil or criminal in nature. No appeal to these Courts lies from the NSW Industrial Relations Commission, the decisions of the Full Bench of the Commission being final and protected by a privative clause: *Industrial Relations Act 1996* (NSW) s 179(1).

75. Information supplied by N Nheu of the Land and Environment Court (11 November 2002).

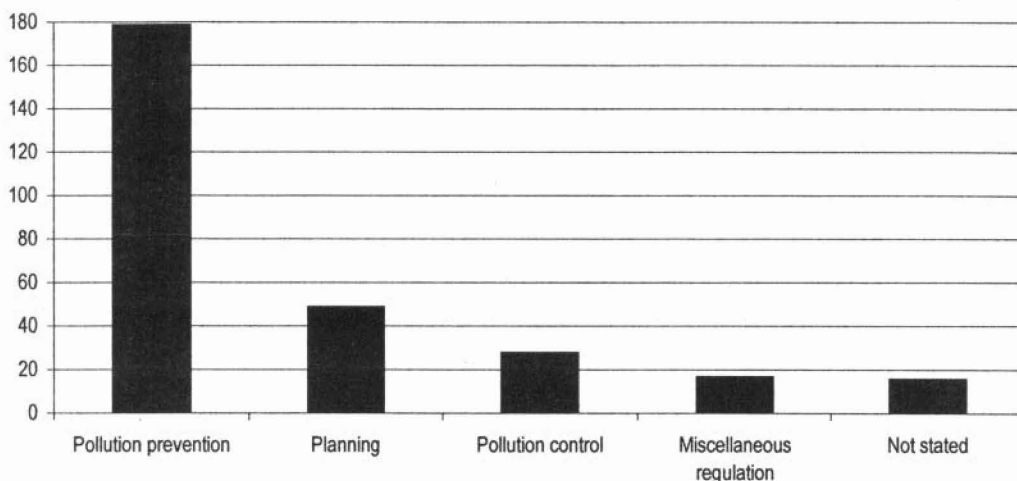
76. In contravention of *Waste Minimisation and Management Act 1995* (NSW) s 64(1). See *Environment Protection Authority v Sorcevski* [2002] NSWLEC 115.

77. In breach of *Environmental Offences and Penalties Act 1989* (NSW) s 6(1). See *Environment Protection Authority v CSR Ltd* [2001] NSWLEC 267.

78. *Filipowski v Fratelli D'Amato* (2000) 108 LGERA 8.

1.31 Most offences (approximately 62%) involved the breach of laws designed to prevent pollution.⁷⁹ The next largest category, at around 17%, involved offences in the area of planning and building regulation,⁸⁰ whilst 10% involved the control and licensing of polluting activities.⁸¹

TABLE TWO
LAND AND ENVIRONMENT COURT – CORPORATE OFFENCES (1996-2002)



New South Wales Industrial Relations Commission

1.32 According to data from JIRS, in the nearly 11-year period from September 1989 until July 2000, the Industrial Relations Commission imposed 273 fines on businesses (which can include other vehicles for conducting business apart from corporations) for breaches of the *Occupational Health and Safety Act 1983* (NSW).⁸²

1.33 One of the most serious offences under the Act is breach of section 15, which is failure by an employer to provide and maintain safe systems of work. The JIRS data indicate that the median fine given to businesses for this offence between September 1989 and July 2000 fell in the range of

79. For example, *Clean Air Act 1961* (NSW); *Clean Waters Act 1970* (NSW); *Environmental Offences and Penalties Act 1989* (NSW); *Marine Pollution Act 1987* (NSW); *Protection of the Environment Operations Act 1997* (NSW).

80. *Environmental Planning and Assessment Act 1979* (NSW); *Local Government Act 1993* (NSW).

81. *Pollution Control Act 1970* (NSW); *Waste Minimisation and Management Act 1995* (NSW).

82. This Act has been replaced by the *Occupational Health and Safety Act 2000* (NSW).

5-10% of the maximum fine, which is 5000 penalty units for corporations.⁸³ Data obtained from 68 published Industrial Relations Commission cases decided in the period of 2000-2001⁸⁴ found that the average fine given to a corporation in breach of section 15(1) was \$80,908. This sum represents 14.71% of the maximum fine.⁸⁵ The single largest fine within this sample was \$300,000.⁸⁶

A need for better data-collection

1.34 Though the accuracy of the statistical data recording the sentencing of corporate crime is somewhat sketchy, the Commission is of the view that it does at least show that the phenomenon of corporate crime is a significant issue in New South Wales. Moreover, given that the available statistics only record convictions, the incidence of prosecutions of corporate offences is possibly considerably higher. The Commission notes that improvements to the collection of data regarding the extent of corporate crime in New South Wales would greatly facilitate the formulation of an appropriate government response.

83. *Occupational Health and Safety Act 1983* (NSW) s 15. A penalty unit is currently set at \$110: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.

84. According to the NSW Bureau of Crimes Statistics and Research, there were no prosecutions under this section in the lower courts during the period 1993-2001.

85. The maximum fine for a corporation is 5000 penalty units: s 15.

86. *State Rail Authority of NSW v WorkCover Authority of NSW (Inspector Dubois)* (2000) 102 IR 218. This was a decision on appeal to the Full Bench of the IRC in Court Session, which overturned Maidment J's penalty of \$420,000, reducing the fine to \$300,000.

2. Corporate criminal liability

- The current legal regime
- Further bases of liability
- Is the present law satisfactory?
- The justification of corporate criminal liability

2.1 While the basis for the imposition of criminal liability on corporations is outside the terms of the Commission's sentencing reference, a recurring theme in the consultations undertaken by the Commission with regulatory agencies and prosecution officers was the need to clarify and reform the legal principles for determining corporate fault.¹ The inadequacy of the tests for corporate liability in the law of New South Wales was argued to be one of the main reasons inhibiting the prosecution of corporations.² Further, the Commission believes that a consideration of the bases of corporate liability helps to shed light on the application to corporate offenders of general sentencing objectives.³

2.2 This Chapter examines the basis of corporate criminal liability in the law of New South Wales. It discusses the adequacy of the law in the light of the reasons for the imposition of corporate criminal liability, taking into consideration alternative models of such liability.

THE CURRENT LEGAL REGIME

2.3 The general principles governing criminal liability, in particular the requirement to prove the requisite *mens rea* and *actus reus* of an offence, were developed with individual offenders in mind. Their transposition to entities that are inanimate and without a mind of their own is not obvious. The imputation of criminality to corporations is particularly difficult in offences that are committed with a specific intent, for example murder, or the case of where the *actus reus* must be that of a natural person, as in a sexual offence.⁴

2.4 Legislation makes the imposition of corporate liability easier in some cases. It may make the offences it contains expressly applicable to corporations.⁵ Moreover, the difficulty of proving *mens rea* might be avoided by imposing a regime of absolute liability, which does not require proof that the accused knew or could reasonably have known that its act was wrongful, and which does not recognise any excuse of honest and reasonable mistake. However, most offences still require some element of fault, either by way of intent to commit the offence or some degree of knowledge or recklessness with respect to conduct.

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1. Regulatory Agencies and Prosecution Officers, *Consultation*; Ms Kerry Palmer, Principal Legal Officer (Legal Services Branch), NSW Environment Protection Authority, *Consultation*.
 2. Regulatory Agencies and Prosecution Officers, *Consultation*.
 3. See Chapter 3.
 4. See P Gillies, *Criminal law* (4th ed, LBC Information Services, Sydney, 1997) at 133; *R v ICR Haulage* [1944] 1 KB 551 at 554.
 5. The statutes listed in Appendix A contain penalties that are specific to corporations.

2.5 As a corporation can only act through the natural persons that constitute it, corporate responsibility is traditionally based on the conduct and intent of individuals in the corporation. The law has come to attribute responsibility in two ways:

- by identifying the behaviour of a person who is the directing mind of the corporation as that of the corporation; and
- by imposing vicarious liability on the corporation for the acts of its employees and agents.

Identification doctrine

2.6 The principal basis on which a corporation is responsible for a criminal act is that a person who is the directing mind and will of the company and controls what it does, has committed an offence in the course of the company's business. Such a person is treated in law as being the company.⁶ Lord Reid explained the reason for this in the leading English case of *Tesco Supermarkets Ltd v Natrass*, which states the common law of Australia:⁷

A living person has a mind which can have knowledge or intention or be negligent and has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company ... He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind than that guilt is the guilt of the company.⁸

2.7 Lord Pearson said that there are some officers of a company who may for some purposes (such as determining the criminal liability of the corporation) "be identified with it, as being or having its directing mind and will, its centre and ego, and its brains."⁹

2.8 The persons who can be considered the company's directing mind include its directors, the managing director, or the persons to whom the particular functions of the corporation have been delegated so that they may be performed without the need for supervision. Not every employee

6. This is separate from vicarious liability which is discussed in 2.12-2.14: see *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 at 170, 190. But see E Colvin, "Corporate personality and criminal liability" (1995) 6 *Criminal Law Forum* 1 at 13-14.

7. See *Hamilton v Whitehead* (1988) 166 CLR 121 (managing director held to be mind of the company for purposes of determining whether company breached provisions of the *Companies Code* (WA)). See also *Criminal Code Act 1995* (Cth) s 13.3; *Trade Practices Act 1974* (Cth) s 84.

8. *Tesco Supermarkets Ltd v Natrass* at 170 (Lord Reid).

9. *Tesco Supermarkets Ltd v Natrass* at 190 (Lord Pearson).

“whose work is brain work, or exercise some managerial discretion under direction of superior officers” would fall within this category.¹⁰ The doctrine recognises delegation of authority but the delegate must have full discretion to act independently of instructions from the board of directors.¹¹ Hence, the manager of one of the shops of the defendant company in the *Tesco* case was held not to be the same person as the company because he was an employee in a relatively subordinate post, and, in the company’s hierarchy, there were layers of supervisors between him and the board of directors.¹²

2.9 This identification doctrine has been criticised mainly because it restricts corporate criminal liability to the conduct or fault of directors and high-level managers.¹³ It creates a discriminatory rule in favour of larger corporations. The range of persons within a large company who will possess the relevant characteristics to make the company liable will inevitably be a small percentage of those who work for the company. The consequence is that the company will be able to escape criminal liability for the acts of most of its employees.¹⁴

2.10 The doctrine also does not address the consideration that offences committed on behalf of large organisations often occur at the level of middle or lower-tier management.¹⁵ Directors of large companies do not usually take a direct hand in the day-to-day operations of the company.¹⁶ Many decisions of large corporations are made at the level of branches or units and the identification doctrine insulates a corporation from liability for decisions made at those levels.¹⁷

2.11 Moreover, the *Tesco* principle does not take into account the diverse structures of contemporary corporations. Many of them have “flatter structures” with greater delegation being given to relatively junior officers.¹⁸ The principle oversimplifies the structures of large companies and fails to take account of their complex and interconnected processes where corporate decisions and operations are the result of the conduct of a number of individuals at different levels of management.¹⁹

10. *Tesco Supermarkets Ltd v Natrass* at 171 (Lord Reid).

11. *Tesco Supermarkets Ltd v Natrass* at 170 (Lord Reid).

12. *Tesco Supermarkets Ltd v Natrass* at 193 (Lord Pearson).

13. B Fisse, “The attribution of criminal liability to corporations: a statutory model” (1991) 13 *Sydney Law Review* 277.

14. J Gobert, “Corporate criminality: four models of fault” (1994) 14 *Legal Studies* 393 at 400.

15. Fisse at 277-278.

16. Gobert at 401.

17. E Colvin, “Corporate personality and criminal liability” (1995) 6 *Criminal Law Forum* 1 at 15.

18. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys General, *Model criminal code: chapter 2: general principles of criminal responsibility* (Final Report, 1992) at para 501.

19. Gobert at 401.

Vicarious liability

2.12 Statute may impose vicarious liability on a corporation for the acts of its employees or agents acting within the scope of their authority.²⁰ Whether the statute does so or not is a question of statutory interpretation: did the legislature, expressly or by necessary implication, create a criminal offence for which the corporation can be found vicariously liable?²¹ The answer is found by reference to several factors, including the object of the statute; the language used; the nature of the duty laid down; the person upon whom the duty is imposed; and the person upon whom a penalty is to be imposed.²²

2.13 In its application to corporations, vicarious liability may be justified on the basis of deterrence: it is directed at ensuring internal policing. The argument is that the prospect of the corporation incurring vicarious liability will result in greater shareholder and corporate officer attention to the selection of officers and subordinates. Vicarious liability also has utilitarian value in extending liability to wrongs committed by lower level officials and employees. However, the reasonableness of imposing liability on a corporation for the criminal acts of low level officials and employees is debatable where the corporation has derived no benefit from such acts. Further, for large corporations, a practical objection to the principle of vicarious liability is that it does not take account of the difficulty in supervising what may be hundreds or even thousands of employees.²³

2.14 There are more fundamental criticisms. The principle of vicarious liability is borrowed from the civil law of torts and is said to be at odds with the notion of criminal liability, ordinarily dependent on proof of fault. Conviction without fault, especially in cases involving serious offences and where a heavy fine is imposed, is, arguably, unjust. Moreover, vicarious

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20. Eg *R v Australasian Films Ltd* (1921) 29 CLR 195; *Morgan v Babcock & Wilcox Ltd* (1929) 43 CLR 163 esp at 173-174 (Knox CJ and Dixon J). A modern example is the *Fair Trading Act 1987* (NSW) s 70 which provides that if it is necessary to establish the state of mind of a body corporate, it is sufficient to show that its director, servant, or agent of the body corporate, acting within the scope of their authority, had that state of mind. Moreover, it provides that conduct engaged in on behalf of the body corporate by its director, servant or agent acting within the scope of their authority, shall be deemed to have been engaged in also by the body corporate.
 21. *Tiger Nominees Pty Ltd v State Pollution Control Commission* (1992) 25 NSWLR 715 at 718-719 (Gleeson CJ). The statute involved in this case was the *Clean Waters Act 1970* (NSW), which contained offences relating to water pollution.
 22. *Moussell Bros Ltd v London and North-Western Railway Co* [1917] 2 KB 836 at 845 (Atkin J). For a discussion on the case law on the matter, see J Clough and C Mulhern, *The prosecution of corporations* (Oxford University Press, Melbourne, 2002) at 81-88.
 23. J Gobert, "Corporate criminality: four models of fault" (1994) 14 *Legal Studies* 393 at 398-399.

liability is not excluded even if the management of the company has expressly forbidden the employees from committing the acts in question.²⁴ In other words, under the principle of corporate vicarious liability, a company may become criminally liable for the conduct of one employee even if it has taken reasonable steps to ensure compliance with the law.²⁵ It has, however, been observed that, in practice, vicarious liability is imposed for reasons of enforcement rather than blameworthiness, especially where resort to personal liability would make legislation difficult to enforce.²⁶ Hence, it is generally applied only to offences characterised as regulatory in substance although criminal in form, such as laws relating to fair-trading, consumer protection and the environment.²⁷

FURTHER BASES OF LIABILITY

Aggregation model

2.15 This model of corporate criminal liability extends the identification and vicarious liability doctrines by “aggregating” into one criminal whole the conduct of two or more individuals acting as the company (or for whom the corporation is vicariously liable) in order to impose corporate criminal liability on the corporation where the acts combined establish that liability but each act is in itself insufficient to do so.²⁸ Aggregation can involve matching the conduct, the state of mind or the culpability of one individual with any one of these aspects of the behaviour of another individual. Thus, where an offence requires a particular level of knowledge or negligence, this can be found in an aggregation of the knowledge or negligence of several individuals.²⁹

2.16 American courts developed the aggregation model, sometimes referred to as the doctrine of collective knowledge.³⁰ A well-known

24. *Coppen v Moore (No 2)* [1898] 2 QB 306 (An employee of the defendant company sold American ham as Scotch ham. The company was convicted of an offence under legislation notwithstanding that written instructions had been issued to employees prohibiting them from selling ham under specific name or place of origin.)

25. J Gobert, “Corporate criminality: four models of fault” (1994) 14 *Legal Studies* 393 at 398.

26. J Clough and C Mulhern, *The prosecution of corporations* (Oxford University Press, Melbourne, 2002) at 80.

27. Clough and Mulhern at 80, citing *Tiger Nominees Pty Ltd v State Pollution Control Commission* (1992) 25 NSWLR 715 at 718 (Gleeson CJ).

28. E Colvin, “Corporate personality and criminal liability” (1995) 6 *Criminal Law Forum* 1 at 18-19; E Lederman, “Models for imposing corporate criminal liability: from adaptation and imitation toward aggregation and the search for self-identity” (2000) 4 *Buffalo Criminal Law Review* 641 at 662-663.

29. Colvin at 18-19.

30. In Australia, a concept of collective knowledge is found in the relationship between a Minister, the relevant government department and civil servants: see *Minister*

illustration is *United States v Bank of New England*.³¹ The charge was wilfully failing to file reports relating to currency transactions exceeding a certain statutory amount. The trial court's instructions to the jury (which the US Court of Appeals for the First Circuit upheld) contained these remarks: "The bank's knowledge is the totality of what all of the employees know within the scope of their authority. So if employee A knows one facet of the currency reporting requirement, and B knows another facet of it, and C a third facet of it, the bank knows them all ..." The Court of Appeals' decision affirming the bank's conviction stated:

A collective knowledge is entirely appropriate in the context of corporate criminal liability ... Corporations compartmentalise knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of the operation know the specific activities of employees administering another aspect of the operation.³²

2.17 Aggregation is said to be most useful in negligence cases: a series of minor failures by relevant officers of the company might add to a gross breach by the company of its duty of care.³³ There is, however, ongoing debate as to whether the principle applies to, and is an adequate test of, liability in those forms of corporate crime that require proof of will or intent.³⁴

2.18 The aggregation doctrine is rejected at common law, both in England³⁵ and in Australia, and both in criminal and civil cases.³⁶ In *R v*

of Aboriginal Affairs v Peko-Wallsend (1986) 162 CLR 24 at 66, where Justice Brennan quoted with approval the following passage in Lord Diplock's speech in *Bushell v Environment Secretary* [1981] AC 75 at 95: "Discretion in making administrative decisions is conferred upon a minister not as an individual but as the holder of an office in which he will have available to him in arriving at his decision the collective knowledge, experience and expertise of all those who serve the Crown in the department of which, for the time being, he is the political head. The collective knowledge, technical as well as factual, of the civil servants in the department and their collective expertise is to be treated as the minister's own knowledge, his own expertise."

31. *United States v Bank of New England* (1987) 821 F2d 844.

32. *United States v Bank of New England* at 856.

33. E Colvin, "Corporate personality and criminal liability" (1995) 6 *Criminal Law Forum* 1 at 23.

34. See E Lederman, "Models for imposing corporate criminal liability: from adaptation and imitation toward aggregation and the search for self-identity" (2000) 4 *Buffalo Criminal Law Review* 641 at 665-677.

35. See *R v HM Coroner for East Kent* (1989) 88 Cr App R 10. See also England and Wales, Law Commission, *Legislating the criminal code: involuntary manslaughter* (Report 237, 1996) at para 6.50.

36. For civil cases, see *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133 (fraud), esp at 145, explaining *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563 at 568.

Australasian Films Ltd,³⁷ the High Court held, in a situation in which the corporation was potentially vicariously liable by statute, that the only state of mind that can be imputed to a corporation is that of the individual who performs the prohibited act, not the state of mind of a different employee also acting within the scope of authority. Further, in a recent Victorian case, the prosecution argued for the use of aggregation to establish criminal negligence on that part of a corporation.³⁸ The corporation was charged with manslaughter for a death resulting from an explosion in its chemical plant. The prosecution submitted that criminal liability could be fixed on the company for the acts and omissions of its employees, particularly the plant manager and plant engineer. The Supreme Court of Victoria found that the acts of the individuals, while capable of being negligent, were not in the category of criminal negligence sufficient to support a conviction of manslaughter. The court further held that the “prosecution cannot rely on the concept of aggregation to move what may, in individual cases, be negligence, to the realm of negligence which can be attributed to the Company.”³⁹

2.19 Notwithstanding the courts’ rejection of an aggregation principle, the Criminal Law Officers Committee of the Standing Committee of Attorneys General of Australia recommended its inclusion as one of the tests of liability for offences involving negligence by a body corporate.⁴⁰ The Federal Government has implemented this recommendation. Section 12.4(2) of the *Criminal Code Act 1995* (Cth) provides:

If:

- (a) negligence is a fault element in relation to a physical element of an offence; and
- (b) no individual employee, agent or officer of the body corporate has that fault element;

that fault element may exist on the part of the body corporate if the body corporate’s conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).

2.20 The aggregation doctrine expands the identification and vicarious liability models of corporate criminal liability by enabling them to deal with cases involving events that result from complex processes and structures in corporations where decisions are made by a number of individuals at different levels of management, and where the act of one individual is innocent but when combined with others’ acts facilitates proof of the

37. *R v Australasian Films Ltd* (1921) 29 CLR 195.

38. *R v A C Hatrick Chemicals Pty Ltd* (Victoria, Court of Appeal, No 1485 of 1995, Hampel J, 29 November 1995).

39. *R v A C Hatrick Chemicals Pty Ltd* at 19.

40. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys General, *Model criminal code: chapter 2: general principles of criminal responsibility* (Final Report, 1992) at s 501.3.1.

corporation's failure to comply with the law. In itself, the aggregation model provides no justification for this expansion of corporate criminal liability. That justification is found in broader considerations of corporate blameworthiness or fault.

Corporate fault

2.21 Unlike other models of corporate criminal liability, this model attempts to discover a touchstone of liability in the behaviour of the corporation itself rather than in the attribution to the corporation of the conduct or mental states of individuals within the corporation. That touchstone is the blameworthy “organisational conduct” (the “fault”) of the corporation, such as the failure to take precautions or to exercise due diligence to avoid the commission of a criminal offence. The determination of liability focuses on the role that a company's structures, policies, practices, procedures, and culture (the “corporate culture”) play in the commission of an offence.⁴¹ These reveal the collective “will” of the company.

2.22 This model recognises that corporations have distinct public personae and possess collective knowledge. It considers corporations as quite capable of committing crimes in their own right, that is, through the collective.⁴² Its premise is that corporate criminal liability should no longer be seen simply as an offshoot of personal criminal liability, but that separate principles ought to govern these legal entities.⁴³ Its proponents view traditional criminal law concepts with their “human moorings”⁴⁴ as neither appropriate nor useful in the corporate context.⁴⁵ The fundamental shift in the conception of corporate criminal liability, that is, the “transition from derivative to organizational liability”,⁴⁶ has come about because of the increasing acceptance of the notion that corporations are moral and responsible agents.⁴⁷

41. J Gobert, “Corporate criminality: new crimes for the times” [1994] *Criminal Law Review* 722 at 723.

42. See B Fisse, “The attribution of criminal liability to corporations: a statutory model” (1991) 13 *Sydney Law Review* 277; E Colvin, “Corporate personality and criminal liability” (1995) 6 *Criminal Law Forum* 1; P French, *Collective and corporate responsibility* (Columbia University, New York, 1984); L Friedman, “In defense of corporate criminal liability” (2000) 23 *Harvard Journal of Law and Public Policy* 833.

43. Gobert; C Wells, “Corporate criminal developments in Europe” (2001) 39 *Law Society Journal* 62.

44. Gobert at 727.

45. Colvin at 8; Gobert; Wells; T Woolf, “The Criminal Code Act 1995 (Cth) – towards a realist vision of corporate criminal liability” (1997) 21 *Criminal Law Journal* 257.

46. Colvin at 4.

47. Colvin at 24. This explanation of corporations as blameworthy agents is put in like fashion by Braithwaite and Fisse, who cite T Donaldson, *Corporations and*

2.23 A major assumption of this model is that a corporation, especially a large one, is not only a collection of people who shape and activate it, but is also a set of attitudes, positions and expectations, which determine or influence the modes of thinking and behaviour of the people who operate the corporation.⁴⁸ This basis for imposing liability is attractive because it is better equipped to regulate the modern corporation, especially a large one, which is typically decentralised. It has been observed that harm from corporate crime may have, in many situations, less to do with misconduct by or incompetence of individuals and more to do with systems that fail to address problems of risk.⁴⁹

2.24 The *Criminal Code Act 1995* (Cth) provides a legislative model of corporate fault. It provides that if an offence requires fault, “the fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.”⁵⁰ The Act provides several means by which such an authorisation or permission may be established,⁵¹ including:

- proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision⁵² or

morality (Prentice-Hall, Englewood Cliffs, 1982) at 30-31, to justify the imposition of moral agency on corporations on the basis that corporations can give moral reasons for its decision making, and further, that “organisations have the capacity to change their policies and procedures”: J Braithwaite and B Fisse, “Accountability for corporate crime” (1988) 11 *Sydney Law Review* 468 at 485-486.

48. E Lederman, “Models for imposing corporate criminal liability: from adaptation and imitation toward aggregation and the search for self-identity” (2000) 4 *Buffalo Criminal Law Review* 641 at 686.

49. “A company should be criminally liable when it has organised its business in such a way that persons and property are exposed to unreasonable and unnecessary dangers, when the systems for controlling, monitoring and supervising those whom the company has put in a position to cause harm are inadequate, when a criminogenic ethos or culture has been allowed to flourish, and when the company failed to put into place mechanisms for managing and minimising risk. In short, corporate fault inheres in a company’s culpable failure to prevent business-related crimes that could have been averted had the company paid proper attention to the problem”: J Gobert and E Mugnai, “Coping with corporate criminality – some lessons from Italy” [2002] *Criminal Law Review* 619 at 621.

50. *Criminal Code Act 1995* (Cth) s 12.3(1).

51. The Act provides other means of establishing the fault element, such as:

- proving that the body corporate’s board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence: *Criminal Code Act 1995* (Cth) s 12.3(2)(a); or
- proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence: *Criminal Code Act 1995* (Cth) s 12.3(2)(b).

52. *Criminal Code Act 1995* (Cth) s 12.3(2)(c).

- proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.⁵³

2.25 The Act defines corporate culture as “an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes [sic] place”.⁵⁴

IS THE PRESENT LAW SATISFACTORY?

2.26 In the Commission’s view, the need for a review of the principles of corporate criminal liability is urgent, both generally and in the case of corporate liability for death and injury.

The models of corporate criminal liability

2.27 The appropriateness and adequacy of each of the existing and proposed models of corporate criminal liability is a matter of debate, as is the relationship between the various models. In particular, the present law seems deficient in two respects:

- First, it does not seem to take into account adequately the complexity of processes in corporations where decisions are made by a number of individuals at different levels of management; where operations are compartmentalised; or where the elements of specific duties are allocated to various individuals. In such instances, it is difficult to gather sufficient evidence successfully to prosecute and convict a corporation unless the law allows the aggregation of the components that constitute the corporation’s knowledge of a particular event.
- Secondly, it does not address the extent to which corporate policies or systems expressly, tacitly or impliedly permit the commission of the offence in question – for example, where a corporation has structured its business in a manner that exposes persons (its employees or customers) and property to harm; or where its systems for controlling and monitoring its officers and employees to ensure their compliance with the law are inadequate.

2.28 These points suggest at least a wider regime of liability than exists at present, one that would reflect a comprehensive and flexible corporate regulatory framework favoured by the Commission.⁵⁵

Corporate liability for death and injury

2.29 The particular respect in which a review of corporate criminal liability is desirable is in relation to a corporation’s liability for acts or

53. *Criminal Code Act 1995* (Cth) s 12.3(2)(d).

54. *Criminal Code Act 1995* (Cth) s 12.3(6).

55. See para 2.46-2.48.

omissions causing death or injury. A series of human disasters in which corporations have been found to be seriously at fault⁵⁶ have prompted calls around the world for reform to the legal principles governing corporate criminal liability in this respect.⁵⁷ In 1996, the English Law Commission published a Report into corporate manslaughter that recommended the enactment of an offence of “corporate killing”.⁵⁸ In 2000, the English Home Office published a Consultation Paper⁵⁹ that largely adopted the proposals of the Law Commission, on the basis that the identification doctrine had resulted in few prosecutions for corporate manslaughter,⁶⁰ and only three successful ones, all of small companies.⁶¹ The Home Office’s in principle support for the legislative reforms suggested by the Law Commission is embodied in the *Offences Against the Person Bill* appended to the Consultation Paper. The Bill has not yet been introduced into Parliament.

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56. In 1998, an explosion at the Esso’s Longford gas plant near Sale, Victoria, killed two workers, injured eight other staff and cut gas supplies to Victoria for two weeks at an estimated loss to industry of \$1.3 billion. Disasters in the United Kingdom that have fuelled debate regarding reform to this area of law include the 1987 capsizing of a P & O vehicle ferry, the *Herald of Free Enterprise*, off Zeebrugge which killed 187 people; the King’s Cross Fire in 1987 in which 31 people died as a result of systemic flaws in the operation of London Underground; and the Southall crash in 1997 in which 7 people died and for which senior management of Great Western Trains were held responsible. See C Wells, “Corporate criminal developments in Europe” (2001) 39 *Law Society Journal* 62; England, Home Office, *Reforming the law on involuntary manslaughter: the government’s proposals* (Stationery Office, May 2000).
 57. For a comparative analysis of developments in common law and civil law jurisdictions, see C Wells, “Corporate criminal developments in Europe” (2001) 39 *Law Society Journal* 62. For an overview of law reform in Western Europe and common law countries, see Queensland Department of Justice and Attorney General, *Dangerous industrial conduct* (Discussion Paper, 2000).
 58. England and Wales, Law Commission, *Legislating the criminal code: involuntary manslaughter* (Report 237, 1996). For a discussion of the Law Commission’s proposed offence of “corporate killing”, see J Clough and C Mulhern, *The prosecution of corporations* (Oxford University Press, Melbourne, 2002) at 181-182. See further P Glazebrook, “A better way of convicting businesses of avoidable deaths and injuries” (2002) 61 *Cambridge Law Journal* 405; J Liberman and J Clough, “Corporations that kill: the criminal liability of tobacco manufacturers” (2002) 26 *Criminal Law Journal* 223.
 59. United Kingdom Home Office, *Reforming the law on involuntary manslaughter: the Government’s proposals* (Stationery Office, May 2000).
 60. For example, *R v Cory Brothers and Company Ltd* [1927] 1 KB 810; *P & O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72 (Central Criminal Court).
 61. Following the House of Lords decision in *R v Adomako* [1995] AC 17, the Court of Appeal held in *Attorney General’s Reference No 2/1999 under Section 36 of the Criminal Justice Act 1972* (England, Court of Appeal, No 1999 07474 R2, 15 February 2000, unreported) that a defendant can be convicted of gross negligence manslaughter without evidence of his state of mind. However, the Court also ruled that the guilt of a human individual had first to be established before a non-human could be convicted.

2.30 Death in the workplace is a significant problem in New South Wales, where a total of 2,209 work-related deaths occurred between 1987 and 2001.⁶² At present, there are no statutory offences of corporate homicide in New South Wales. There has been recent debate in Victoria⁶³ and Queensland⁶⁴ regarding the introduction of such offences, and concomitant to that proposal, reform to existing principles of corporate criminal liability. In the Commission's view, it is timely for NSW to review the law in this area.

The Commission's view

2.31 More than a decade ago, the Criminal Law Officers' Committee of the Standing Committee of Attorneys General made reform proposals which, while retaining and modifying the traditional principles of corporate criminal liability, also adopted new standards to broaden the ways by which corporations may be held criminally liable.⁶⁵ The Commonwealth has taken the lead in implementing these proposals.⁶⁶ The *Criminal Code Act 1995* (Cth) in Part 2.5 contains the concepts of vicarious liability,⁶⁷ the identification doctrine,⁶⁸ aggregation,⁶⁹ and corporate fault as tests of corporate criminal responsibility.⁷⁰ These provisions may, of course, need development or refinement.⁷¹ Nevertheless, the Commission is of the view that the Government should examine whether the provisions are appropriate for general adoption in this State, with a view to ensuring that

62. NSW WorkCover, *Statistical bulletin 2000/2001* at para 2.1.

63. In 2001, the Victorian Government introduced the *Crimes (Workplace Deaths and Serious Injuries) Bill 2001* (Vic). The Bill was defeated in the Legislative Council and has not been reintroduced. For a detailed discussion of this bill, see J Clough and C Mulhern, *The prosecution of corporations* (Oxford University Press, Melbourne, 2002) at 178-180.

64. In 2000, Queensland's Department of Justice and Attorney General published a paper calling for submissions regarding the creation of an offence of "Dangerous Industrial Conduct". Since that time however, there have been no new developments to the proposals contained in that Discussion Paper.

65. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys General, *Model criminal code: chapter 2: general principles of criminal responsibility* (Final Report, 1992) at 104-113.

66. See *Criminal Code Act 1995* (Cth) Pt 2.5 Div 12.

67. Section 12.2.

68. Section 12.3(2)(a) and (b).

69. Section 12.4(2).

70. Section 12.3(2)(c) and (d). See also section 12.3(6).

71. For a discussion on potential problems and other issues relating to the provisions in Part 2.5 of the *Criminal Code Act 1995* (Cth), see J Clough and C Mulhern, *The prosecution of corporations* (Oxford University Press, Melbourne, 2002) at 138-158. See also T Woolf, "The Criminal Code Act 1995 (Cth) – towards a realist vision of corporate criminal liability" (1997) 21 *Criminal Law Journal* 257.

prosecution officers, regulatory agencies and the courts have wider means of determining the liability of corporations for violations of the law.

RECOMMENDATION 1

Consideration should be given to the adoption of the relevant provisions of Part 2.5 (Corporate Criminal Liability) of the *Criminal Code Act 1995* (Cth) as part of the law of New South Wales.

THE JUSTIFICATION OF CORPORATE CRIMINAL LIABILITY

2.32 The general desirability of regulating corporations through the mechanism of the criminal law is implicit in Recommendation 1. This section examines the validity of this assumption, which raises two fundamental and related questions, whose resolution will affect the model or models of corporate liability that should, appropriately, be adopted. The questions are:

- Is it appropriate to impose criminal liability on corporations at all? And,
- Who should be prosecuted for corporate crime, the corporation or its constituents (officers, employees and agents)?

Is corporate criminal liability appropriate?

2.33 Criminal liability is only one means of regulating corporations. Regulation is also possible through the civil law and through the persuasive techniques of self-regulation. Criminal sanctions typically include imprisonment, fines and community service orders. Since a corporation cannot be imprisoned, the criminal sanction most frequently imposed in the corporate context is the fine.⁷² Civil sanctions commonly take the form of a declaration, injunction, community service order, compensation order or a pecuniary penalty.⁷³ Administrative penalties form part of the civil sanctioning regime and are enforceable by the relevant regulatory agency. Administrative sanctions⁷⁴ may include the issuing of

72. See para 1.25.

73. See Australian Law Reform Commission, *Review of civil and administrative penalties in the federal jurisdiction* (Background Paper 7, 2001) and *Securing compliance: civil and administrative penalties in federal regulation* (Discussion Paper 65, 2002) at para 3.44-3.60; *Principled regulation: federal civil and administrative penalties in Australia* (Report 95, 2002) at para 2.45-2.63.

74. For further discussion, see Australian Law Reform Commission, *Principled regulation: federal civil and administrative penalties in Australia* (Report 95, 2002) at para 2.64-2.70.

infringement notices,⁷⁵ negotiated⁷⁶ or other monetary penalties,⁷⁷ publicity orders,⁷⁸ the restriction of rights and withholding of licences.⁷⁹ Most commonly however, administrative remedies entail the resolution of disputes by alternative means, such as negotiation, arbitration, authorisation and conciliation.

2.34 The circumstances in which it is appropriate to regulate through the imposition of criminal as opposed to civil liability can only be determined by appreciating the strengths and weaknesses of each form of regulation. By way of generalisation, however, it is worth noting that regulatory theorists generally warn against over-reliance on criminal law as a regulatory mechanism.⁸⁰

Advantages of regulation by criminal law

2.35 **Express public censure.** The capacity to express public disapproval of the convicted party is often said to be unique to criminal liability,⁸¹ as “only criminal liability is understood against the background of social norms, codified by the criminal law, as conveying the particular moral condemnation that expressive retribution contemplates”.⁸² That condemnation may result in a loss of corporate reputation, which may in turn translate into financial harm, and which is, arguably, the most powerful sanction that can be imposed on a corporation.⁸³ Many corporate executives care

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75. For example, *Marine Parks Act 1997* (NSW) s 38 empowers marine park rangers to issue penalty notices to people who commit offences against the Act. A person served with such a notice must pay the stated amount or otherwise have the matter dealt with in court.
 76. Where the parties to an action agree on a penalty prior to the commencement of proceedings.
 77. Such as charges or interest determined according to statute, for example, *Civil Liability Act 2002* (NSW) s 18(2) and (3).
 78. For example, the *Anti-Discrimination Act 1977* (NSW) s 113(1)(b)(iia) enables the Anti-Discrimination Board to order respondents to publish an apology or retraction for conduct that infringes the Act.
 79. For example, the *Animal Research Act 1985* (NSW) s 44 empowers the Director-General of the Animal Research Review Panel to impose sanctions affecting a corporation's licence in the event of substantiated complaints against that corporation.
 80. See B Fisse, *Howard's criminal law* (5th ed, Law Book Company, Sydney, 1990) at 598; Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974* (Discussion Paper 56, 1993) at para 6.11; M Bagaric, “The civilisation of the criminal law” (2001) 25 *Criminal Law Journal* 184 at 184-185.
 81. See J Coffee, “Paradigms lost: the blurring of the criminal and civil law models – and what can be done about it” (1992) 101 *Yale Law Journal* 1875; L Friedman, “In defense of corporate criminal liability” (2000) 23 *Harvard Journal of Law and Public Policy* 833. Compare V Khanna, “Corporate criminal liability: what purpose does it serve?” (1996) 109 *Harvard Law Review* 1477.
 82. Friedman at 855.
 83. Khanna at 1492.

deeply about avoiding adverse publicity because they view both their personal reputation and that of the corporation as priceless assets.⁸⁴

2.36 Severe penalties. Criminal penalties tend to be more severe than civil penalties. As criminal liability may lead to reputational losses for the corporation and deprivation of liberty for corporate management, criminal sentences are widely perceived as harsher than civil penalties. Fines imposed for criminal conduct are typically higher than those in the civil regime. The heightened procedural safeguards for defendants in criminal cases, such as more stringent rules of evidence⁸⁵ and a higher standard of proof⁸⁶ show the importance of ensuring that defendants are afforded procedural fairness in light of the potential severity of the penalty.⁸⁷

2.37 Reinforcement of societal values. One function of the criminal law is to shape standards of appropriate behaviour and reaffirm fundamental community values. The public prosecution of violations of the criminal law is a visible demonstration of the State's will to protect certain values and an affirmation that the community continues to adhere to those values.⁸⁸

2.38 Enhanced potential for publicity. The stigma that attaches to criminal liability, as well as the possibility that high level managers (who are possibly also well-respected members of the community) may be incarcerated, means that criminal proceedings generally receive intense media coverage.⁸⁹ It is arguable however, that corporate criminal liability

84. B Fisse, *The impact of publicity on corporate offenders* (State University of New York Press, Albany, 1983) cited in I Ayres and J Braithwaite *Responsive regulation: transcending the deregulation debate* (Oxford University Press, New York, 1992) at 22. This finding was supported in consultations conducted by the ALRC, in which it was established that a majority of corporate executives are more concerned with avoiding a criminal conviction than the imposition of a monetary penalty, even if the civil penalty is greater than the criminal penalty: Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974* (Report 68, 1994) at para 9.10.

85. For example, the privilege against self-incrimination, (*Evidence Act 1995* (NSW) s 128) and the various restrictions on the admissibility of evidence that relate to the credibility (s 102) or character (s 110) of the accused.

86. The prosecution in criminal proceedings must prove its case "beyond a reasonable doubt", whereas in civil proceedings, the standard is "on the balance of probabilities".

87. See K Mann, "Punitive civil sanctions: the middleground between criminal and civil law" (1992) 101 *Yale Law Journal* 1795 at 1811.

88. Canadian Law Reform Commission, *Sentencing in environmental cases* (Protection of Life Series, Study Paper, 1985) at 1.

89. And, if one accepts Coffee's assertion that, with regard to white-collar crimes, "the public learns what is criminal from what is punished, not vice versa", then this aspect of the criminal law is clearly of critical importance: J Coffee, "Paradigms lost: the blurring of the criminal and civil law models – and what can be done about it" (1992) 101 *Yale Law Journal* 1875 at 1889.

receives more public attention simply because of the nature and extent of the penalty awarded, or perhaps, the public prominence of the corporation, rather than from any cause derived from the criminal process itself.

Disadvantages of regulation by criminal law

2.39 Ineffective in the corporate context. Some commentators have suggested that criminal sanctions are inappropriate in the corporate context given that corporations are immune to traditional criminal penalties:⁹⁰ corporations cannot be imprisoned and their formidable wealth often renders the imposition of a fine inconsequential.⁹¹ Moreover, where the defendant corporation is bankrupt or no longer trading at the time of sentencing, the fine as a sanction is ineffectual. It has also been said that, as corporate criminal liability derives from the culpability of individuals within the corporation,⁹² the moral condemnation that attaches to criminal liability has little rehabilitative impact on the organisation itself, as the corporation is an inanimate entity, incapable of feeling shame, guilt or remorse. Commentators favouring corporate criminal liability dismiss these concerns, arguing that, as many corporations appear to possess distinct public personae, they are capable of “expressive potential” and as such, are rightly subject to criminal liability for misconduct.⁹³

2.40 Disincentive to self-regulation. A regulatory framework with its focus on punishment rather than cooperation, promotes disharmony by putting the relationship between the relevant enforcement agency and businesses that it seeks to regulate on an adversarial footing. Criminal investigations and prosecutions may antagonise businesses, prompting the emergence of a sub-culture of disobedience.⁹⁴

2.41 Difficult to secure convictions. The heightened procedural safeguards that attend criminal proceedings mean that there is a lower likelihood of proving criminal, as opposed to civil, liability.

Advantages of regulation by civil liability

2.42 Widely available. Civil remedies are more accessible than criminal penalties as they do not rely solely, or even primarily, on public

90. See, for example, V Khanna, “Corporate criminal liability: what purpose does it serve?” (1996) 109 *Harvard Law Review* 1477.

91. Khanna at 1478.

92. Khanna at 1485.

93. Friedman observes that “corporate exemption from criminal liability would tend to undermine the condemnatory effect of criminal liability on individuals in respect to similar conduct – and, ultimately ... diminish the moral authority of the criminal law as a guide to rational behavior”: L Friedman, “In defense of corporate criminal liability” (2000) 23 *Harvard Journal of Law and Public Policy* 833 at 859.

94. I Ayres and J Braithwaite, *Responsive regulation; transcending the deregulation debate* (Oxford University Press, New York, 1992) at 20.

enforcement. Civil liability is arguably easier to prove than criminal liability as a lower standard of proof and more inclusive practices regarding the admissibility of evidence apply.

2.43 Flexible. In civil proceedings the parties may narrow the issues in dispute by the use of interlocutory procedures such as discovery and interrogatories. This enables the court to avoid wasting time and money hearing evidence on matters where, in effect, there is general agreement between the parties.⁹⁵ The court is also afforded greater flexibility in fashioning orders that are appropriate in the particular circumstances, and as such, is more able to ensure that the remedy fits the wrong.

2.44 Preventive rather than merely punitive. In particularly urgent and appropriate cases, the enforcer can seek injunctive relief. Accordingly, civil remedies are capable of preventing misconduct from occurring in the first place, as the complainant need not wait for injury to occur before instituting proceedings.

Disadvantages of regulation by civil liability

2.45 Little denunciatory capability. Civil sanctions lack the moral condemnatory force, and therefore possibly the deterrent effect, of criminal penalties.⁹⁶ As one commentator has remarked, civil liability merely identifies “a failure to live up to an ideal standard of conduct which may be beyond the knowledge or capacity of the individual, and in acts which are normal and usual in the community, and without moral reproach in its eyes”.⁹⁷ As such, the imposition of a civil penalty may simply be viewed by corporate management as a necessary, and recoupable, cost of business.

The Commission's view

2.46 The Commission sees no reason why the two regimes of criminal and civil liability should not exist side by side to regulate the conduct of

95. Although the *Evidence Act 1995* (NSW) s 184 provides for the accused in criminal proceedings to admit matters of fact, such admissions in practice are significantly less common than in the civil context.

96. J Gobert, “Corporate criminality: new crimes for the times” [1994] *Criminal Law Review* 722 at 726.

97. K Mann, “Punitive civil sanctions: the middleground between criminal and civil law” (1992) 101 *Yale Law Journal* 1795 at 1806, quoting W Prosser, *Handbook of the law of torts* (5th ed, 1984) at 22. Compare V Khanna, “Corporate criminal liability: What purpose does it serve?” (1996) 109 *Harvard Law Review* 1477 at 1508, who cites a study conducted by M Block (“Optimal penalties, criminal law and the control of corporate behavior” (1991) 71 *Boston University Law Review* 395 at 414-415) to suggest that a finding of liability itself, regardless of whether the arena is civil or criminal, inflicts an equal degree of loss of reputation on a corporation. Khanna is skeptical that the public really cares whether a pecuniary fine is imposed in a civil or criminal setting, finding that it is the quantum of the fine alone that makes an impression on the public.

corporations. While the civil law may provide more predictable, accessible and efficient remedies than the criminal law, the criminal law's unique ability to express the community's condemnation of morally unacceptable behaviour is equally valuable. The criminal law identifies conduct wholly lacking in social utility and seeks to instil an environment of deterrence.

2.47 The Commission recognises, however, that public censure is a limited resource.⁹⁸ Reform of the current regulatory framework should, therefore, avoid the over-criminalisation of corporate behaviour. The Commission agrees with the view that criminal liability should attend morally blameworthy behaviour. Moreover, while we accept that civil liability is generally appropriate for regulatory offences that, while not immoral, offend against statute,⁹⁹ we reject the suggestion that the criminal law should have absolutely no role in the regulation of these types of offences.

2.48 The Commission's view accords with modern regulatory theory, particularly with Ayres and Braithwaite's influential theory of responsive regulation,¹⁰⁰ which recognises that the adoption of a regulatory strategy based totally on persuasion, or alternatively, based solely on punishment, is inappropriate.¹⁰¹ Ayres and Braithwaite represent the ideal regulatory approach through the tool of an "enforcement pyramid",¹⁰² in which the majority of enforcement action occurs at the base of the pyramid without resort to civil or criminal enforcement processes at all. Here preliminary mechanisms, consisting of administrative responses such as written warnings and negotiation meetings, aim to coax compliance through gentle persuasion. Where such measures fail, the regulator may choose to escalate its enforcement response by perhaps issuing a formal notice or making an application for the imposition of a civil penalty. Where non-compliance continues, further ascension up the pyramid becomes necessary. This may include the use of the criminal law; and, in extreme cases, "corporate capital punishment",¹⁰³ where the company is incapacitated by the revocation of its licence or a dissolution order.¹⁰⁴ The obvious advantage of this approach is that regulators are always able to keep the more stringent sanctions in reserve while attempting to encourage compliance. In practice,

98. J Coffee, "Paradigms lost: the blurring of the criminal and civil law models – and what can be done about it" (1992) 101 *Yale Law Journal* 1875 at 1877.

99. S Simpson, *Corporate crime, law, and social control* (Cambridge University Press, New York, 2002) at 49.

100. I Ayres and J Braithwaite, *Responsive regulation: transcending the deregulation debate* (Oxford University Press, New York, 1992).

101. See Ayres and Braithwaite at 21.

102. See F Haines, *Corporate regulation: beyond punish or persuade* (Clarendon Press, 1977) at 218.

103. Ayres and Braithwaite at 53.

104. See Chapter 8.

legislation reflecting this approach may provide for sequential or parallel proceedings, as is presently the case in federal law.¹⁰⁵

Why prosecute the corporation?

2.49 Our conclusion that corporate activity is best regulated by an enforcement regime comprising both criminal and civil sanctions does not answer the question of who should be prosecuted, the corporation or its constituents (officers, employees and agents). In some cases the prosecution of culpable individuals within an organisation can be a very effective way of punishing and deterring corporate crime. From the perspective of these individuals, the prospect of a criminal conviction, especially one that leads to imprisonment, may have a greater deterrent effect than a sanction imposed on the company.¹⁰⁶ There are cases where it is only possible to prosecute the individuals, for example where the company has become insolvent. However, there are a number of reasons why, in general, it is desirable that criminal liability be imposed on corporations in addition to, or instead of, individuals within those organisations.

The corporation as a source of crime

2.50 Corporate crime may result from an individual's personal motivations, stem from improper corporate values and practices,¹⁰⁷ or a combination of both.¹⁰⁸ The reason that corporate crime occurs varies, and in most instances, no single agent will be solely responsible for the misconduct. Prosecution of the corporation is appropriate where the unlawful conduct results from corporate organisational processes and policies¹⁰⁹ rather than the actions of an individual;¹¹⁰ and where both the corporation and certain individuals are to blame for the infringement.¹¹¹

105. See for example, *Corporations Act 2001* (Cth) s 1317M, s 1317N and s 1317P. For an explanation of how these sections operate in practice, see Australian Law Reform Commission, *Securing compliance: civil and administrative penalties in federal regulation* (Discussion Paper 65, 2002) at para 17.22.

106. A Cowan, "Scarlet letters for corporations? Punishment by publicity under the new sentencing guidelines" (1992) 65 *Southern California Law Review* 2387 at 2393.

107. For example, employee selection and retention policies; the setting of unrealistic performance goals; division of labour so that individual employees inadvertently contribute to the committing of an offence; and the non-existence of crime prevention measures.

108. See R Gruner, *Corporate crime and sentencing* (2nd ed, Business Laws Inc, Chesterland, Ohio, 1997) at 1.010-1.019.

109. Also referred to as "intra-organizational bureaucratic failures": E H Miller, "Federal sentencing guidelines for organizational defendants" (1993) 46 *Vanderbilt Law Review* 197 at 210.

110. Gruner at 2.030.

111. Gruner at 1.009.

2.51 For example, many cases of environmental pollution or dangerous work practices, including failure to provide safe workplaces, arise from defective systems rather than the wrongful conduct of a single individual or group of individuals.¹¹² In this situation, the imposition of liability on individuals alone may not correct the institutional factors that caused or contributed to the offence,¹¹³ and may actually lead to managerial encouragement of criminal behaviour in order to profit from the prohibited acts without incurring liability.¹¹⁴ In such instances, prosecution of the corporation in addition to, or instead of individuals, will likely be the more effective way of correcting systemic faults.

Compliance in exchange for legal privileges

2.52 Corporate criminal liability may be predicated on an implied duty on the part of a corporation to comply with the law. The State confers on a corporation the capacity to perform transactions with legal effect and affords it other privileges, such as protection from anti-competitive conduct. In return for these legal benefits, the State should expect corporations to abide by its laws.¹¹⁵ It is said that corporate criminal liability is part of a public policy bargain, whereby the corporation is afforded privileges in exchange for the imposition of a legal and moral duty to remain within the bounds of the law and thereby prevent harm to outsiders.¹¹⁶

Criminal liability is an effective deterrent in the corporate context

2.53 It is commonly said that corporations are rational actors given that, as incorporeal entities, it is impossible for them to be driven by emotion. Accordingly, corporate crimes are not typically crimes of passion, but rather, result from corporate policies and practices deliberately implemented by management on a cost-analysis gamble.¹¹⁷ In theory then, it should be possible to use the economics of corporate crime to deter the majority of would-be corporate criminals.¹¹⁸ Where preventive measures

112. See, for example, B Fisse, *Howard's criminal law* (5th ed, Law Book Company, Sydney, 1990) at 591-594; C D Stone, "The place of enterprise liability in the control of corporate conduct" (1980) 90 *Yale Law Journal* 1.

113. E H Miller, "Federal sentencing guidelines for organizational defendants" (1993) 46 *Vanderbilt Law Review* 197 at 211. See also J Clough and C Mulhern, *The prosecution of corporations* (Oxford University Press, Melbourne, 2002) at 6-7.

114. Miller at 210-211.

115. J Gobert, "Corporate criminality: new crimes for the times" [1994] *Criminal Law Review* 722 at 729; L Leigh, "The criminal liability of corporations and other groups" (1977) 9 *Ottawa Law Review* 247 at 287.

116. Some commentators argue that a general duty of care should be owed by all corporations towards society in exchange for the State having provided them with "the protective umbrella of its laws": Gobert at 729.

117. Gobert at 733.

118. R Gruner, *Corporate crime and sentencing* (2nd ed, Business Laws Inc, Chesterland, Ohio, 1997) at 1.040.

fail, the imposition of criminal liability and an adequate penalty on an offending corporation sends an important signal to others in the industry that their kind of commercial activities are being actively regulated, perhaps resulting in general deterrence throughout the industry.

Encourages self-regulation and reform

2.54 Prosecution of the corporation may compel corporate management (by way of shareholder or public pressure), to discover the individuals responsible for the offence and punish them accordingly. The threat of corporate criminal liability may also prompt management to implement preventive programs and foster an environment of compliance.¹¹⁹ Additionally, where the enforcement regime provides certain incentives for compliance (such as the exercise of due care and diligence as well as the reporting of regulatory infringements), there is a greater likelihood that management will cooperate with authorities by providing information and carrying out internal investigations to locate responsibility.

2.55 This rationale is particularly appealing as it pays due regard to the fact that some corporations, large and complex ones in particular, might be better suited than the government to allocate blame and impose punishment on culpable officers and employees.¹²⁰ While self-regulation has its own problems and should not be seen as the panacea for corporate misconduct, it does provide a good means of addressing the causes of corporate offending without unnecessary government intervention.¹²¹ A sentencing policy that encourages internal discipline is important in an environment where regulatory agencies do not always have sufficient resources to discharge their enforcement functions exhaustively.

Ease of prosecution

2.56 Another reason why governments may choose to prosecute a corporation rather than its officers or employees is that it may be less burdensome to investigate, prosecute and convict the company than to prove individual guilt.¹²² It is often difficult and costly for the prosecuting authority to determine which individuals within a corporation are actually responsible for the unlawful conduct.¹²³ At times, the company's organisational structure may obscure the culpable person(s)¹²⁴ or perhaps

119. R Gruner, *Corporate crime and sentencing* (2nd ed, Business Laws Inc, Chesterland, Ohio, 1997) at 2.033.

120. S A Saltzburg, "The control of criminal conduct in organizations" (1991) 71 *Boston University Law Review* 421 at 428.

121. J Clough and C Mulhern, *The prosecution of corporations* (Oxford University Press, Melbourne, 2002) at 7.

122. Saltzburg at 425.

123. Saltzburg at 427.

124. A Cowan, "Scarlet letters for corporations? Punishment by publicity under the new sentencing guidelines" (1992) 65 *Southern California Law Review* 2387 at 2393.

no single person may be responsible for the breach. Alternatively, the action of each individual may not be sufficient to convict him or her. Factors of loyalty, secrecy, or selective memory loss within the organisation may also hamper the investigation and prosecution.¹²⁵ Further, in the event that culpable corporate officers are identified, their co-operation may be more important to the overall investigation than their individual prosecution and conviction.¹²⁶

2.57 It may also be harder to secure the conviction of culpable individuals. It has been argued that jurors are more reluctant to convict corporate officers, who are seen as real people with families and responsibilities, than faceless corporations.¹²⁷ More to the point, where individuals are concerned, the prosecution must prove that the accused committed the offence with the requisite *mens rea*. On the other hand, when the government charges a corporation, it may not, depending on the elements of the offence, have to demonstrate precisely who committed the offence, or the mental state of individual actors in the organisation.¹²⁸ For example, there are laws that require corporations to secure a licence from the relevant licensing authority before they can conduct a particular business or engage in some activity, under pain of penal sanction.¹²⁹ If a corporation contravenes this requirement, the prosecuting authorities need not show which individual officer or employee was responsible for the omission: they need only prove that the corporation engaged in the relevant business or activity without a licence. A similar example involves laws that require corporations to keep records and provide penal sanctions for mere failure to do so.¹³⁰

Equitable distribution of penalty

2.58 Even when the barriers to prosecuting individuals are overcome and a conviction is obtained, there may still be problems imposing a just penalty. Low-level employees of the corporation may not have adequate funds to pay a heavy fine or to compensate victims.¹³¹ On the other hand, when senior

125. A Cowan, "Scarlet letters for corporations? Punishment by publicity under the new sentencing guidelines" (1992) 65 *Southern California Law Review* 2387 at 2393.

126. S A Saltzburg, "The control of criminal conduct in organizations" (1991) 71 *Boston University Law Review* 421 at 427.

127. Cowan at 2393.

128. Saltzburg at 425.

129. For example: *Motor Dealers Act 1974* (NSW); *Gaming Machines Act 2001* (NSW); *Property, Stock and Business Agents Act 2002* (NSW); *Liquor Act 1982* (NSW).

130. For example: *Medical Practices Act 1992* (NSW) s 127; *Registered Clubs Act 1976* (NSW) s 27B; *Taxation Administration Act 1996* (NSW) s 48; *Workers Compensation Act 1987* (NSW) s 174.

131. "Of course, in some cases, an organization could also have trouble paying substantial restitution and heavy fines. Even so, including an organization in a criminal prosecution ordinarily will increase the likelihood that fines and restitution will be recovered": Saltzburg at 429.

managers are convicted and punished with a monetary penalty that they are able to pay, the penalty's sting may be reduced if corporations reimburse their executives for fines and legal fees.¹³² In these instances, corporate criminal liability provides a useful middle ground for prosecuting authorities.¹³³

Heightened capacity to cause harm to the community

2.59 The economic and non-economic¹³⁴ harm caused by corporate crime potentially exceeds that arising from crimes carried out by individuals.¹³⁵ Given the immense scale of damage that corporations are able to cause in the current age of international trade and technology, the argument that the full artillery of the law should be made available to deter corporate crime is persuasive.

The Commission's view

2.60 Corporate criminal liability is complementary to individual liability. The present liability regime that makes both corporate and individual prosecutions available to regulatory authorities has undeniable advantages over one that does not. Where crime arises from intra-organisational defects, the dismissal or discipline of a few individuals is clearly an inadequate response. Further, where individual liability is difficult to determine, prosecution of the corporation is an attractive alternative. There are many other situations where the prosecution of the corporation may be the only way to allocate responsibility for white-collar crime. Where both a corporation and its officers can be prosecuted, the prosecution of one over

132. In *Magna Alloys and Research Pty Ltd v Federal Commissioner of Taxation* (1980) 49 FLR 183, the Federal Court held that a corporation may claim as allowable deduction under the *Income Tax Assessment Act 1936* (Cth) the amounts it paid to its directors for their legal costs in defending criminal charges. Subsequent to the case, however, a sub-section was added to the Act prohibiting the deduction of an amount payable by way of a penalty, or an amount ordered by a court, upon conviction of an offence, to be paid by the person: *Income Tax Assessment Act 1936* (Cth) s 51(4).

133. R Gruner, *Corporate crime and sentencing* (2nd ed, Business Laws Inc, Chesterland, Ohio, 1997) at 2.031.

134. "Non-economic harm" includes personal injury and death, environmental pollution, even social disharmony given that "[w]hite collar crimes violate trust and therefore create distrust, and this lowers social morale and produces social disorganization": Gruner at 1.007, citing E H Sutherland, *White-collar crime* (revised ed, 1983) at 10.

135. For example, as of 1997, Exxon Valdez had paid an estimated US\$2 billion in cleanup costs and agreed to pay another US\$1 billion dollars as part of its settlement of criminal charges following the infamous 1989 oil spill. Civil claims against the corporation totalling over US\$50 billion were still pending. Additionally, an estimated 250,000 seabirds, 2,800 sea otters, 300 harbour seals and 22 killer whales died as a result of the spill. See Gruner at 1.006-1.007. See also Chapter 1.

the other, or both, is a matter that is largely left to the discretion of the prosecuting authority.¹³⁶ The prosecution's choice should be aimed at achieving the effective regulation of corporate activities, as well as the general objectives of sentencing. It is important to give regulators a multi-pronged strategy to allow them to tailor their enforcement response to the specific circumstances of each case. In the Commission's view, such a strategy, operating in conjunction with a penalty regime comprising both criminal and civil sanctions, provides a flexible regulatory framework that has optimum potential for corporate crime prevention.

136. In Australia, there has been a tendency to prosecute the corporation rather than individuals. A study by P Grabowsky and J Braithwaite, *Of manners gentle: enforcement strategies of Australian business regulatory agencies* (Oxford University Press, Melbourne, 1986) showed that from 1981-1984, of 96 regulatory agencies in Australia, 41 preferred to prosecute the corporation, 20 preferred to go after the individual, with 38 not having pursued an individual in the 3 year period; cited in B Fisse and J Braithwaite, *Corporations, crime and accountability* (Cambridge University Press, 1993) at 5-6. The findings of this study may no longer hold true. During the Commission's consultations, officers of various regulatory agencies indicated a preference for prosecuting individuals because of, among other things, the problems associated with attributing criminal liability to corporations. The experience of some of the judicial members of this Commission supports the current tendency towards individual prosecutions and away from corporate prosecutions.

3. Sentencing objectives

- Introduction
- Deterrence
- Retribution and denunciation
- Rehabilitation and incapacitation
- Other matters
- Applying sentencing objectives to corporate offenders

INTRODUCTION

3.1 The objectives of punishment are traditionally stated as retribution, deterrence, rehabilitation and incapacitation. The Commission's previous work dealing with the general principles of sentencing observed that this is not a comprehensive list. It does not for example take into account other purposes which the criminal law serves, such as, being a teacher of minimal standards of morality and behaviour; as well as an agency for the expression of public indignation and condemnation. We said that "denunciation" should be added to the list of the sentencing objectives, which were discussed in detail in Discussion Paper 33.¹ It is unnecessary to repeat that discussion in this Report.

3.2 In Report 79, the Commission recommended that consolidated sentencing legislation should include an express statement of the purposes for which a court may impose a sentence.² This recommendation was recently implemented with the addition of section 3A to the *Crimes (Sentencing Procedure) Act 1999* (NSW).³ This section provides that the purposes for which a court may sentence an offender include:

- (a) to ensure that the offender is adequately punished for the offence,
- (b) to prevent the crime by deterring the offender and other persons from committing similar offences,
- (c) to protect the community from the offender,
- (d) to promote the rehabilitation of the offender,
- (e) to make the offender accountable for his or her actions,
- (f) to denounce the conduct of the offender,
- (g) to recognise the harm done to the victim of the crime and the community.

3.3 In considering the objectives or purposes of sentencing in relation to corporations it must be borne in mind that a considerable amount of corporate offending takes place in a regulatory context. Ensuring future compliance will, therefore, usually be the overarching concern when sentencing corporate offenders. In this context particular emphasis will be given to the objectives of deterrence and rehabilitation.

3.4 In this Chapter, we conclude that deterrence, retribution, denunciation, rehabilitation, incapacitation and the recognition of harm to victims and

1. NSW Law Reform Commission, *Sentencing* (Report 79, 1996) at para 14.10-14.13; (Discussion Paper 33, 1996) ("NSWLRC DP 33") at 3.2-3.24. See also J M Barry, *The courts and criminal punishment* (1969) at 14-15.

2. NSWLRC Report 79, Recommendation 85.

3. This section, which became effective on 1 February 2003, was added by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW).

the community – the sentencing objectives conventionally applied to individual offenders – are all relevant in sentencing corporate offenders.

DETERRENCE

3.5 There are two kinds of deterrence: specific deterrence, which aims to dissuade the offender from committing further crime; and general deterrence, which aims to dissuade others who have been made aware of the punishment inflicted upon the offender from committing crime.⁴ One of the main purposes of punishment is the protection of the community by making it clear to the offender and others that if they violate the law they will be appropriately punished.⁵

3.6 Courts have long recognised deterrence as one the main purposes of criminal punishment.⁶ Judges have said on a number of occasions that they view corporate crime very seriously and recognise deterrence as an important consideration in the sentencing process, given that corporate offences are notoriously difficult to detect and because some will inflict substantial financial loss and other harm on the public.⁷

3.7 For these reasons, the New South Wales courts have on occasions expressly referred to the deterrence principle in cases involving corporate offenders.⁸ For example, in a case involving breach of occupational health

4. NSWLRC DP 33 at para 3.2.

5. NSWLRC DP 33 at para 3.6.

6. *R v Corner* (NSWCCA, No 602119/97, 19 December 1997, unreported) at 16. See also *R v Radich* [1954] NZLR 86 at 87; *R v Rushby* [1977] 1 NSWLR 594 at 597 (Street CJ); *Director of Public Prosecutions (Cth) v El Karahni* (1990) 21 NSWLR 310 at 377-378.

7. *R v Corner* (NSWCCA, No 602119/97, 19 December 1997, unreported); *R v Mato* [1999] NSWCCA 395; *R v Szeto* [1999] NSWCCA 296; *R v Boskovitz* [1999] NSWCCA 437; *R v Pont* (2000) 121 A Crim R 302; *R v Hawker* [2001] NSWCCA 148; *R v Woodman* [2002] NSWCCA 310; *R v Finn* [2002] NSWCCA 86; *Capral Aluminium Ltd v WorkCover Authority of NSW* (2000) 49 NSWLR 610; *Fisher v Samaras Industries Pty Ltd* (1996) 82 IR 384.

8. See *WorkCover Authority of NSW (Inspector Stewart) v Siemans Dematic Pty Ltd (No 2)* [2003] NSWIRComm 45 at para 48; *Workcover Authority of NSW (Inspector Mansell) v Hayman Industries Pty Ltd* [2003] NSWIRComm 154 at para 47; *WorkCover Authority of NSW (Inspector Vierow) v J Gardner (NSW) Contractors Pty Ltd* [2003] NSWIRComm 19 at para 15; *WorkCover Authority of NSW (Inspector Suliman) v Favelle Favco Cranes Pty Ltd* [2003] NSWIRComm 150 at para 52, 53; *WorkCover Authority of NSW (Inspector Blume) v TMP Worldwide eResourcing* [2003] NSWIRComm 37 at para 19; *Patton v Fletcher Construction Australia Limited (No 2)* [2003] NSWIRComm 94 at para 4; *WorkCover Authority of NSW (Inspector Patton) v P & M Denton Building Constructions Pty Ltd* [2003] NSWIRComm 17 at para 75; *Capral Aluminium Ltd v WorkCover Authority of NSW* (2000) 49 NSWLR 610; *Fisher v Samaras Industries Pty Ltd* (1996) 82 IR 384 at 388 (Hungerford J).

and safety legislation by a corporate employer, the Full Bench of the Industrial Relations Commission stated that both specific and general deterrence should be given weight of some substance in the sentencing process.⁹ In another case where the corporate offender employed a large number of vulnerable persons (that is, young people with little or no previous work experience) the IRC gave significant weight to deterrence and imposed a sentence that would attract the attention of others employing vulnerable persons.¹⁰

3.8 The deterrent effect of criminal penalties on corporate offenders finds some support in both theoretical and empirical crime literature.¹¹ There are a number of reasons why the criminal law can deter corporate misconduct. First, the criminal law forces corporations to take steps to avert the risk of punishment when the financial benefits of averting the risk exceed the costs.¹² Secondly, it establishes the ethical and acceptable boundaries of corporate conduct:

When criminal sanctions are brought against specific offenders, the punished will learn the boundaries of appropriate behaviour and adjust future actions accordingly. Further, unsanctioned firms, by observing the punishment of others, are sensitised to the existing boundaries.¹³

3.9 There have been a few relatively old empirical studies that test the deterrent effects of legal sanctions on corporate offenders. The results of these studies are equivocal, with some providing strong or moderate support for the effectiveness of the deterrence model,¹⁴ while others are less

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9. *Capral Aluminium Ltd v WorkCover Authority of NSW* (2000) 49 NSWLR 610 at 644. There are cases when specific deterrence need not be given much weight. For example, in *WorkCover Authority of NSW (Inspector Gilbert) v Kayuu Pty Ltd* [2000] NSWIRComm 3, the court acknowledged that where a liquidator is appointed or the defendant company has ceased trading, a penalty may not have its desired effect of specific deterrence.
 10. *WorkCover Authority of NSW (Inspector Ankucic) v McDonald's Australia Ltd* (2000) 95 IR 383.
 11. See for example W J Chambliss, "Types of deviance and the effectiveness of legal sanctions" (1967) 25 *Wisconsin Law Review* 703.
 12. S Simpson, *Corporate crime, law, and social control* (Cambridge University Press, New York, 2002) at 36, citing F Cullen, W J Maakstad and G Cavender, *Corporate crime under attack: the Ford Pinto case and beyond* (Anderson Publishing, Cincinnati, 1987).
 13. S Simpson, *Corporate crime, law, and social control* (Cambridge University Press, New York, 2002) at 36 citing *Corporate crime under attack: The Ford Pinto case and beyond* (Anderson Publishing, Cincinnati, 1987).
 14. K Block, F Nold and J Sidak, "The deterrent effect of antitrust enforcement" (1981) 89 *Journal of Political Economy* 429; S Simpson and C Koper "Deterring corporate crime" (1992) 30 *Criminology* 201; M Lewis-Beck and J Alford "Can government regulate safety?" (1980) 74 *American Political Science Review* 745.

supportive of traditional deterrence arguments.¹⁵ For example, one US study into price-fixing in the bread industry found that baking firms were very sensitive to changes in both the certainty and severity of punishment. The study found that the deterrent effects of legal sanctions are both general and specific. General deterrence was evidenced by the fact that price mark ups in general decreased when prosecutions increased. Specific deterrence was shown when those found guilty of collusion reduced price mark ups in the year following their prosecution.¹⁶

3.10 Conversely however, a study of nursing homes in Australia tested the deterrent effects of criminal penalties on organisations (as opposed to individuals).¹⁷ The researchers sought to assess whether management perceptions of deterrence have any effect on organisational compliance, the theory being that compliance is a result of the perceived likelihood of detection and punishment and the perceived severity of available sanctions.¹⁸ The study found that sanction certainty and severity failed to produce significant deterrent effects in the corporate context.¹⁹

3.11 Written submissions universally identified deterrence as the main aim of sentencing corporate offenders.²⁰ Deterrence also emerged in our consultation meetings as the most important consideration at sentencing for regulatory agencies. The New South Wales Department of Fair Trading stated that the purpose of prosecution is to secure future compliance with fair-trading legislation by offenders and other traders. If measures taken to achieve deterrence do not work in a particular case, incapacitation is considered a last resort.²¹ In another consultation meeting, the New South Wales Environment Protection Authority said that deterrence is more

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15. P Jesilow, G Geis and M J O'Brien, "Experimental evidence that publicity has no effect in suppressing auto repair fraud" (1986) 70 *Sociology and Social Research* 222; P Jesilow, G Geis and M J O'Brien, "Is my battery any good? A field test of fraud in the auto repair business" (1985) 8 *Crime and Justice* 1; J Braithwaite and T Makkai, "Testing an expected utility model of corporate deterrence" (1991) 25 *Law and Society Review* 7; J Braithwaite and T Makkai, "The dialectics of corporate deterrence" (1994) 31 *Journal of Research in Crime Delinquency* 360.
 16. K Block, F Nold and J Sidak, "The deterrent effect of antitrust enforcement" (1981) 89 *Journal of Political Economy* 429.
 17. J Braithwaite and T Makkai, "Testing an expected utility model of corporate deterrence" (1991) 25 *Law and Society Review* 7.
 18. This is based on the so-called perceptual deterrence model.
 19. J Braithwaite and T Makkai, "Testing an expected utility model of corporate deterrence" (1991) 25 *Law and Society Review* 7 at 35.
 20. Australian Stock Exchange, *Submission* at 2; NSW Department of Fair Trading, *Submission* at 2; NSW Land and Environment Court, *Submission* at 1.
 21. Regulation and Prosecution Agencies, *Consultation*.

important than retribution when one is considering whether to prosecute, and in determining the penalty.²²

3.12 The Commission affirms the view that deterrence is an essential aim of sentencing corporate offenders. The penalty to be imposed on a corporate offender and the procedures by which it is imposed should be aimed at dissuading the organisation from committing further crime, as well as ensuring that other corporations become aware of the punishment inflicted upon the offender.

RETRIBUTION AND DENUNCIATION

3.13 Retribution is the notion that the guilty ought to suffer the punishment that they deserve.²³ Denunciation on the other hand, requires the imposition of a sentence that is so severe as to make a statement that the offence in question is not to be tolerated by society.²⁴ It may be argued that denunciation is one aspect or version of retribution, sometimes referred to as “expressive”²⁵ or “reprobative”²⁶ retribution, which is the notion that punishment in proportion to deserts is a way of expressing the community’s degree of reprobation for the wrongdoing.

3.14 It has been argued that retribution and denunciation are not relevant when sentencing corporations because a corporation is an incorporeal entity that lacks the capacity to suffer moral condemnation.²⁷ It is argued that corporate decisions and processes are simply the result of determinations by managers and agents within the corporation.²⁸ That is, the corporation is nothing more than a collection of individuals and so it lacks a substantive independent identity.²⁹ Consequently, the corporation is said to be immune from retributive concerns: “we can no more condemn the

22. Ms Kerry Palmer, Principal Legal Officer (Legal Services Branch), NSW Environment Protection Authority, *Consultation*.

23. NSWLRC DP 33 at para 3.3. A Alschuler, “The changing purposes of criminal punishment: a retrospective on the past century and some thoughts about the next” (2003) 70 *University of Chicago Law Review* 1, argues that retribution, disparaged for much of the twentieth century, now merits recognition as the criminal law’s central objective.

24. NSWLRC DP 33 at para 3.9.

25. L Friedman, “In defense of corporate criminal liability” (2000) 23 *Harvard Journal of Law and Public Policy* 833 at 844-845. Friedman did not agree with this view.

26. B Fisse and J Braithwaite, *Corporations, crime and accountability* (Cambridge University Press, 1993) at 44-50.

27. See A W Alschuler, “Introduction comment, ancient law and the punishment of corporations: of Frankpledge and Deodand” (1991) 71 *Boston University Law Review* 307 at 311-12.

28. V Khanna, “Corporate criminal liability: what purpose does it serve?” (1996) 109 *Harvard Law Review* 1477.

29. D Fischel and A Sykes, “Corporate crime” (1996) 25 *Journal of Legal Studies* 319.

organization for a criminal act than we could the glass and steel office building its managers and agents occupy.”³⁰

3.15 Most writers, however, prefer the view that retribution and denunciation are valid sentencing objectives for corporations because, although they are incorporeal entities, they are nevertheless blameworthy agents and the community perceives them as such.³¹ Some commentators argue that the modern corporation has an identifiable persona³² quite apart from that of its owners, managers and employees. The public perceives some corporations as “alive” and capable of acting through their agents. There is a perception that all corporations are not alike: each corporation has its own unique character – its own culture, method of training employees, and preferred practices. It can also be said that corporations, like individuals, can have a guilty mind. That is, they possess a certain kind of identity, namely their corporate policy, “which does not express merely the intentionality of a company’s directors, officers or employees, but projects the idea of a distinct corporate strategy”.³³ Corporate policy determines the conduct and actions of the corporation: it is what encourages or allows the corporation to engage in criminal conduct through its officers and agents. The fact that corporations can change their policies and procedures further bolsters the argument in favour of holding them responsible for the outcomes of such policies and procedures.³⁴

3.16 Hence people speak of corporations as “real” entities in ordinary language, and in moral discourse as being “good” or “bad”. Therefore it is argued that corporations can suffer moral condemnation for their wrongdoing through criminal conviction and punishment.³⁵ Retribution can therefore be seen as a valid objective of corporate punishment. Several submissions identified retribution as an important aim of sentencing corporations.³⁶

3.17 Some judges in Australia have also recognised the retributive and denunciatory functions of sentences for corporate offenders. While they emphasise that deterrence is the primary aim of laws that regulate corporate activity, they have also expressed the view that penalties for

30. L Friedman, “In defense of corporate criminal liability” (2000) 23 *Harvard Journal of Law and Public Policy* 833 at 844.

31. B Fisse and J Braithwaite, *Corporations, crime and accountability* (Cambridge University Press, 1993) at 44-50; L Friedman, “In defense of corporate criminal liability” (2000) 23 *Harvard Journal of Law and Public Policy* 833.

32. See Friedman at 847.

33. Fisse and Braithwaite at 26.

34. Fisse and Braithwaite at 29.

35. Friedman at 847, 852.

36. Australian Stock Exchange, *Submission* at 2; NSW Department of Fair Trading, *Submission* at 2.

corporate offenders should be an expression of punishment³⁷ and the amount of fine imposed should not suggest tolerance of violations of the law.³⁸

REHABILITATION AND INCAPACITATION

3.18 Rehabilitation seeks to reform offenders by bringing about change in their future behaviour, both in the interests of society and of the offenders themselves.³⁹ Incapacitation involves rendering an offender incapable of committing further offences⁴⁰ in order to protect the community from offenders likely to re-engage in serious criminal conduct.⁴¹ Both objectives (arguably sub-goals of deterrence) have traditionally focused on natural persons and have played a limited role in the sentencing of corporate offenders.

3.19 One view is that the courts should not consider rehabilitation and incapacitation when sentencing corporate offenders.⁴² Rehabilitation assumes that criminal propensities can be cured through treatment, while incapacitation assumes that some personalities need to be restrained in order to prevent future crimes. It is suggested that neither purpose translates successfully in the context of corporations because these entities do not have a human personality, and because any interventions may be inefficient and destructive in the organisational setting.⁴³

3.20 A majority view, supported as to rehabilitation in one submission,⁴⁴ is that rehabilitation and incapacitation are useful to the sentencing of corporate entities.⁴⁵ Rehabilitative approaches tend to assume that the factors leading to the commission of crime can be identified, and that

37. *ACCC v Australian Safeway Stores Pty Ltd* (1997) ATPR ¶41-562 at 43,811 (1997) 145 ALR 36. See also *ACCC v J McPhee & Son (Australia) Pty Ltd* (1998) ATPR ¶41-628.

38. *Trade Practices Commission v TNT Australia Pty Ltd* (1995) ATPR ¶41-375.

39. NSWLRC DP 33 at para 3.14.

40. NSWLRC DP 33 at para 3.18.

41. NSWLRC DP 33 at para 3.18 citing J Floud and W Young, *Dangerousness and criminal justice* (Heinemann, London, 1981) at xvii, 60; N Morris, "On 'dangerousness' in the judicial process" (1982) 39 *Record of the Association of the Bar of the City of New York* 102; J Q Wilson, "Dealing with the high-rate offender" (1983) 72 *The Public Interest* 52; N Walker, *Sentencing: theory, law and practice* (Butterworths, London, 1985); N Walker, "Ethical aspects of detaining dangerous people" in Hamilton and Freeman (ed), *Dangerousness: psychiatric assessment and management* (Gaskill, London, 1982) at 24.

42. B Fisse and J Braithwaite, *Corporations, crime and accountability* (Cambridge University Press, 1993) at 44-50.

43. J Parker, "Criminal sentencing policy for organizations: the unifying approach of optimal penalties" (1989) 26 *American Criminal Law Review* 513 at 567.

44. NSW Department of Fair Trading, *Submission* at 2.

45. B Fisse, "Reconstructing corporate criminal law: deterrence, retribution, fault, and sanctions" (1983) 56 *Southern California Law Review* 1141 at 1159-1160.

treatment or assistance can be prescribed to remove the causes of the undesirable behaviour. In the organisational context, it is argued that such factors are readily identifiable. A corporation's operating procedures, policies, rules, attitudes and course of conduct, sometimes collectively called the "corporate culture", determines how the corporation conducts its business and may, in some instances, explain how and why the corporation committed the offence. The elements that constitute a corporation's culture must be addressed in order to change the corporation's propensity to offend in the future. The forms of rehabilitation that may "treat" the corporate culture include revision of company policy and procedures, and the adoption of better disciplinary and accountability mechanisms.

3.21 The view that rehabilitation is a legitimate objective with respect to organisational offenders is now reflected in federal law. The *Trade Practices Act 1974* (Cth) has recently been amended to allow the court to order a person (including artificial persons such as corporations) to be subject to a probation order. A probation order is defined as "an order that is made by the court for the purpose of ensuring that the person does not engage in the contravening conduct, similar conduct or related conduct during the period of the order".⁴⁶ Among other things, a court can order an offender to establish a compliance program designed to ensure that its employees and other persons involved in the business are aware of the responsibilities and obligations in relation to the contravening conduct, similar or related conduct. A court can also direct an offender to revise the internal operations that led to the offender engaging in the contravening conduct.

3.22 Incapacitation may likewise be relevant to corporate offenders. This sentencing objective is closely associated with the notion of criminal propensity, that is, the likelihood of an offender committing further crime.⁴⁷ Incapacitation may be relevant to corporations that have a poor record of compliance with the law, or more seriously, where the corporation operates primarily for a criminal purpose or by criminal means.⁴⁸ The ways by which this objective may be achieved include preventing the company from engaging in its business by withdrawing its licence,⁴⁹ disqualifying it from contracting with the government,⁵⁰ or dissolving the corporation.

46. *Trade Practices Act 1974* (Cth) s 86C(2)(b).

47. NSWLRC DP 33 at para 3.19.

48. See United States Sentencing Commission, *Guidelines manual* (2002) §8C1.1.

49. For example, the Director General may suspend licences under the *Fair Trading Act 1987* (NSW) s 64A.

50. In the United States, a corporation can be disqualified from contracting with the United States Government as a result of indictment or conviction and health care providers may be excluded from participation in the Medicare and Medicaid programs: *Medicare and Medicaid Patients and Program Protection Act*, 42 USC §1320a-7 (1994).

OTHER MATTERS

3.23 The Commission considers that sentencing objectives should generally allow for the recognition of harm to victims, and as an adjunct to the sentencing process, for reparation (including restitution and compensation).

Recognition of victims

3.24 In recent times the law has recognised that the harm caused by crime to victims and the community is an important consideration of the criminal justice system generally, and at sentencing in particular. In New South Wales, there are statutory provisions that recognise and promote the rights of victims of crime,⁵¹ and that provide compensation to victims of certain crimes.⁵² At sentencing, the law allows the courts to have regard to the impact of the crime on victims through the admission of victim impact statements.⁵³ In cases where the harm that resulted from an offence affects the wider community rather than individual victims (for example, an environmental offence) some statutes authorise a sentencing court to order the offender to undertake projects that remedy the harm to the community.⁵⁴

Reparation

3.25 A related but distinct matter is reparation and its role at sentencing. Reparation requires the offender to indemnify the victim for the injury caused as a result of the offender's criminal conduct. In the United States, the law requires the court, "in determining the particular sentence to be imposed", to consider "the need to provide restitution to any victims of the offense".⁵⁵ The US Federal Sentencing Guidelines for Organizations provide that remedying any harm caused by the offence, including the provision of compensation to victims, is a consideration when sentencing organisational offenders.⁵⁶

3.26 Reparation as an objective of sentencing would link punishment to the victim's need for restitution or compensation, rather than to the gravity of the offender's conduct.⁵⁷ This presents a philosophical challenge to the idea that punishment is imposed because the criminal law of the State has been broken. For this reason, reparation is most commonly regarded as an

51. *Victims Rights Act 1996* (NSW).

52. *Victims Support and Rehabilitation Act 1996* (NSW) Pt 4.

53. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26-30.

54. *Protection of the Environment Operations Act 1997* (NSW) s 250(c); *Environment Protection Act 1979* (Vic) s 67AC(2)(c); *Environment Protection Act 1993* (SA) s 133(b).

55. 18 USC §3553(a)(7).

56. United States Sentencing Commission, *Guidelines manual* (2002) at 423.

57. See generally Chapter 12.

adjunct to the other options available when sentencing an offender.⁵⁸ In our previous work dealing with the general principles of sentencing, we expressed the view that reparation is an ancillary measure or adjunct to the sentencing process.⁵⁹

APPLYING SENTENCING OBJECTIVES TO CORPORATE OFFENDERS

3.27 Having identified the sentencing objectives that should apply to corporate offenders, the issue that arises is whether or not these should be stated in legislation.

3.28 It is not immediately clear that the sentencing objectives identified in section 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) apply to corporate offenders. The Act defines an “offender” as a person whom a court has found guilty of an offence.⁶⁰ This term covers corporate offenders since the word “person” may generally be interpreted as including a corporation.⁶¹ On the other hand, the Act appears to be written with natural persons in mind. It deals mainly with imprisonment, as well as its alternatives, and consequently assumes for the most part that an offender is a natural person.⁶² The Commission is of the view that the legislation should expressly state that the objectives of sentencing set out in section 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) apply equally to cases involving corporate offenders.

RECOMMENDATION 2

The *Crimes (Sentencing Procedure) Act 1999* (NSW) should expressly provide that the objectives of sentencing in section 3A apply to corporate offenders.

58. See *Criminal Procedure Act 1986* (NSW) s 126; *Crimes Act 1914* (Cth) s 21B; *Penalties and Sentences Act 1992* (Qld) s 35(2); *Sentencing Act 1995* (WA) s 110(1).

59. NSWLRC DP 33 at para 3.21.

60. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3(1).

61. See *Interpretation Act 1987* (NSW) s 21.

62. The fine provisions of the Act refer to bodies corporate: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 16.

4. Factors relevant to sentencing

- Factors of general application
- Factors relevant to sentencing corporate offenders
- The offender's circumstances
- A legislative restatement

4.1 This chapter examines the principal factors that courts take into account in determining the appropriate sentence (mainly a fine under current law) to be imposed for a corporate offender. These factors originate at common law and are stated in general sentencing legislation.¹ The weight attributed to each factor is very much case-specific and lies in the discretion of the sentencing court. In exercising that discretion, the judge endeavours to make the punishment fit the crime as well as the particular circumstances of the offender. The discretion involves a synthesis of all factors relevant to the offence and offender to formulate an appropriate sentence.²

4.2 Particular statutes include lists of factors that are relevant to the sentencing of corporate offenders. These statutes apply only in certain areas of law, for example environmental law³ or trade practices law.⁴ The relevant provisions are not specific to corporate offenders and may also apply to individual offenders. However, the breach of these statutes is such that they are more likely to be committed by corporate offenders than by individuals.

4.3 The lists of relevant factors in these statutory provisions are usually open-ended and non-exhaustive, and so allow the sentencing court to take other matters into account.⁵ The listed factors represent only a small proportion of those that are commonly referred to by the courts when sentencing corporate offenders.⁶ The factors are listed in the relevant statutes in no order of priority or importance and no attempt is made to state whether a particular factor is relevant as an aggravating or mitigating factor.

FACTORS OF GENERAL APPLICATION

4.4 General sentencing legislation in New South Wales includes a list of mitigating and aggravating factors that the courts may take into account in determining sentence. The list, found in section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), is not exhaustive but is “in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law”.⁷ This section was

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1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A.
 2. *Wong v The Queen* (2001) 207 CLR 584; *Cameron v The Queen* (2002) 76 ALJR 382.
 3. *Protection of the Environment Operations Act 1997* (NSW) s 241. See also *Pesticides Act 1999* (NSW) s 109.
 4. *Trade Practices Act 1974* (Cth) s 76.
 5. See for example, the *Protection of the Environment Operations Act 1997* (NSW) s 241(2).
 6. For example, while there are only four listed factors in the *Trade Practices Act 1974* (Cth) s 76, the courts usually refer to others. In *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076, French J identified nine relevant factors (including those listed in s 76) in determining the appropriate penalty for breach of the *Trade Practices Act 1974* (Cth).
 7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1).

designed with individual offenders in mind. These two factors on the list, for instance, clearly only apply to individual offenders:

- where the offence was committed while the offender was on conditional liberty in relation to an offence;
- the offender was not fully aware of the consequences of his or her actions because of the offender's age or disability.

4.5 However, all the other aggravating and mitigating factors in section 21A seem capable of applying to corporate offenders. The Commission is of the view that the legislation should make it clear that, with the exception of the two factors listed above, the factors listed in section 21A do apply to corporate offenders. The question then arises whether the section would be adequate as a statement of factors relevant to the sentencing of corporate offenders. In the Commission's view, the section 21A list needs to be expanded to include factors particularly relevant to the sentencing of corporate offenders.

FACTORS RELEVANT TO SENTENCING CORPORATE OFFENDERS

4.6 Three major factors are relevant at sentencing:⁸

- the general aims of sentencing (considered in Chapter 3);
- the objective seriousness of the offence, such as whether or not the consequences were foreseeable, the extent of the harm caused, and whether the commission of the offence was deliberate;
- the circumstances of the offender – its characteristics as well as its response to the occurrence of the offence and charge.⁹

4.7 The cases in New South Wales dealing with these factors as they apply to corporate offenders have mainly been in the areas of environmental law and occupational health and safety. The Commission has also surveyed cases dealing with breaches of the *Trade Practices Act 1974* (Cth).

Objective seriousness of the offence

4.8 The “seriousness” of the offence is the most important factor in establishing an appropriate penalty.¹⁰ The relative seriousness of the

8. R G Fox and A Freiberg, *Sentencing: State and Federal law in Victoria* (2nd ed, Oxford University Press, 1999) at 181.

9. For a discussion of the objective seriousness of the offence and the circumstances of the offender, see NSW Law Reform Commission, *Sentencing* (Discussion Paper 33, 1996), ch 5.

10. *Veen v The Queen (No 2)* (1988) 164 CLR 465. See also *Patton v Fletcher Construction Australia Limited (No 2)* [2003] NSWIRComm 94 at para 4.

offence is determined by reference to a worst case for which the maximum penalty is provided.¹¹ The seriousness of the offence forms the yardstick of the “objective” penalty, which (by instinctive synthesis) is augmented by aggravating factors or reduced by mitigating circumstances – an approach followed on countless occasions.¹² Generally, the objective seriousness of the offence is of greater importance to the assessment of the penalty than any mitigating factors.¹³ This is particularly so in the case of corporate offenders since the humane considerations that might apply to the sentencing of some individual offenders will not usually apply to corporations.

4.9 The key reasons for the importance given to the objective seriousness of the offence are the need for proportionality between the wrongdoing and the punitive response, and for specific and general deterrence.¹⁴ The objectives of proportionality and deterrence are particularly relevant when the offence is committed in the commercial arena, since deterrence is unlikely to be achieved when the penalties imposed are not adequate.¹⁵

4.10 Factors that go to the seriousness of an offence include:

- the gravity with which the offence is viewed by the community;
- the extent of any harm, or risk of harm, resulting from the offence;
- whether the offence involved systematic or deliberate defiance of the law; and
- the foreseeability of the offence or its consequences.

The gravity with which the community views the offence

4.11 Courts have long regarded the maximum penalty as an indication of the gravity of the offence because it reflects the legislative view of the seriousness of the offending conduct.¹⁶

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11. *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 698 (Kirby P). See also *Lawrenson Diecasting Pty Ltd v WorkCover Authority of NSW (Inspector Ch'ng)* (1999) 90 IR 464 at 474;
 12. See *WorkCover Authority of NSW (Inspector Farrell) v Forgacs Shipyard Pty Ltd* [2001] NSWIRComm 227; *WorkCover Authority of NSW (Inspector Page) v Walco Hoist Rentals Pty Ltd (No 2)* (2000) 99 IR 163; *WorkCover Authority of NSW v Profab Industries Pty Ltd* (2000) 49 NSWLR 700; *WorkCover Authority of NSW (Inspector Bourne) v Delta Pty Ltd* [2000] NSWIRComm 67; *Fletcher Construction Australia Ltd v WorkCover Authority of NSW (Inspector Fisher)* (1999) 91 IR 66.
 13. *Lawrenson Diecasting Pty Ltd v WorkCover Authority of NSW (Inspector Ch'ng)* (1999) 90 IR 464 at 475.
 14. *R v Radich* [1954] NZLR 86 at 87, cited with approval by the NSWCCA in *R v Rushby* [1977] 1 NSWLR 594 at 598.
 15. *Trade Practices Commission v Stihl Chain Saws (Aust) Pty Ltd* (1978) ATPR ¶40-091 at 17,896.
 16. *R v Oliver* (1980) 7 A Crim R 174 at 177 (Street CJ).

4.12 The courts view high or increased maximum penalties as an indicator of the “community concern”, expressed by the Parliament, to which they should give effect when assessing the relative seriousness of a particular offence.¹⁷ Increases in maximum penalties can be taken as an intention on the part of Parliament to denounce and deter particular behaviour.¹⁸ A marked increase in a maximum penalty, for example, tripling it, may be taken as an indication that Parliament intended existing sentencing patterns to be sharply increased.¹⁹ Increases in sentencing patterns do not have to be exactly proportional to increases in the statutory penalties²⁰ and “offences of low criminality remain offences of low criminality even if the maximum penalty is increased” since “the increase can readily be recognised as operating as a deterrent to wilful disregard of statutory obligations”.²¹

Extent of the harm caused

4.13 The nature and extent of any harm caused as a result of the commission of an offence may be a factor in determining objective seriousness. Legislation and case law take harm into account in one of two ways:

- the gravity of actual harm is considered indicative of the seriousness of the offence;
- the potential risk of harm from the offence is considered indicative of the seriousness of the offence. It is common for courts to find that despite little or no actual harm arising, the potential for harm was significant and should be taken into account on sentence.²²

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17. *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 698 (Kirby P).
 18. *R v Howland* (1999) 104 A Crim R 273 at 279 (Spigelman CJ). Followed in *Department of Mineral Resources (Chief Inspector McKenney) v Berrima Coal Pty Ltd* (2001) 105 IR 348; *Capral Aluminium Ltd v WorkCover Authority of NSW* (2000) 49 NSWLR 610.
 19. *R v Slattery* (1996) 90 A Crim R 519 at 524 (Hunt CJ at CL). This has been followed in *WorkCover Authority of NSW (Inspector Reynolds) v NorthPower* [2001] NSWIRComm 104 at para 155; *WorkCover Authority of NSW (Inspector Donnelly) v Riverina Wool Combing Pty Ltd* [2000] NSWIRComm 29 at para 38.
 20. *Environment Protection Authority v Middle Harbour Constructions Pty Ltd* (2002) 119 LGERA 440; *Environment Protection Authority v Timber Industries Ltd* [2001] NSWLEC 25.
 21. *Cabonne Shire Council v Environment Protection Authority* (2001) 115 LGERA 304 at para 37. See also *Environment Protection Authority v Middle Harbour Constructions Pty Ltd* (2002) 119 LGERA 440.
 22. See, eg, *Environment Protection Authority v Simplot Australia Pty Ltd* [2001] NSWLEC 264; *Environment Protection Authority v J K Williams Contracting Pty Ltd* [2001] NSWLEC 13; *Environment Protection Authority v Supreme Poultry & Chickens Pty Ltd* [2001] NSWLEC 215; *Environment Protection Authority v Ferrcom Pty Ltd* [1999] NSWLEC 162.

4.14 In New South Wales environmental protection law, these principles have been given legislative force. The *Protection of the Environment Operations Act 1997* (NSW) provides that in imposing a penalty for an offence against the Act, the court is to consider, among other things, “the extent of the harm caused or likely to be caused to the environment by the commission of the offence”.²³ Accordingly, the court will consider factors such as:

- actual disturbance to fauna, flora and aquatic life;
- the time period for which the disturbance lasted;
- the geographical extent of the damage;
- the cost of cleanup operations; and
- any ongoing effects.²⁴

4.15 Trade practices legislation also requires a sentencing court to take into account the extent of harm caused by an offence. The *Trade Practices Act 1974* (Cth) requires that, in arriving at a pecuniary penalty for an offence under the Act, courts must have regard to, among other things, the extent of any loss or damage suffered as a result of the act or omission.²⁵ The courts have, however, noted there are problems associated with attaching great weight to some of the “essentially unquantified, and to some degree speculative, consequences” of trade practices offences, such as forgone profit and restriction of the consumer market.²⁶

4.16 In occupational health and safety cases, a significant body of case law follows similar principles. Thus, assessment of the seriousness of an offence is not dependent upon the occurrence of serious harm, but may be indicated by it, especially in cases of loss of life.²⁷ Further, a breach where serious harm was highly likely might be assessed on a different basis to a breach where such consequences were unlikely.²⁸ The courts have, therefore, recognised that the greater the risk and gravity of harm in a given situation, the higher the duty to take precautions, even if such precautions

23. *Protection of the Environment Operations Act 1997* (NSW) s 241(1)(a).

24. See, for example, *Newcastle City Council v Pace Farm Egg Products Pty Ltd* [2002] NSWLEC 66; *Environment Protection Authority v The Shell Company of Australia Ltd* [2000] NSWLEC 16; *Environment Protection Authority v Sydney Water Corporation* [2000] NSWLEC 156; *Environment Protection Authority v CSR Ltd* [2001] NSWLEC 267; *Environment Protection Authority v Heggies Bulkhaul Limited* [2003] NSWLEC 77.

25. *Trade Practices Act 1974* (Cth) s 76(1).

26. *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076 at 52,155.

27. *Genner Constructions Pty Ltd v WorkCover Authority of NSW (Inspector Guillarte)* (2001) 110 IR 57 at 72; *WorkCover Authority of NSW (Inspector Lancaster) v BHP Steel (AIS) Pty Ltd* (2001) 111 IR 181; *Lawrenson Diecasting Pty Ltd v WorkCover Authority of NSW (Inspector Ch'ng)* (1999) 90 IR 464 at 476.

28. *Capral Aluminium Ltd v WorkCover Authority of NSW* (2000) 49 NSWLR 610 at 650.

are expensive or difficult to adopt.²⁹ However, on some occasions, the court has emphasised that serious or fatal injuries resulting from an offence do not mean that the court will automatically impose a heavier penalty.³⁰

Systematic or deliberate defiance of the law

4.17 Generally, if the offence involves systematic and deliberate defiance of the law, it will be characterised as more serious, and therefore attract a higher penalty.

4.18 For example, one factor to be taken into account under s 76 of the *Trade Practices Act 1974* (Cth) is the “deliberateness of the contravention and the period over which it extended”,³¹ particularly when senior management of a large company is involved in the contravention.³² Establishing proportional relationship between the deliberateness of the wrongdoing and the severity of the penalty is seen as essential to deterring the offender and others from making commercial decisions in defiance of the law.³³

4.19 Environmental protection cases also support the principle that systematic or deliberate contravention of the law will attract stronger penalties. The NSW Court of Criminal Appeal has noted that high maximum penalties were provided by the legislation to cover, for instance, offences “committed deliberately after a cost/benefit analysis by the perpetrator”.³⁴ If the offence can be characterised as “deliberate”, “repeated”, “flagrant” or motivated primarily by economic considerations, it will be treated as more serious, and therefore attract a higher penalty.³⁵

29. *WorkCover Authority of NSW (Inspector Glass) v Kellogg (Aust) Pty Ltd (No 1)* (2000) 101 IR 239; *WorkCover Authority of NSW (Inspector Byer) v Cleary Bros (Bombo) Pty Ltd* (2001) 110 IR 182.

30. See, for example, *Watson v Southern Asphalters Pty Ltd* (1996) 83 IR 446 at 456.

31. *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076 at 52,152. See also *Trade Practices Commission v Stihl Chain Saws (Aust) Pty Ltd* (1978) ATPR ¶40-091.

32. *Trade Practices Commission v TNT Australia Pty Ltd* (1995) ATPR ¶41-375 at 40,167.

33. *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 75 FCR 238 at 240-241; *Trade Practices Commission v TNT Australia Pty Ltd* (1995) ATPR ¶41-375 at 40,167; *Trade Practices Commission v Stihl Chain Saws (Aust) Pty Ltd* (1978) ATPR ¶40-091 at 17,896.

34. *Environment Protection Authority v Middle Harbour Constructions Pty Ltd* (2002) 119 LGERA 440 at para 57.

35. See *Environment Protection Authority v Energy Services International Pty Ltd* [2001] NSWLEC 59; *Environment Protection Authority v Timber Industries Ltd* [2001] NSWLEC 25. But see *Cabonne Shire Council v Environment Protection Authority* (2001) 115 LGERA 304 at para 29, where the NSW Court of Criminal Appeal stated that the deliberate actions of an employee will not necessarily count against the corporation.

Foreseeability of the offence or its consequences

4.20 Another factor is whether the offender should have foreseen the event or its consequences. If an offence is deemed to have been foreseeable, the court will view it as more serious, and the offender as more culpable for allowing the event or its consequences to occur. The offence will thereby warrant a higher penalty. Foreseeability is relevant to the assessment of penalty regardless of whether it is an element of the offence itself.³⁶

4.21 In occupational health and safety cases foreseeability is determined as follows:

Whilst the reasonable foreseeability of an accident may not be relevant to the question of liability under the Act ... the degree of foreseeability is a significant factor to be taken into account when assessing the level of culpability of the defendant. The existence of a reasonably foreseeable risk to safety which is likely to result in serious injury or death is a factor which will be relevant to the assessment of the gravity of the offence ...

The standard of foreseeability is objective, but it is not necessary that the precise causal circumstances of exposure to the risk and the consequent accident were reasonably foreseeable ...³⁷

4.22 While the existence of a reasonably foreseeable risk of injury will result in the offence being classified as more serious, the absence of foreseeability does not necessarily render the offence nominal or less serious.³⁸

4.23 In occupational health and safety cases the guiding rationale in considering issues of foreseeability is provided by the general aims of the *Occupational Health and Safety Act 2000* (NSW). Because the Act is directed toward the implementation of safe systems of work,³⁹ the foreseeability of a safety risk in respect of the actual harm caused, the

36. Foreseeability is most often raised in occupational health and safety and environmental cases, where liability is strict and causality is irrelevant.

37. *Department of Mineral Resources of NSW (McKensy) v Kembla Coal and Coke Pty Ltd* (1999) 92 IR 8 at 27. Approved in *Capral Aluminium Ltd v WorkCover Authority of NSW* (2000) 49 NSWLR 610. See also *WorkCover Authority of NSW (Inspector Ankucic) v McDonald's Australia Ltd* (2000) 95 IR 383; *WorkCover Authority of NSW (Inspector Glass) v Kellogg (Aust) Pty Ltd (No 2)* (2000) 101 IR 261; *WorkCover Authority of NSW (Inspector Bourne) v Delta Pty Ltd* [2000] NSWIRComm 67.

38. *Capral Aluminium Ltd v WorkCover Authority of NSW* (2000) 49 NSWLR 610 at 646.

39. *Drake Personnel Ltd v WorkCover Authority of NSW (Inspector Ch'ng)* (1999) 90 IR 432 at 452-453; *Haynes v CI & D Manufacturing Pty Ltd* (1995) 60 IR 149 at 158-159; *Hannah v Ricegrowers Co-operative Ltd* (NSW Industrial Court, No 88/1990, Fisher P, 20 November 1990, unreported).

potential for harm, or both, will count toward the gravity of the offence and thereby increase the penalty.⁴⁰

4.24 The degree of foreseeability of the harm or potential for harm caused by an offence is often found to be relevant to the seriousness of environmental offences. The *Protection of the Environment Operations Act 1997* (NSW) requires a sentencing court to consider:

the extent to which the person who committed the offence could reasonably have foreseen the harm caused or likely to be caused to the environment by the commission of the offence.⁴¹

4.25 If evidence of the foreseeability of the harm or likelihood of environmental harm caused by the offence is found, it will count toward the gravity of the offence and weigh in favour of the imposition of a higher penalty.⁴²

THE OFFENDER'S CIRCUMSTANCES

4.26 This section deals with factors that relate to the offender, its characteristics and also its response to the occurrence of the offence and charge, including:

- the offender's financial circumstances;
- the presence of corporate compliance systems;
- whether the corporation accepts responsibility or cooperates with authorities;
- whether management is involved in or tolerates the criminal activity;
- the corporation's prior criminal record;
- the offender's corporate character; and
- the effect of the sentence on the provision of public services.

40. See *WorkCover Authority of NSW (Inspector Dubois) v Transfield Pty Ltd* [2000] NSWIRComm 204; *WorkCover Authority of NSW (Inspector Richey) v State Rail Authority of NSW* [2000] NSWIRComm 205; *WorkCover Authority of NSW (Inspector Glass) v Kellogg (Aust) Pty Ltd (No 2)* (2000) 101 IR 261; *WorkCover Authority of NSW (Inspector Ankusic) v McDonald's Australia Ltd* (2000) 95 IR 383.

41. *Protection of the Environment Operations Act 1997* (NSW) s 241(c). See *Environment Protection Authority v Heggies Bulkhaul Limited* [2003] NSWLEC 77; *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 699-700 (Kirby P).

42. See *Environment Protection Authority v Duke Eastern Gas Pipeline Pty Ltd* [2002] NSWLEC 84; *WorkCover Authority of NSW (Inspector Lancaster) v BHP Steel (AIS) Pty Ltd* (2001) 111 IR 181; *Environment Protection Authority v Timber Industries Ltd* [2001] NSWLEC 25; *Environment Protection Authority v Sydney Water Corporation* [2000] NSWLEC 156; *Environment Protection Authority v Simplot Australia Pty Ltd* [2001] NSWLEC 40.

Financial circumstances

4.27 Section 6 of the *Fines Act 1996* (NSW) provides that in the exercise of its discretion to fix the amount of a fine, the court is required to consider any information regarding the means of the accused as is reasonably and practicably available to the court. Courts have used this provision to reduce the amount of the fine imposed where it appeared that the financial circumstances of the accused did not warrant a high penalty.⁴³ Independently of this statutory provision, courts have developed a sentencing principle that the financial circumstances of the offender are to be taken into account when determining the fine to be imposed.⁴⁴ Subject always to the objective seriousness of the offence, if the corporation is financially able to pay a large fine, the court may impose an amount in the upper range.⁴⁵

4.28 **Size of the company.** Among the financial circumstances that a court considers important is the size of the corporation.⁴⁶ The court is entitled to take into account the fact that the business of the offender is large in size with substantial assets. A fine that would operate as no significant imposition on a large corporation might well ruin a smaller one.⁴⁷ Depending on the objective seriousness of the offence, large corporations that contravene a particular law can expect penalties in the upper reaches of the range.⁴⁸

4.29 On the other hand, courts will not usually impose a high penalty on a small company if the penalty will be oppressive or cause undue hardship to

43. *Workcover Authority of NSW (Inspector Mansell) v Hayman Industries Pty Ltd* [2003] NSWIRComm 154; *Mosman Municipal Council v Menai Excavations Pty Ltd* (2002) LGERA 89 at para 36 (Lloyd J); *WorkCover Authority of NSW (Inspector Page) v Walco Hoist Rentals Pty Ltd (No 2)* (2000) 99 IR 163 at para 27.

44. *WorkCover Authority of NSW (Inspector Patton) v P & M Denton Building Constructions Pty Ltd* [2003] NSWIRComm 17 at para 77; *Australian Competition and Consumer Commission v Rural Press Ltd* (2001) ATPR ¶41-833 at para 58; *WorkCover Authority of NSW (Inspector Page) v Walco Hoist Rentals Pty Ltd (No 2)* (2000) 99 IR 163 at para 7; *Australian Competition and Consumer Commission v Mayo International Pty Ltd (No 3)* (1998) ATPR ¶41-655 at 41,284.

45. *Trade Practices Commission v TNT Australia Pty Ltd* (1995) ATPR ¶41-375; *Registrar of the Court of Appeal v John Fairfax Group Pty Ltd* (NSWCA, No 40478/92, 21 April 1993, unreported); *Trade Practices Commission v Carlton United Breweries Ltd* (1990) 24 FCR 532.

46. *Trade Practices Commission v Carlton United Breweries Ltd* (1990) 24 FCR 532; *Trade Practices Commission v TNT Australia Pty Ltd* (1995) ATPR ¶41-375; *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 5 BR 419.

47. *Environment Protection Authority v Middle Harbour Constructions Pty Ltd* (2002) 119 LGERA 440; *Trade Practices Commission v Carlton United Breweries Ltd* (1990) 24 FCR 532; *Trade Practices Commission v TNT Australia Pty Ltd* (1995) ATPR ¶41-375.

48. *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076.

the company, or render the company's business unviable.⁴⁹ For example, the New South Wales Industrial Relations Commission reduced a sentence upon finding that the imposition of a fine of \$160,000 on a company with net assets of \$31,000 was demonstrably oppressive.⁵⁰ It is not the function of the court to impose a penalty that would put a company out of business or into liquidation.⁵¹ Courts are also mindful of possible negative consequences that a harsh fine might have on innocent third parties, such as the corporation's employees.⁵²

4.30 Other financial circumstances. The courts have looked at other financial circumstances when determining the appropriate amount of fine including: the fact that the company had gone through low profit years; was burdened with bad debts and had reinvested all profits back into the company;⁵³ was paying back substantial debt; ran at a loss and supported five family members;⁵⁴ or was experiencing deteriorating trading conditions.⁵⁵

4.31 Where a court regards a corporation as the alter ego of its owners, it may look at the financial circumstances of the latter, even though they are not parties to the case, in determining the financial capacity of the company to pay a fine.⁵⁶

Corporate compliance systems

4.32 The absence or inadequacy of procedures in the corporation to prevent the contravention of the law may aggravate the penalty.⁵⁷ On the other

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49. *WorkCover Authority of NSW (Inspector Reynolds) v PF Thearle & Co Pty Ltd* [2001] NSWIRComm 105; *WorkCover Authority of NSW (Inspector Robinson) v Milltech Pty Ltd* [2001] NSWIRComm 192; *Smith v Cnizonom* (NSWLEC, 25 March 1982, unreported).
 50. *Manpac Industries Pty Ltd v WorkCover Authority of NSW (Inspector Glass)* (2001) 106 IR 435.
 51. *Attorney General v Mayas Pty Ltd* (NSWCA, No 174/83, 28 March 1984, unreported).
 52. In *Smith v Cnizonom* (NSW LEC, 25 March 1982, unreported) the court stated that a substantial penalty for the offender could create undue hardship on the company and could cause employment problems.
 53. *WorkCover Authority of NSW (Inspector Lancaster) v Burnshaw Constructions Pty Ltd* [2001] NSWIRComm 306.
 54. *WorkCover Authority of NSW (Inspector Howard) v General Beton Co Pty Ltd* (2001) 107 IR 278.
 55. *WorkCover Authority of NSW (Inspector Robinson) v Milltech Pty Ltd* [2001] NSWIRComm 192.
 56. *WorkCover Authority of NSW (Inspector Dubois) v Galicia Constructions Pty Ltd* [2000] NSWIRComm 195 (a company was formed to enable a builder to secure a building contract, and the builder and his wife were the only directors and shareholders of the company).
 57. *Attorney General (NSW) v Radio 2UE Sydney Pty Ltd* (NSWCA, No 40236/96, 11 March 1998, unreported) at 22-26 (Priestly J), at 6-11 (Powell J); *Harkianakis v Skalkos* (NSWCA, No 40514/96, 15 October 1997, unreported) at 6-9 (Mason P);

hand, the existence of such a system may result in a more lenient penalty.⁵⁸ For example, steps taken by the company to educate employees prior to the breach or the existence of a company policy against breaches of the law have been held to be relevant.⁵⁹ Steps taken by the corporation after the occurrence of the offence, such as the adoption or improvement of policies and procedures to prevent further contravention may be taken into account to mitigate the penalty.⁶⁰

4.33 Most of the New South Wales cases where the presence or absence of corporate compliance systems have been held relevant have been in the areas of occupational health and safety,⁶¹ environment protection and contempt by publication. There is, however, a lack of clarity in the cases as to what is required for a compliance system to help mitigate the severity of corporate penalties. There is some confusion over whether the mere existence of a compliance system is sufficient or if the corporation must prove that the system has the capacity to prevent and detect violations of the law. The standards by which the effectiveness of such programs could be gauged are not apparent.

4.34 In cases under the *Trade Practices Act 1974* (Cth), the Federal Court has held that an important factor in mitigation is whether the company has a corporate culture conducive to compliance with the Act. Evidence of educational programs and disciplinary or other corrective measures in response to an acknowledged contravention may be given.⁶² However, the court will only mitigate the penalty if the company provides specific evidence of a compliance system aimed at preventing breaches of the Act.⁶³

Trade Practices Commission v CSR Ltd (1991) ATPR ¶41-076; *R v David Syme & Co Ltd* [1982] VR 173 at 182 (Marks J).

58. See, for example, *Director of Public Prosecutions (Cth) v United Telecasters Sydney Ltd (in liquidation)* (1992) 7 BR 364.

59. *Trade Practices Commission v Annand and Thompson Pty Ltd* (1987) ATPR ¶40-772; *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285.

60. *Environment Protection Authority v Supreme Poultry & Chickens Pty Ltd* [2001] NSWLEC 215; *State Rail Authority of NSW v WorkCover Authority of NSW (Inspector Dubois)* (2000) 102 IR 218; *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285; *Trade Practices Commission v Annand and Thompson Pty Ltd* (1987) ATPR ¶40-772.

61. See, for example, *Patton v Fletcher Construction Australia Limited (No 2)* [2003] NSWIRComm 94.

62. *Australian Competition and Consumer Commission v Nissan Motor Company (Australia) Pty Ltd* (1998) ATPR ¶41-660; *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 75 FCR 238; *Trade Practices Commission v TNT Australia Pty Ltd* (1995) ATPR ¶41-375; *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076; *Trade Practices Commission v Mallesys Ltd* (1979) 25 ALR 250.

63. *Trade Practices Commission v CC (NSW) Pty Ltd (No 2)* (1995) ATPR ¶41-406.

Mere policy statements by the board or other senior management regarding an intention to adopt a compliance system will not be sufficient.⁶⁴

4.35 The Commission is of the view that it should not be sufficient for a compliance program to exist or for a corporation merely to exhort its officers and employees to obey the law. Case law supports the view that a compliance program must also be a successful management tool with the demonstrated capacity to prevent, detect and remedy breaches that may occur in the daily conduct of the company's business.⁶⁵ Hence, shortcomings in a compliance system that contribute to the commission of an offence may aggravate the penalty.⁶⁶ It is unclear, however, what factors the courts will look at in determining the capacity of a compliance program to be successful and effective. For example, is the occurrence of an offence determinative of an inquiry into whether the compliance program as a whole is ineffective?

4.36 In the United States, the Guidelines for Sentencing of Organizations provide for substantial reductions in the amount of the fine to be imposed if the organisational offender had an effective compliance program.⁶⁷ The US Sentencing Commission's commentary on the Guidelines states that an effective compliance program requires a corporation to have:

- established compliance standards and procedures that are "reasonably capable of reducing the prospect of criminal conduct" by its employees and other agents;
- made specific officers in important positions within the corporation responsible for overseeing compliance with the standards and procedures;
- taken due care not to delegate "substantial discretionary authority" to persons who have a propensity to engage in illegal activities;
- taken steps to communicate the standards and procedures effectively to all employees and other agents;
- taken reasonable steps to achieve compliance with the standards;
- consistently enforced the standards through appropriate disciplinary mechanisms, including the disciplining of individuals responsible for an offence and of those who failed to detect offences;

64. *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076.

65. *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 75 FCR 238. See also C Parker and O Conolly, "Is there a duty to implement a corporate compliance system in Australian law?" (2002) 30 *Australian Business Law Review* 273 at 285-286 for an analysis of *ACCC v Australian Safeway Stores Pty Ltd* and related cases.

66. *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 75 FCR 238; *ACCC v Nissan Motor Company (Australia) Pty Ltd* (1998) ATPR ¶41-660.

67. United States Sentencing Commission, *Guidelines manual* (2002) § 8C2.5(f).

- taken all reasonable steps, after an offence has been detected, “to respond appropriately to the offense and to prevent further similar offenses”.⁶⁸

4.37 Under the Guidelines, the actions necessary for an effective compliance program depend on factors such as the size of the corporation, the likelihood that certain offences may occur due to the nature of the business and the prior history of the organisation. The larger the organisation, the more formal the program. An organisation’s prior history may indicate the types of offences that it should have taken positive steps to prevent.⁶⁹

Acceptance of responsibility and cooperation with the authorities

4.38 Courts have recognised that repentance and remorse are relevant to reducing a sentence in appropriate cases. It might be argued that remorse “cannot be felt by a corporate abstraction”.⁷⁰ However, it has been held that factors evincing contrition by a natural person charged with a serious crime under the general criminal law apply equally to corporations.⁷¹ Corporate contrition may be evidenced in a number of ways:

- a plea of guilty;
- cooperation with investigators, regulators and prosecutors;
- stopping the offending conduct voluntarily; or
- making reparation.

4.39 **Plea of guilty.** A plea of guilty may mitigate the sentence.⁷² It acknowledges the offence; frees up prosecutors; and spares the community the cost of a trial.⁷³ A plea of guilty will be considered less significant if it is not made until shortly before the hearing is to commence

68. United States Sentencing Commission, *Guidelines manual* (2002) § 8C2.5(f), Commentary.

69. United States Sentencing Commission, *Guidelines Manual* (2002) § 8C2.5(f), Commentary.

70. *Trade Practices Commission v TNT Australia Pty Ltd* (1995) ATPR ¶41-375 at 40,169.

71. *Alcatel Australia Ltd v WorkCover Authority of NSW* (1996) 70 IR 99 at 106-107.

72. *WorkCover Authority of NSW (Inspector Stewart) v Siemens Dematic Pty Ltd (No 2)* [2003] NSWIRComm 45; *WorkCover Authority of NSW (Inspector Blume) v TMP Worldwide eResourcing* [2003] NSWIRComm 37; *Environment Protection Authority v Heggies Bulkhaul Limited* [2003] NSWLEC 77; *Holroyd City Council v Skyton Developments Pty Ltd* [2002] NSWLEC 32; *Environment Protection Authority v Johnson & Johnson Pacific Pty Ltd* (2001) 114 LGERA 169; *Environment Protection Authority v J K Williams Contracting Pty Ltd* [2001] NSWLEC 13; *WorkCover Authority of NSW (Inspector Buggy) v P&O Ports Ltd* [2000] NSWIRComm 249; *Commissioner for Consumer Affairs v Reject Shop (Australia) Pty Ltd* [1999] NSWSC 62.

73. *Capral Aluminium Ltd v WorkCover Authority of NSW* (2000) 49 NSWLR 610; *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 5 BR 419; *Trade Practices Commission v TNT Australia Pty Ltd* (1995) ATPR ¶41-375.

or has commenced.⁷⁴ Nevertheless, a late plea of guilty may still have some mitigating value when seen against a background of early and ongoing assistance and cooperation with the authorities.⁷⁵

4.40 Co-operation with investigators, regulators and prosecutors. The consequences that flow when a natural person charged with a serious crime cooperates with the authorities arise equally when a corporate offender co-operates.⁷⁶ For example, the fact that a company's management reports an accident in the workplace to WorkCover on the day it happens may be a factor that goes towards the company getting a substantial discount at sentencing. The important factors in determining whether a discount should be allowed, as well as the amount of the discount, include matters such as the nature of the co-operation; whether it had the potential to assist the investigation significantly; whether information was provided which the offender did not believe was already in the possession of the authorities; and whether the consequence of providing such assistance was likely to increase the risk of prosecution or to lead to the prosecution of others.⁷⁷

4.41 Discontinuing the offending conduct. An offender's prompt action in discontinuing unlawful conduct after discovery of its illegality is relevant in determining an appropriate penalty.⁷⁸

4.42 Reparation. Remedial action undertaken by a corporate offender to repair any harm done is a very important consideration in sentencing.⁷⁹ Hence, a corporation convicted of an air pollution offence was given a substantial discount because, after being charged, it expended considerable

74. See *Environment Protection Authority v J K Williams Contracting Pty Ltd* [2001] NSWLEC 13; *Environment Protection Authority v Johnson & Johnson Pacific Pty Ltd* (2001) 114 LGERA 169; *WorkCover Authority of NSW (Inspector Buggy) v P&O Ports Ltd* [2000] NSWIRComm 249; *Director of Public Prosecutions (Cth) v United Telecasters Sydney Ltd* (NSWCA, No 40139/90, 11 October 1990, unreported).

75. *R v Craven* (1995) 17 ACSR 368.

76. *Alcatel Australia Ltd v WorkCover Authority of NSW* (1996) 70 IR 99 at 106-107.

77. *Alcatel Australia Ltd v WorkCover Authority of NSW* (1996) 70 IR 99 at 107. For more recent examples of the application of this principle, see *Environment Protection Authority v Heggies Bulkhaul Limited* [2003] NSWLEC 77; *WorkCover Authority of NSW (Inspector Suliman) v Favelle Favco Cranes Pty Ltd* [2003] NSWIRComm 150; *WorkCover Authority of NSW (Inspector Vierow) v J Gardner (NSW) Contractors Pty Ltd* [2003] NSWIRComm 19; *Workcover Authority of NSW (Inspector Mansell) v Hayman Industries Pty Ltd* [2003] NSWIRComm 154.

78. *Trade Practices Commission v Mallesys Ltd* (1979) 25 ALR 250.

79. *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 701. See also *Environment Protection Authority v Heggies Bulkhaul Limited* [2003] NSWLEC 77; *Environment Protection Authority v Supreme Poultry & Chickens Pty Ltd* [2001] NSWLEC 215; *Environment Protection Authority v J K Williams Contracting Pty Ltd* [2001] NSWLEC 13.

amounts of capital to mitigate the pollution.⁸⁰ In convictions relating to occupational health and safety, steps taken to address the risk to safety highlighted by a workplace accident, and the assistance provided to the victim or the victim's relatives have also been taken into account as mitigating factors.⁸¹

Involvement in or tolerance of criminal activity by management

4.43 Whether the contravention arose out of the conduct of senior management or at a lower level is relevant in the assessment of the appropriate penalty.⁸² The higher the level of management implicated in the contravention, the more serious the infringement and the higher the level of penalty that will be imposed.⁸³ An issue that arises in this context relates to the nature of the conduct of management and other individuals in the corporation. It is clear that active participation by management in the offence can be an aggravating factor. But it must also be the case that tolerance or ignorance of the offence by corporate officers and directors can, in appropriate circumstances, be relevant. The Federal Court has considered the fact that several corporate officers became aware of illegal conduct but did nothing to correct it as relevant in determining the appropriate sentence.⁸⁴

4.44 In the United States, the Guidelines for Sentencing of Organisations provide for the aggravation of the penalty if:

- (1) an individual within “high-level personnel” of the organisation participated in, condoned, or was wilfully ignorant of the offence; or
- (2) tolerance of the offence by “substantial authority personnel” was pervasive throughout the organisation.⁸⁵

4.45 “High level personnel” is defined to include individuals who have substantial control of the organisation or who have a substantial role in policy making, such as a director, executive officer or an individual in

80. *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 701; See also *Environment Protection Authority v Heggies Bulkhaul Limited* [2003] NSWLEC 77 at para 32; *Environment Protection Authority v Simplot Australia Pty Ltd* [2001] NSWLEC 40 at para 27 (Bignold J); *Newcastle City Council v Pace Farm Egg Products Pty Ltd* [2002] NSWLEC 66 at para 55 (Lloyd J).

81. *WorkCover Authority of NSW (Inspector Buggy) v P & O Ports Ltd* [2000] NSWIRComm 249; *WorkCover Authority of NSW (Inspector Dubois) v Transfield Pty Ltd* [2000] NSWIRComm 204.

82. *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076.

83. *Trade Practices Commission v TNT Australia Pty Ltd* (1995) ATPR ¶41-375.

84. *Trade Practices Commission v Dunlop Australia* (1980) 30 ALR 469.

85. United States Sentencing Commission, *Guidelines manual* (2002) § 8C2.5(b), Commentary. The extent of the aggravation of the penalty depends on the number of employees of the corporation.

charge of a major business or functional unit. “Substantial authority personnel” denotes individuals who exercise a substantial measure of discretion in acting on behalf of the corporation, including high-level personnel and individuals who exercise substantial supervisory authority, such as a plant or sales manager.⁸⁶

Prior criminal record

4.46 An offender’s prior record is relevant at sentencing. A good record will invariably be taken into account in the offender’s favour.⁸⁷ One previous conviction may not necessarily be taken as evidence of a bad record when other circumstances are considered, such as the size and extent of the operations of the corporation.⁸⁸ However, a record of recent breaches of the law may show that the offence was not aberrant and will aggravate the penalty.⁸⁹

Corporate character

4.47 A corporation’s “character” or reputation may be taken into account during sentencing in the same way as that of an individual. Generally, evidence of good character reduces the severity of the penalty imposed. A clean prior record will usually be taken as an indication of good character.⁹⁰ They are, however, not synonymous.⁹¹ Courts look at many

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86. United States Sentencing Commission, *Guidelines manual* (2002) § 8A1.2, Commentary.
 87. *WorkCover Authority of NSW (Inspector Vierow) v J Gardner (NSW) Contractors Pty Ltd* [2003] NSWIRComm 19; *Patton v Fletcher Construction Australia Limited (No 2)* [2003] NSWIRComm 94; *Newcastle City Council v Pace Farm Egg Products Pty Ltd* [2002] NSWLEC 66; *Environment Protection Authority v J K Williams Contracting Pty Ltd* [2001] NSWLEC 13; *Environment Protection Authority v The Shell Company of Australia Ltd* [2000] NSWLEC 16; *Attorney General (NSW) v Time Inc Magazine Co Pty Ltd* (NSWCA, No 40331/94, 21 October 1994, unreported); *Attorney General (NSW) v Macquarie Publications Pty Ltd* (1988) 40 A Crim R 405 at 410 (Kirby P); *Director of Public Prosecutions (Cth) v Australian Broadcasting Corporation* (1987) 7 NSWLR 588 at 615; *Hinch v Attorney General (Vic)* [1987] VR 721 at 752 (Kaye J); *Trade Practices Commission v Malleys Ltd* (1979) 25 ALR 250.
 88. *WorkCover Authority of NSW (Inspector Ankucic) v McDonald’s Australia Ltd* (2000) 95 IR 383; *Environment Protection Authority v The Shell Company of Australia Ltd* [2000] NSWLEC 16.
 89. *Environment Protection Authority v Virotec International Ltd* [2002] NSWLEC 110; *WorkCover Authority of NSW (Inspector Olive) v Transfield Pty Ltd* [2001] NSWIRComm 295.
 90. *WorkCover Authority of NSW (Inspector Ankucic) v McDonald’s Australia Ltd* (2000) 95 IR 383; *Environment Protection Authority v Devro-Teepak Pty Ltd* [2000] NSWLEC 275 at para 24; *Environment Protection Authority v Camberwell Coal Pty Ltd* [1999] NSWLEC 193 at para 16 (Cowdroy J).
 91. *Melbourne v The Queen* (1999) 198 CLR 1 at 42 (Kirby J).

other factors that may indicate a “fine corporate character”⁹² or “good industrial citizenship”.⁹³ Such factors may relate to the nature of the corporation’s business, the contribution that its business makes to the community or to the particular industry to which it belongs, and the fact that it is generating employment. The following examples are illustrations of the kinds of factors courts have taken into account when determining the character of a corporation:

- The corporation’s business, although for its own commercial profit, offered some benefit to the community, in that it served an environmentally useful purpose.⁹⁴
- The corporation, convicted of polluting waters, had a strong environmental commitment, and was making efforts to increase standards Australia-wide on fuel decanting operations.⁹⁵
- The corporation provided employment and produced “work of excellence”.⁹⁶
- The corporation was undertaking charitable work, and gave funding to research, even though it also received some benefit from these activities.⁹⁷
- The predecessor of the corporation, which had been operating for decades, suffered financial loss and went into liquidation. The corporation was formed by the children of the directors of the previous company to avoid the bankruptcy of their parents, and in the process paid off the creditors of the former company and saved jobs.⁹⁸
- The corporation made efforts to rehire and accommodate an injured worker.⁹⁹

4.48 Corporate character may also be used to aggravate the penalty. For example, when a corporation’s commercial activities substantially

92. *WorkCover Authority of NSW (Inspector Howard) v General Beton Co Pty Ltd* (2001) 107 IR 278 at 282.

93. *WorkCover Authority of NSW (Inspector Vierow) v J Gardner (NSW) Contractors Pty Ltd* [2003] NSWIRComm 19 at para 18; *WorkCover Authority of NSW (Inspector Ankusic) v McDonald’s Australia Ltd* (2000) 95 IR 383 at 454.

94. *Camilleri’s Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 701; *Environment Protection Authority v Virotec International Ltd* [2002] NSWLEC 110.

95. *Environment Protection Authority v The Shell Company of Australia Ltd* [2000] NSWLEC 16.

96. *WorkCover Authority of NSW (Inspector Mansell) v Anytime Industrial Services Pty Ltd* (2001) 110 IR 34.

97. *Environment Protection Authority v Virotec International Ltd* [2002] NSWLEC 110.

98. *WorkCover Authority of NSW (Inspector Howard) v General Beton Co Pty Ltd* (2001) 107 IR 278.

99. *WorkCover Authority of NSW (Inspector Vassel) v Duff Bros Pty Limited* [2000] NSWIRComm 78.

permeate the commercial and consumer life of the public, it is appropriate to take its market dominance into account in sentencing.¹⁰⁰ This factor is important not only to serve the purpose of deterrence but also because courts recognise that corporations have certain social responsibilities. A high profile corporation that has a standing in the commercial community “ought to be a leading exponent of ethical and lawful business practices”.¹⁰¹

Effect on provision of services to the public

4.49 In one of the Commission’s consultation meetings, government regulators pointed out a difficulty in cases involving entities that render service to the public.¹⁰² It was said that while there is a need to ensure that these entities are treated like others when they breach the law, courts must also consider any adverse consequences a heavy fine might have for the community. For example, a fine imposed on the State Rail Authority might affect services to the commuting public if the fine is so great that it impacts on the SRA’s capacity to operate efficiently. The concern for a penalty’s effects on services beneficial to the community should also be taken into account in cases involving non-government corporations.¹⁰³

A LEGISLATIVE RESTATEMENT

4.50 The Commission is of the view that legislation should contain a non-exhaustive list of the more important aggravating and mitigating factors that a court should take into account when sentencing corporate offenders to make the punishment fit the crime and the circumstances of the offender. The Commission stresses that the judicial officer’s discretion in identifying and synthesising the factors relevant to the offence and offender remains crucial to reaching an appropriate sentence. The illustrative list of relevant important factors is intended to be no more than a useful guide for both the court and corporations themselves. It would not in any way limit judicial discretion.

4.51 In addition to clarifying that relevant factors in section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) apply to corporate offenders, the Commission considers that there is a need to add other factors that are particularly relevant to corporate offenders.

100. *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 75 FCR 238.

101. *Trade Practices Commission v ICI Australia Operations Pty Ltd* (1991) 105 ALR 115.

102. Government Regulation and Prosecution Agencies, *Consultation*. See also United States Sentencing Commission, *Guidelines manual* (2002) § 8C4.7, which allows departures from the Guidelines’ fine range if the offender is a public entity.

103. The Australian Red Cross Society is an example of a non-government corporation which renders valuable services to the public.

Aggravating factors

4.52 The aggravating factors that ought to be identified in legislation are:

- **Foreseeability of the offence or its consequences.** If the accused could have reasonably foreseen the occurrence of the offence and any harm caused or likely to be caused, this should be indicative of the seriousness of the offence and favour the imposition of a higher penalty.¹⁰⁴
- **Involvement in or tolerance of the criminal activity by management.** The legislation should clarify the nature of the relevant managerial conduct. In particular, it should be made clear that, in addition to active management participation in the offence, tolerance or wilful ignorance of the offence may also aggravate the penalty. The United States Guidelines for Sentencing of Organizations provide a useful comparative model,¹⁰⁵ especially for identifying the corporate officers and employees who ought to be targeted by such a provision.
- **Absence of an effective compliance program.** The cases indicate that the absence or inadequacy of procedures in the corporation to prevent the contravention of the law may aggravate the penalty.¹⁰⁶ This is likely to be relevant only where a compliance program ought in all the circumstances to have been in place. Case law has developed a test on the adequacy of compliance programs for purposes of sentencing.¹⁰⁷

Mitigating factors

4.53 The mitigating factors that ought to be added to the legislative list are:

- **Financial circumstances of the offender.** Courts should be able to tailor the penalty to the financial situation of the corporation so that the imposition of a penalty, within the appropriate range, is not oppressive, or would not cause undue hardship or render the company's business unviable.¹⁰⁸
- **Presence of an effective compliance program.** A compliance program must be effective and not merely a matter of form for its presence to be a mitigating factor.¹⁰⁹
- **Stopping unlawful conduct promptly and voluntarily.** Section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) already recognises the predominant ways that an offender's contrition may be evinced. These

104. See para 4.20-4.25.

105. See para 4.43-4.45.

106. See para 4.32.

107. See para 4.35.

108. See para 4.29.

109. See para 4.33-4.37.

include a plea of guilty by the offender,¹¹⁰ assistance by the offender to law enforcement authorities,¹¹¹ and the making of reparations for any injury, loss or damage.¹¹² An offender's voluntary action in stopping the unlawful conduct within a reasonable time after its discovery is a further factor that should be added to the legislative statement.¹¹³

- **Effect of the penalty on services to the public.** The courts should be able to take into account any adverse effects a penalty might have on the provision of public services.

RECOMMENDATION 3

Legislation should provide that, in addition to the factors listed in section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) that are relevant to the sentencing of corporate offenders, a court is to take into account the following matters in determining the appropriate sentence for a corporate offender:

Aggravating Factors:

- (a) the corporation could have reasonably foreseen the occurrence of the offence and any harm caused or likely to be caused;
- (b) individuals who have substantial control of the organisation, or who have a substantial role in policy making, participated in, condoned, or were wilfully ignorant of the offence;
- (c) tolerance of the offence by members of management and others who exercise a substantial measure of discretion in acting on behalf of the corporation was pervasive throughout the corporation;
- (d) the corporation did not have, at the time of the offence, an effective compliance program designed to prevent and detect violations of the law.

Mitigating Factors:

- (a) the financial circumstances of the corporation;
- (b) the corporation had, at the time of the offence, an effective compliance program designed to prevent and detect violations of the law;
- (c) the corporation stopped the unlawful conduct within a reasonable time of its discovery;
- (d) the effect of the penalty on services to the public.

110. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(k).

111. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(m).

112. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(i).

113. See para 4.41.

The matters referred to above should be in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law.

5. Range of sentences

- The law in New South Wales
- The law in other Australian jurisdictions
- Recommendations as to other options

5.1 This chapter surveys the various sentencing options currently available for dealing with corporate offenders both generally and in specialised statutes and also discusses sentencing options that have been proposed in the literature.

THE LAW IN NEW SOUTH WALES

5.2 There is no single law in New South Wales that comprehensively deals with sentencing corporate offenders. The range of sentencing options currently available for dealing with corporate offenders is also limited. Under general sentencing law options involving incarceration are not available for corporate offenders, nor are community service orders. Probation orders are available in limited circumstances. The fine is the main penalty that is imposed. Of the 2,784 convictions of corporate offenders in New South Wales Local Courts in the period 1993-2001, 2,515 (approximately 90%) resulted in the imposition of a fine.¹

5.3 Some statutes also provide sentencing options that are specifically applicable to corporate offenders. These are in the areas of trade practices, industrial relations and occupational health and safety, for example, probation orders under the *Trade Practices Act 1974* (Cth) and other orders under the *Protection of the Environment Operations Act 1997* (NSW) and *Occupational Health and Safety Act 2000* (NSW).²

Fines

5.4 For common law offences the fine is said to be the appropriate penalty for a body corporate.³ It is, however, more common for corporations to be prosecuted under a wide range of statutes, a number of different types of which are considered in the following paragraphs.

5.5 One type of statute frames offences and penalties in general terms applicable to any person, natural or artificial.⁴ The *Crimes (Sentencing*

1. See para 1.25.

2. *Trade Practices Act 1974* (Cth) s 86C; *Protection of the Environment Operations Act 1997* (NSW) s 245, s 250; *Occupational Health and Safety Act 2000* (NSW) s 113, s 116. See Chapter 9, below.

3. *Registrar of the Court of Appeal v John Fairfax Group Pty Ltd* (NSWCA, No 40478/92, 21 April 1993, unreported) at 5 (Mahoney J). This case involved the common law offence of sub judice contempt. Most convictions for this offence involve media organisations and fine is the usual penalty.

4. *Criminal Procedure Act 1986* (NSW) s 59 provides that, unless a contrary intention appears, a provision of an Act relating to an offence applies to a body corporate as well as to individuals. Most offences in the *Crimes Act 1900* (NSW) refer to “a person”, rather than a natural person. *Interpretation Act 1987* (NSW) s 21 states that “person” includes “an individual, a corporation and a body corporate or politic”.

Procedure) Act 1999 (NSW) deals with situations where the only penalty prescribed is a maximum term of imprisonment (which cannot be imposed on a corporation)⁵ by stating that the maximum fine that can be imposed is 2,000 penalty units in cases heard by the higher courts,⁶ and 100 penalty units in all other courts.⁷

5.6 Other statutes provide fine levels that differentiate between individuals and corporations. Some statutes multiply the maximum fine applicable by a prescribed number where the offender is a corporation. For example, both the *Taxation Administration Act 1996* (NSW) and the *Trade Measurement Act 1989* (NSW) provide that the maximum penalty that a court may impose on a corporation is five times the maximum penalty applicable to a natural person convicted of the same offence.⁸ There are, however, limits on these provisions. For example, under the *Exotic Diseases of Animals Act 1991* (NSW), a Local Court may not impose an increased penalty on a corporate offender that exceeds 100 penalty units.⁹

5.7 Another type of statute makes separate provision for the amount of fine that may be imposed on corporations in addition to the amount that may be imposed on individuals. A table in Appendix A of this Report sets out a non-exhaustive list of more than forty New South Wales statutes that carry specific penalties for corporations. The maximum amounts fixed by these statutes vary widely.¹⁰

5.8 The question of the suitability of the fine as a general sanction on corporations is discussed in Chapter 7.

Probation

5.9 Examples of probation under the general sentencing regime include good behaviour bonds, conditional discharge of an offender and suspended sentences.

- **Good behaviour bonds** may be imposed only as an alternative to imprisonment.¹¹ When imposed on an offender a bond generally contains

5. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 16.

6. That is, the NSW Supreme Court, Court of Criminal Appeal, Land and Environment Court, Industrial Relations Commission and District Court.

7. A penalty unit is currently set at \$110: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.

8. *Taxation Administration Act 1996* (NSW) s 122; *Trade Measurement Act 1989* (NSW) s 69.

9. *Exotic Diseases of Animals Act 1991* (NSW) s 72(2).

10. For example, a corporation may be fined as much as \$825,000 for certain occupational health and safety offences: See *Occupational Health and Safety Act 2000* (NSW) s 12, 24.

11. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9.

such conditions as are specified in the order. The term of a good behaviour bond must not exceed five years.¹²

- **Conditional discharges** are available where the court considers it “inexpedient” to inflict other than nominal punishment in the circumstances of the case. A conditional discharge is an “order discharging the person on condition that the person enter into a good behaviour bond for a term not exceeding 2 years”.¹³
- **Suspended sentences:** a sentence of imprisonment of not more than two years may be suspended on condition that the offender enters a good behaviour bond.¹⁴

5.10 Courts in New South Wales do not generally impose probation on corporations under the current sentencing regime. With the exception of conditional discharges, probation cannot apply to corporations because it can only be imposed as an alternative to imprisonment¹⁵ and corporations cannot be imprisoned.

5.11 There has been some judicial support for the use of good behaviour bonds in conjunction with a conditional discharge. For example, the Land and Environment Court has stated that it may be open for the Court to release a company on a good behaviour bond even though the relevant provisions¹⁶ are “referable only to non-corporate persons”.¹⁷

5.12 The Industrial Relations Commission has imposed probation for breaches of the *Occupational Health and Safety Act 1983* (NSW), deciding:

to discharge [the company] on condition that it enter into a good behaviour bond by way of self recognisance with a duration of two years ... This should enable the re-activation of [the company], should other circumstances permit, without it facing a crippling financial barrier whilst demanding that its industrial safety behaviour be exemplary for the period of two years under pain of significant sanction. The public deterrent factor should thus be met.¹⁸

12. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9(2).

13. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10.

14. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 12.

15. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9, s 12.

16. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95, s 96.

17. *Environment Protection Authority v Virotec International Ltd* [2002] NSWLEC 110 at para 36.

18. *WorkCover Authority of NSW (Inspector Dubois) v Galicia Constructions Pty Ltd* [2000] NSWIRComm 195 at para 24 (Maidment J). However, such an order has only rarely been made in relation to breaches of the *Occupational Health and Safety Act 1983* (NSW): *WorkCover Authority of NSW v Genner Constructions Pty Ltd* [2000] NSWIRComm 87 at para 12-15.

Such an order effectively requires the corporation to reform itself and in this way intrudes upon the corporation's day to day operations. Further options for the imposition of probation upon corporations are discussed in Chapter 9.

Other penalties

5.13 Recent legislative innovations in New South Wales contain alternative sentencing options applicable to corporations. The *Protection of the Environment Operations Act 1997* (NSW) gives a court the power to make a broad range of orders including: publicity orders, community service orders, mandatory audit orders, and orders to prevent or mitigate the harm caused by the offence, or to make good any resulting environmental damage.¹⁹ Under the *Occupational Health and Safety Act 2000* (NSW), a court can now order an offender to: publicise the offence and other facts relating to the offence; carry out a specified project for the general improvement of occupational health, safety and welfare; or remedy any matter caused by the commission of the offence that appears to the court to be within the offender's power to remedy.²⁰

THE LAW IN OTHER AUSTRALIAN JURISDICTIONS

5.14 As in New South Wales, the fine is the main penalty for corporate offenders in all other Australian jurisdictions, none of which have adopted general provisions that set out alternative options for sentencing corporations. Like New South Wales, the other States, Territories and the Commonwealth have a range of statutes creating offences and penalties that may apply to corporations. Some have statutory provisions, to be found in general sentencing or criminal legislation, which allow the court to impose a fine for an offence committed by a corporation if that offence is otherwise punishable only by imprisonment.²¹ Some have laws which provide that where a body corporate is convicted of an offence, the court may impose a fine not exceeding five times the maximum penalty that could be imposed by the court on a natural person convicted of the same offence.²²

5.15 Some jurisdictions have introduced new sentencing options including probation orders, publicity orders, community service orders, injunctive orders and audit orders. A number of observations may be made about these new sentencing options. First, they have not been introduced under general sentencing legislation but are instead contained in statutes dealing

19. *Protection of the Environment Operations Act 1997* (NSW) s 245, s 250.

20. *Occupational Health and Safety Act 2000* (NSW) s 113, s 115(1)(a), s 116.

21. See, for example, *Sentencing Act 1991* (Vic) s 109(3A); *Sentencing Act* (NT) s 118.

22. See eg, *Crimes Act 1914* (Cth) s 4B; *Sentencing Act 1995* (WA) s 40(5).

with specialised areas of law, mainly in the areas of environmental protection and fair trading. Secondly, they are not limited in application to corporations. However, the fact that such sanctions are made available in areas of law in which corporations are frequently prosecuted shows an intention to include corporate offenders within the relevant sentencing regimes. Thirdly, these sanctions are generally stated to be in addition to any other penalty imposed (that is, in the case of corporations, usually a fine). For example, both Victoria and South Australia's Environment Protection Acts²³ contain similar sentencing options to those in New South Wales. At the Commonwealth level, new sanctions, including orders in the nature of community service orders, probation orders, and publicity orders,²⁴ were introduced to the *Trade Practices Act 1974* (Cth) in 2001.²⁵

RECOMMENDATIONS AS TO OTHER OPTIONS

5.16 The trend in the sentencing of corporations is for options to be expanded. The fine, currently the principal sanction for corporate wrongdoing, clearly does not serve all the objects that should be addressed at sentencing.²⁶

5.17 The Commission has considered whether or not the following sentencing options should be made generally available in addition to the fine in sentencing corporations:

- **Equity fines** (Chapter 7). Otherwise known as “stock dilution”, equity fines require that a corporation issue a certain number of shares to a third party, for example, a victims’ compensation fund.
- **Incapacitation** (Chapter 8). Incapacitation involves orders aimed at preventing a corporation from carrying out certain commercial, trading or investment activities or taking advantage of certain rights (referred to as “disqualification”) and also involves orders aimed at winding up a corporation either directly or indirectly (referred to as “dissolution”).
- **Correction orders** (Chapter 9). Correction orders include a range of orders, often referred to as “probation orders”, as well as another range of generally stricter orders that are referred to as “punitive injunctions”. Corporate probation orders aim to alter corporate behaviour, for example,

23. *Environment Protection Act 1993* (SA) s 133; *Environment Protection Act 1979* (Vic) s 67AC. See also R Baird, “Environmental prosecutions in Victoria – full benefit of amendments limited by prosecution structure” (2002) 19 *Environmental and Planning Law Journal* 83.

24. *Trade Practices Act 1974* (Cth) s 86C(2)(a), s 86C(2)(b), s 86C(4), s 86D.

25. The changes were made to implement the recommendations made by the Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974* (Report 68, 1994).

26. See Chapter 6.

by achieving some internal discipline in the corporation or reforming the organisation by means of external monitoring. Punitive injunctions involve a more severe form of intervention in the operation of the corporation. Such orders might involve specific internal controls, or require that particular activities cease or be undertaken.

- **Community service orders** (Chapter 10). Community service orders may direct a corporation to undertake or contribute to work or projects that benefit the community or a part of the community in some way.
- **Publicity orders** (Chapter 11). Publicity orders include orders designed to inform specific people, groups of people or the community, of details relating to the offender, the offence and the penalty imposed for the offence.
- **Reparation** (Chapter 12). Reparation involves orders for both compensation and restitution to victims of corporate crime.

The Commission has considered these additional sentencing options against the background of models established by legislation in various jurisdictions, and discussed or recommended in relevant academic literature, and the views expressed of these models in our consultations. The Commission has concluded that forms of each of the above options should be made generally available as part of the State's regime for sentencing corporations with the exception, however, of equity fines and reparation.

5.18 The Commission, therefore, recommends that when sentencing a corporation, in addition to, or instead of, imposing a fine, the court may make one or more orders that the court considers will best achieve the objects of sentencing. These orders include: correction orders, community service orders, publicity orders and incapacitation. Such an approach allows wide scope for the exercise of judicial discretion which is necessary to achieve the most appropriate outcome with respect to individual corporate offenders. The important role of judicial discretion in sentencing has recently been affirmed by the Attorney General, who stated that:

By preserving judicial discretion we ensure that the criminal justice system is able to recognise and assess the facts of an individual case.

This is the mark of a criminal justice system in a civilised society.²⁷

This is a general recommendation. Specific recommendations relating to aspects of each of the sentencing options will be made in the chapters that follow.

27. NSW *Parliamentary Debates (Hansard)* Legislative Assembly, 23 October 2002, the Hon R J Debus, Second Reading Speech at 5813.

Use of terminology

5.19 In recommending a general regime for the sentencing of corporate offenders a number of considerations relating to the use of terminology need to be kept in mind. First, the discussion and recommendations relating to the various sentencing orders have been based to an extent on terminology generally adopted in practice or as proposed in academic literature. The terminology applicable to these options and models is not used consistently in legislation, the literature or ordinary speech. Some of the terms have been borrowed from sentencing dispositions that relate to individual offenders even though their application to corporate entities may not be precisely the same. For example, an individual carrying out a community service order cannot hire someone else to carry out the sentence, whereas corporations subject to a “community service order” would be able to make some decisions about the deployment of their resources and may even hire others to carry out some of the work. The terminology used for the purpose of discussion of the various options may, therefore, not be reflected in the final form of the new provisions relating to the sentencing of corporate offenders. The Commission has, wherever possible, used terminology that commands wide support, subject to two exceptions:

- Where the form and practical outcome of proposed individual orders are the same, we have classified the orders functionally and adopted one expression for them notwithstanding varying terminology in the legislation and literature. For example, we have used the term “punitive injunction” to identify an order that is variously described in the literature as a “punitive injunction”, “preventive order”, and an order “for restoration and prevention”.²⁸
- We have not used terminology that, in our view, leads to confusion. For example, we have not used the term “probation” in the way in which it is used in s 86C(4) of the *Trade Practices Act 1974* (Cth), because the organisational focus of that section gives the word a different meaning to that which it bears in general sentencing law.

5.20 There is also a degree of overlap between the various types of orders discussed, both in terms of the form of the orders and the outcomes to be achieved. For example, some orders relating to disqualification and some punitive injunctions may take very similar forms and achieve substantially the same outcomes. The final legislative form of the various orders should, therefore, take account of the areas of overlap between them.

28. See Chapter 9.

Separate provision

5.21 The Commission recommends a separate set of provisions to deal with the sentencing of corporate offenders. These provisions should apply generally to corporate offenders while not detracting in any way from existing legislative provisions and common law already applicable to corporate offenders. The proposed provisions should form part of the general sentencing regime, perhaps as a new Part to the *Crimes (Sentencing Procedure) Act 1999* (NSW).

Separate, non-exclusive orders

5.22 There are essentially two ways for the courts to impose alternative orders on corporate offenders:

- by making the orders conditions to a bond; or
- by making the orders separate, non-exclusive sanctions.

The various orders recommended in this Report could simply be grafted onto the current regime of bonds under existing sentencing legislation,²⁹ in particular good behaviour bonds and conditional discharges.³⁰ Some changes would, however, be necessary to ensure that bonds could apply to corporations, including making changes to the preconditions for entry into bonds so that it would be possible to suspend sentences other than sentences of imprisonment.

5.23 The Commission's preferred option is to make each of the orders recommended above a separate, non-exclusive sanction. This approach is desirable for a number of reasons. First, establishing separate sanctions means that the system will not be dependent on a structure that was established primarily (if not exclusively) to deal with individual offenders. Secondly, it will allow the courts greater discretion in fixing a combination of penalties appropriate to the circumstances of the individual case so as to achieve the aims of sentencing most effectively. Thirdly, there are already legislative models in Australia and overseas that allow for some orders to be imposed as separate, non-exclusive sanctions.³¹

29. See material on the attempts by US courts and legislatures to meld personal probation orders to corporations: E Lederman, "Criminal law, perpetrator and corporation: rethinking a complex triangle" (1985) 76 *Journal of Criminal Law and Criminology* 285 at 309-310.

30. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9 and Pt 8, s 10.

31. See para 5.15.

RECOMMENDATION 4

In sentencing a corporation, a court, in addition to or instead of imposing a fine, should be able to make one or more other orders that it considers will best achieve the objectives of sentencing. These orders are:

- (a) orders for incapacitation;
- (b) correction orders;
- (c) community service orders; and
- (d) publicity orders.

Each order should be capable of being a separate, non-exclusive sanction.

The orders should form part of the general sentencing regime but should be expressed to apply only to corporations.

The orders should not detract in any way from existing legislative provisions and common law that are applicable to the sentencing of corporations.

6. Fines

- Is the fine an appropriate penalty?
- Setting fines

IS THE FINE AN APPROPRIATE PENALTY?

6.1 The fine is, in general, the main sentence that can be imposed on corporations in New South Wales and in other Australian jurisdictions. The utility of the fine as a penalty for corporate offenders has, however, been the subject of much debate.¹ Fines are said to be inadequate in achieving the objectives of sentencing. Some of the reasons for this proposition are surveyed in the following section.

Ineffectiveness in deterring corporate crime

6.2 Corporations are seen as profit-maximisers and if the expected penalty cost does not outweigh the expected gain from the offence, a corporation might choose to take the risk of being detected and prosecuted. Large corporations may treat relatively low fines as mere business losses, outweighed by the economic gains obtained from the commission of offences.² Fines may also be seen as insignificant in comparison to the more urgent business forces driving managerial decision-making. They may be construed as mere licence fees for illegitimate corporate business operations.³

6.3 Fines may be insignificant in relation to the size and financial position of large companies. For example, in a decision of the NSW Industrial Relations Commission that involved the death of a worker resulting from breach of the occupational health and safety law,⁴ a large corporation and its subsidiary, were fined \$120,000 and \$150,000, respectively.⁵ The fines imposed represented a small fraction of the two companies' gross revenue that year, which when combined was about \$983,000,000.⁶ It is arguable that a fine that is minuscule compared to a

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1. See, for example, B Fisse, "Sentencing options against corporations" (1990) 1 *Criminal Law Forum* 211; B Fisse, "Reconstructing corporate criminal law: deterrence, retribution, fault, and sanctions" (1983) 56 *Southern California Law Review* 1141; Australian Law Reform Commission, *Sentencing: penalties* (Discussion Paper 30, 1987) at para 290; B Fisse, *Sanctions against corporations: economic efficiency or legal efficacy?* (Sydney University, Transnational Corporations Research Project Occasional Paper No 13, 1986); J Braithwaite and P Grabosky, *Occupational health and safety enforcement in Australia: a report to the National Occupational Health and Safety Commission* (Australian Institute of Criminology, Canberra, 1985) at 89.
 2. J C Coffee, "No soul to damn no body to kick': an unscandalized inquiry into the problem of corporate punishment" (1981) 79 *Michigan Law Review* 386 at 390.
 3. *United States v Wise* (1962) 370 US 405.
 4. *WorkCover Authority of NSW (Inspector Ankucic) v McDonald's Australia Ltd* (2000) 95 IR 383.
 5. The maximum fine that could have been imposed was \$550,000.
 6. The corporations involved were MacDonald's Australia Ltd and its subsidiary MacDonald's Properties (Australia) Pty Ltd. According to their respective Financial Statements for the year ending 2000, the gross operating revenue of

company's turnover and which does not make a substantial dent in its profit, could be viewed by a company as a mere cost of doing business, not something that should significantly influence the usual course of its business.

6.4 For smaller corporations, or for subsidiaries of larger corporations, a fine of an amount that accurately reflects the gravity of an offence may well be beyond their means. This results in what is referred to as a wealth boundary or “deterrence trap”, which arises where a corporate offender does not have the resources to pay a fine in an amount theoretically required for effective deterrence. For example, a \$5m fine has no more effect on a corporation with few assets than a \$500,000 fine would if both fines were beyond the resources of the corporation, since the additional deterrent effect of imprisonment is not available. The corporation's wealth (or rather lack of it) is, therefore, an effective barrier to achieving adequate deterrence by means of fines alone.⁷

6.5 However, corporate decisions may not be based on profit-maximising motives alone. Non-financial values, such as prestige, are also important in the business decisions that companies make. Fines do not address the non-economic motivations that lead to the commission of some corporate offences, for example “the urge for power, the desire for prestige, the creative urge, and the need for security”⁸ and consequently, their effectiveness in deterring these kinds of crimes is limited.

Ineffectiveness in rehabilitating offenders

6.6 When a corporation is sentenced to pay a fine, it is not compelled to review its management structure or reform the internal procedures or policies that contributed to or caused the wrongful conduct giving rise to the offence. Rather, organisational reform is left to the corporation to initiate itself, the assumption being that the corporation will be motivated to do so in order to avoid re-offending and the imposition of further fines. However, a fine may not be sufficient to compel the corporation to correct its systemic or procedural faults.⁹ A corporation may determine that the costs of adopting measures to correct the corporation's work systems are higher than the costs of incurring further fines. The insufficiency of fines to effect rehabilitation finds support in a relatively old empirical study on the

MacDonald's Australia Ltd was about \$774,000,000, while that of MacDonald's Properties (Australia) Pty Ltd was about \$209,000,000.

7. C Wells, *Corporations and criminal responsibility* (2nd ed, Oxford University Press, 2001) at 32; J C Coffee, “No soul to damn no body to kick’: an unscandalized inquiry into the problem of corporate punishment” (1981) 79 *Michigan Law Review* 386 at 390; B Fisse, “Sentencing options against corporations” (1990) 1 *Criminal Law Forum* 211 at 217-219.

8. Fisse at 218-219.

9. Fisse at 225-226.

impact of prosecutions and fines under the *Trade Practices Act 1974* (Cth).¹⁰ The study found that in approximately 40% of the cases studied, companies convicted under the Act did not carry out any significant organisational reform. This Act has since been revised to give greater power to courts to make orders directed at achieving change within the organisation to prevent repetition of the offence and to ensure future self-regulation.¹¹

Ineffectiveness in denouncing corporate offences

6.7 It may be argued that fines trivialise the gravity of corporate crime and that they do not sufficiently denounce serious criminal conduct. It has been suggested that fines convey the message to the community that corporate crime is less serious than other crime and that corporations can buy their way out of trouble. “[T]hey create the impression that corporate crime is permissible provided the offender merely pays the going price”.¹² Moreover, the corporate sentencing regime’s reliance on fines seems to indicate that the social harm caused by corporate crime is purely economic in nature. Sole reliance on a monetary sanction tends to diminish the significance of the non-economic harm caused, such as irreparable damage to the environment, or human death or injury sustained in a workplace accident.

Adverse effects on third parties

6.8 One of the main criticisms of fines is that they punish certain groups of people who may not have any involvement in the commission of the offence, including the corporation’s shareholders, employees, creditors, and customers. As one commentator put it, “the costs of deterrence tend to spill over onto parties who cannot be characterized as culpable”.¹³ This phenomenon is commonly referred to as “spillover”.¹⁴

6.9 It has often been said that it is not the company that ultimately pays the fine, but rather, the corporation’s shareholders,¹⁵ who experience the loss resulting from a fine in the form of a fall in the value of their shares

10. A Hopkins, *The impact of prosecutions under the Trade Practices Act* (Australian Institute of Criminology, Canberra, 1978).

11. See para 5.15.

12. B Fisse, “Sentencing options against corporations” (1990) 1 *Criminal Law Forum* 211 at 220.

13. J C Coffee, “No soul to damn: no body to kick’: an unsandalized inquiry into the problem of corporate punishment” (1981) 79 *Michigan Law Review* 386 at 341.

14. Fisse at 228.

15. See Coffee; C Kennedy, “Criminal sentences for corporations: alternative fining mechanisms” (1985) 73 *California Law Review* 443.

and a reduction in dividends.¹⁶ The cost of the fine may also be passed on to others, including: consumers, for whom prices of products or services may increase; and employees of the corporation – whose wages or jobs may be affected.¹⁷ The corrective force of fines is dissipated to the extent that they “spill over” or are “passed on” to groups who are powerless to prevent future corporate violations of the law.¹⁸

6.10 Some commentators, economists in particular, argue that “spillover” is a myth,¹⁹ or at least, overstated. They argue that spillover effects will occur only to the extent that the affected group was enjoying a benefit from the organisation’s illegal activity, a benefit corresponding to an external cost previously imposed on the victims of the crime. Rather than unjustly penalising the “innocent,” it is argued that fines restore efficient resource allocation. Debunking the unfairness argument of spillovers, one commentator argues that there is no reason “why shareholders should not bear these costs since they benefit from corporate crime, have all the privileges associated with limited liability and rarely suffer the environmental hazards produced by their corporations”.²⁰

6.11 The Commission is of the view that concern about the effect of a sentence on third parties is not in itself a reason for rejecting that sentence as the proper response to criminal conduct. Sanctions imposed on individuals often have a punitive effect on those not responsible for the crime, such as dependent children where a parent is sentenced to imprisonment. Yet the general rule in the case of individual offenders is that a court can only take hardship to innocent third parties into account in extreme cases.²¹ The sentencing of a corporation should generally not be approached any differently. However, because of the potentially larger number of third parties who may be affected by corporate crime, the court may, in appropriate cases, be more willing to consider the impact of fines on third parties, at least where criminal liability is also visited on the

16. C Kennedy, “Criminal sentences for corporations: alternative fining mechanisms” (1985) 73 *California Law Review* 443 at 449.

17. M Jefferson, “Corporate criminal liability: the problem of sanctions” (2001) 65 *Journal of Criminal Law* 235 at 238-239.

18. E H Miller, “Federal sentencing guidelines for organizational defendants” (1993) 46 *Vanderbilt Law Review* 197 at 206.

19. Miller at 206, citing J S Parker, “Criminal sentencing policy for organizations” in United States Sentencing Commission, *Discussion materials on organization sanctions* (1988); M Metzger and C Schwenk, “Decision making models, devil’s advocacy, and the control of corporate crime” (1990) 28 *American Business Law Journal* 323 at 337.

20. C Wells, *Corporations and criminal responsibility* (2nd ed, Oxford University Press, 2001) at 36, citing F Pearce, “Corporate crime” (1987) 7 *Critical Social Policy* 116.

21. See R G Fox and A Freiberg, *Sentencing: State and Federal law in Victoria* (2nd ed, Oxford University Press, 1999) at 342-344; K Warner, *Sentencing in Tasmania* (2nd ed, 2001) at 115.

corporation's officers and where the company has not in fact benefited from the conduct.²²

Difficulty of enforcing fines

6.12 From a practical point of view a system relying on fines alone presents problems. There will be situations where a corporation may avoid paying a fine due to such factors as insolvency or its position within a corporate group. The NSW State Debt Recovery Office has received a total of 24,000 corporate matters since 1998 and has recovered moneys from 33% of this class of fine defaulters.²³ Provisions are available for dealing with individuals who do not pay their fines, including, ultimately imprisonment. Other options include driver licence or vehicle registration suspension or cancellation; civil enforcement, including seizure of property and garnishment; and community service orders.²⁴ The *Fines Act 1996* (NSW) provides that these enforcement mechanisms (other than community service orders and imprisonment) also apply to corporations.²⁵ However, such options as may apply to corporations may not be feasible when the corporation is part of a corporate group and need not necessarily earn income or own property. There is little point in imposing a further fine to deal with a corporation that does not pay a fine. A full range of sentencing options other than fines is therefore necessary if only to provide courts with alternative penalties in the event that a corporation defaults in the payment of a fine. This point is discussed more broadly in the context of the consequences of a company failing to carry out the orders of a court.²⁶

The Commission's view

6.13 The limitations of the fine as a penalty should not be overstated. It may be argued that a conviction, in itself, can have a rehabilitative or deterrent value. Regardless of the form of penalty imposed, a conviction may signal to the corporation, its management and owners, that their operational system has failed and a correction is required. Moreover, a conviction, irrespective of the particular sanction, may give the corporation "a stigma that, unlike monetary loss, cannot simply be written off as a

22. See *R v Wattle Gully Gold Mines NL* [1980] VR 622.

23. Information supplied by T Jessup, NSW State Debt Recovery Office (26 May 2003).

24. *Fines Act 1996* (NSW) Pt 4.

25. *Fines Act 1996* (NSW) s 98. Income related collection mechanisms have also been proposed for both individual and corporate offenders to overcome the significant costs involved in imposing alternative enforcement mechanisms: B Chapman, A Freiberg, J Quiggin, D Tait, *Rejuvenating financial penalties: using the tax system to collect fines* (Australian National University, Centre for Economic Policy Research, Discussion Paper 461, 2003).

26. See Chapter 13.

business cost or passed on to others”.²⁷ The threat of stigma that follows a conviction may in some instances effectively deter the corporation and others who value their prestige and goodwill, from committing further offences.

6.14 Notwithstanding the criticisms of the fine, the Commission’s position is that it should remain the primary penalty for corporate offenders. The maximum fine embodies the legislative view, based on community standards, of the seriousness of criminal conduct.²⁸ The additional penalties endorsed in Chapter 5, such as correction orders, may not be capable of achieving this function.

6.15 In addition, fines are arguably an appropriate sanction in certain circumstances, such as cases involving less serious “regulatory” offences. An illustration of one such regulatory offence would be breach of mandatory reporting requirements that are technical in nature and where the only harm that results is the cost to the government in enforcing its rules; for example, some violations of tax laws concerning the failure to furnish documents to the Australian Taxation Office.²⁹ Such offences do not involve substantive tax offences (for example, tax fraud) but rather, involve technical violations, such as the failure to lodge the required forms on time.³⁰

6.16 Fines are relatively inexpensive and easy to administer and enforce. They do not involve government intervention in the internal affairs of a corporation. Fines also generate revenue for the State.

6.17 Nevertheless, in certain circumstances fines are inadequate or inappropriate. Certain offences committed by corporations reflect failure in the organisation’s systems of work and management practices. In those circumstances, it would be useful to have sanctions, such as the correction orders proposed in Chapter 9, that are directed at achieving change in the organisation’s structure or culture to prevent repetition of the offence and facilitate future self-regulation.

6.18 Fines alone may also be inadequate in circumstances where the corporate offender has demonstrated a criminal propensity, that is, where they are likely to commit further crime, based on factors such as their past criminal record and consistent failure to take rehabilitative measures. Moreover, fines are inadequate punishment for the most extreme cases of

27. B Fisse, “Sentencing options against corporations” (1990) 1 *Criminal Law Forum* 211 at 229.

28. See also para 4.12.

29. A majority of these prosecutions are made under the *Taxation Administration Act 1953* (Cth) s 8C(1)(a), which punishes failure to furnish an approved form or any information to the Tax Commissioner: Information supplied by the Bureau of Crimes Statistics and Research (19 August 2002).

30. Information supplied by K Marsh, Technical Advisor, Prosecution Area, Sydney Advanced Legal Team, Australian Taxation Office (6 November 2002).

corporate crime, in particular where a corporation has operated primarily for a criminal purpose or primarily by criminal means. In these cases, there is a need to explore sentencing options that will incapacitate these types of corporate offenders.³¹ Other sentencing options such as publicity orders and community service orders may also be useful to the extent that they avoid some of the limitations inherent in fines, for example, by providing greater scope for denunciation, or simply by providing an alternative penalty where a corporation is unable to pay the appropriate amount of fine.³²

6.19 By themselves, these sanctions may not always be capable of achieving all of the various objectives of sentencing. However, if these sanctions are combined with a fine or other penalties, such as corporate probation, society's goals of punishing and preventing corporate crime are more likely to be achieved.³³

6.20 The Commission is of the view that fines should be part of a wide range of sanctions available to the courts that is sufficiently flexible to cope with relatively minor contraventions as well as more serious corporate offences. This approach acknowledges that fines are not always an adequate penalty and, that no single sanction will ever be a perfect punishment for corporate crime. The Commission, in Chapters 7-12 of this Report, examines the sentencing options that may be used in addition to, or as alternatives to fines, with a view to determining which of them should be adopted in this State.

SETTING FINES

6.21 While there is a clear need for new sentencing options for corporate offenders, the Commission is of the view that fines should remain an integral part of the system of sentencing corporations. There remain outstanding some particular issues concerning fines as penalties for corporate offenders. One is whether the maximum amounts contained in existing statutes are adequate. Another is whether there is a need to examine how courts currently determine the appropriate amount of fine in each case.

The level of fines

6.22 The level of fines that can be imposed on corporate offenders is illustrated in various statutes that regulate corporate activity.³⁴ The maximum

31. See Chapter 9.

32. See Chapters 10 and 11.

33. See Chapter 5.

34. See Appendix A of this Report, which contains a list of more than forty NSW statutes that provide specific penalties for corporations.

amounts vary considerably. Some of the highest amounts are in the areas of environment protection, occupational health and safety, and public health:

- \$10,000,000 – marine pollution (in particular, discharge by a ship of oil into State waters, and discharge of noxious liquid substance from a ship);³⁵
- \$1,100,000 (10,000 penalty units) – the contravention of a direction from the Chief Health Officer to retract or correct information or advice issued by the supplier to the public in relation to the safety of the supplier's drinking water;³⁶
- \$1,000,000 – wilful or negligent disposal of waste in a manner that harms or is likely to harm the environment;³⁷
- \$825,000 (7,500 penalty units) – failure by a corporation to provide safe systems of work.³⁸

6.23 The importance of the statutory maximum penalty provided in legislation is that it is the first factor that a court takes into account in determining the quantum of punishment because the prescribed penalty indicates the Parliament's view (and, through Parliament, the community's view) of the objective seriousness of the crime in question.³⁹

6.24 In the Commission's consultations, representatives from regulatory agencies indicated that there is no need for change in the level of fines,⁴⁰ due to relatively recent increases in statutory maxima, for example, under the *Protection of the Environment Operations Act 1997* (NSW) and the *Occupational Health and Safety Act 2000* (NSW).

Consistency in fines

6.25 The current system by which the courts in New South Wales determine the amount of fines for corporate offenders is the same as that used in sentencing individual offenders. Under the general sentencing regime, the legislature prescribes the maximum penalty and the judiciary relates these to particular cases, applying long established sentencing principles.

6.26 Foremost among these principles is proportionality. Courts are required to examine the objective seriousness of the offence and then look at other variables to ensure that the penalty does not exceed that required by the seriousness of the crime. These variables include the degree to which the offender was responsible for the offence and other subjective factors that relate to the offender, such as its character, and response to the

35. *Marine Pollution Act 1987* (NSW) s 8 and s 18.

36. *Public Health Act 1991* (NSW) s 10C.

37. *Protection of the Environment Operations Act 1997* (NSW) s 119.

38. *Occupational Health and Safety Act 2000* (NSW) s 12.

39. *R v Oliver* (1980) 7 A Crim R 174 at 177. See also the cases cited in para 4.12.

40. Regulatory and Prosecution Officers, *Consultation*.

occurrence of the offence. Some of the most important factors relevant to setting the penalty for corporate offenders are canvassed in Chapter 4 of this Report. The principle of proportionality operates to restrain excessive, arbitrary and capricious punishment, and at the same time requires that a sentence is not excessively lenient. In short, the objective is to obtain a punishment that is just under the circumstances of each case.

6.27 In addition to the proportionality principle, the common law has developed other principles, discussed in detail in our Discussion Paper 33,⁴¹ that are relevant in arriving at sentence in any particular case. Some of these are:

- **Consistency:** The principle applies to the exercise of the court's discretion in sentencing in order to avoid inappropriate disparities between the sentences given to co-offenders as well as between offenders accused of the same or similar types of offences.⁴²
- **Totality:** This principle states that the total sentence imposed upon an offender convicted of more than one offence must reflect the totality of the offending. The rationale behind this principle is that the aggregate sentence should be just and appropriate to the totality of the criminal behaviour.⁴³
- **The statutory maximum is to be imposed for the worst class of cases:** The statutory maximum is to be reserved for the worst category of offence (not the worst case that can be imagined) to which it applies.⁴⁴

6.28 The determination of the appropriate fine in any case is largely governed by the application of these principles to the facts of the particular case, including the circumstances of the individual corporate offender. The variables that the courts take into account in the penalty-setting process do not have any pre-determined value. Rather, their relevance and the extent to which they affect the final amount of fine imposed are left to the discretion of the court. The system strives for the imposition of fines that are fair and just in the circumstances of each case. It could be argued that the lack of precision inherent in this type of system provides scope for inconsistency and the appearance of arbitrariness.

6.29 The Commission is, however, of the view that any sentencing regime should have sufficient flexibility to enable the courts, in their discretion, to fix penalties that take account of the unique situations and frequently complex facts that are raised in dealing with corporate offenders. This flexibility is desirable both in the fixing of fines, where fines are

41. See NSWLRC DP 33 at para 2.2.

42. See *Lowe v The Queen* (1984) 154 CLR 606; *Bugmy v The Queen* (1990) 169 CLR 525. See NSWLRC DP 33 at para 3.38-3.40.

43. See NSWLRC DP 33 at para 3.41.

44. *R v Oliver* (1980) 7 A Crim R 174; *Ibbs v The Queen* (1987) 163 CLR 447 at 451-452.

appropriate, as well as in setting the appropriate mix of fines and other sentencing options in relation to individual corporate offenders.

The United States experience

6.30 Attempts have been made to constrain the courts' sentencing discretion in the United States by developing a system of fines for corporate offenders that is certain, precise, uniform and rational. One reason for this development was evidence that suggested that the sentencing of organisational offenders was inconsistent and disparate. A 1988 study of US federal court cases⁴⁵ found that the penalties imposed on organisations did not "fit" the harm, in the sense that the median fines that the courts imposed on organisations was less than the actual economic loss caused by the offence. Moreover, the study looked at whether comparative harms had been treated equally and found several instances where similar crimes had resulted in very different sanctions. Two of the models developed to deal with these perceived problems are discussed in the following paragraphs.

Optimal penalties model

6.31 A model for sentencing corporate offenders that has received some consideration in the criminal literature,⁴⁶ and that was initially pursued by the United States Sentencing Commission, is the so-called "optimal penalties" model, which takes a law and economics approach to penalties. It is based on the premise that companies are rational entities that act in the pursuit of self-interest, here meaning (essentially) the maximisation of profits. Companies that violate the law do so on the basis of a calculation that the expected benefits of committing crime outweigh the expected costs. Accordingly, the model seeks to deter corporate crime by setting the penalty at a level that is equal to the harm caused by the offence. The model, therefore, relies on a treatment of crime and its enforcement as a "problem of minimising total social cost". The major assumptions of this model are:

- Criminal conduct is prohibited chiefly because of the harm it causes to individuals and society at large.
- Crime and its enforcement and punishment are costly to society.
- It is not certain that criminal conduct will be enforced or punished.

45. M Cohen, et al, "Report on sentencing organizations in the Federal Courts 1984-1987", in United States Sentencing Commission, *Discussion materials on organizational sanctions* (1998).

46. See, for example, M Block, "Optimal penalties, criminal law and the control of corporate behavior" (1991) 71 *Boston University Law Review* 395; J Parker, "Criminal sentencing policy for organizations: the unifying approach of optimal penalties" (1989) 26 *American Criminal Law Review* 513; K Yeung, "Quantifying regulatory penalties: Australian competition law penalties in perspective" (1999) 23 *Melbourne University Law Review* 440.

6.32 The societal costs of criminal behaviour are therefore minimised when offenders are required to provide compensation that reflects the full extent of the harm caused by their actions, including expenditure on enforcement, adjusted to reflect the chance that the offender may escape conviction and punishment.⁴⁷

6.33 In its basic form, the optimal penalties model would require courts to base the amount of fines on two calculations:

- the value, converted into money, of all harm caused by the offence; and
- the probability of conviction, often expressed as the multiplier of the chances of punishment.

6.34 The total penalty is equal to the loss divided by the probability of punishment (or multiplied by the multiple). The penalty under such a formula would be optimal at an aggregate level because total losses from all offences will be exactly compensated by a penalty equal to the losses created by the detected offence multiplied by the chances against detection and punishment.⁴⁸

6.35 At most, the optimal penalties model provides an arguably theoretically coherent basis for penalty-setting in a civil or administrative regulatory context. Its emphasis on the harm caused by the offence and on “social compensation” means that it fails to mirror the objectives of criminal punishment, especially retribution, deterrence and denunciation.

6.36 Further, the model presents intractable practical problems. The first obstacle is quantifying all the social harm that results from offences. An objective calculation of the extent of harm arising from a violation inevitably requires the subjective assessment of harm that cannot be precisely quantified.⁴⁹ Thus, the penalties calculated may in practice be no less arbitrary than penalties assessed under a less complicated model.

6.37 The estimation of the second component of the formula, the probability of detection, also presents a formidable problem. It has been proposed that this figure could be calculated in terms of the combination of estimates by law enforcement agencies, statistical modelling and qualitative analysis of offences in terms of detectability (for example, by examining the inherent characteristics of an offence to rank its detectability in comparison to other offences). The United States Sentencing Commission made an exhaustive effort to come up with a reliable means of calculating probability of detection of crime but in the end

47. J Parker, “Criminal sentencing policy for organizations: the unifying approach of optimal penalties”(1989) 26 *American Criminal Law Review* 513 at 552-553.

48. Parker at 552-553.

49. K Yeung, “Quantifying regulatory penalties: Australian competition law penalties in perspective” (1999) 23 *Melbourne University Law Review* 440 at 453-454.

conceded that “any estimates of multiples reflecting the probability of detection, however they are derived, are likely to be very rough estimations”.⁵⁰ The Sentencing Commission eventually abandoned the optimal penalty model because of this problem.⁵¹

6.38 Besides the practical problems of implementation, the optimal penalties model has also been criticised on the basis that its assumption of corporate rationality does not reflect reality. The assumption is that companies that violate the law do so on the basis of a calculation that the expected benefits of committing crime outweigh the expected costs.⁵² There are empirical studies suggesting “that corporations are not solely driven by self-seeking individuals who are concerned exclusively with profit maximisation, but may also be motivated by non-financial concerns including a concern for social responsibility and respect for the rule of law.”⁵³

6.39 Finally, the optimal penalty model does not take into account notions of fairness. Its largely amoral approach to penalty setting makes it prone to generating outcomes that are unfair. For example, according to the model, repeat violations by the same offender would actually lower the penalty for that offender because a finding of violation raises the probability of detection. As such, the model ignores the social meaning of repeat offending.⁵⁴ Further, the proposition that the same levels of compliance can be achieved by varying penalties in response to variations in the probability of detection can result in excessively harsh and oppressive outcomes. An example of this can be seen in the area of litter prevention:

[A]ssume that one aim of the law is to eliminate street litter, and that if all instances of street littering were detected, absolute deterrence would be achieved if a penalty of \$10 applied to the offence of littering. However, if in fact because the risk of detection for littering were tiny (say, 0.001 percent), then according to the deterrence model a \$1 million penalty (\$10/0.001 percent) would be required in order to ensure that littering is sufficiently deterred.⁵⁵

50. I Nagel and W Swenson, “The Federal Sentencing Guidelines for corporations: their development, theoretical underpinnings, and some thoughts about their future” (1993) 71 *Washington University Law Quarterly* 205 at 219.

51. J Steer, “Changing organizational behavior – The Federal Sentencing Guidelines experiment begins to bear fruit” paper presented at the *Twenty-Ninth Annual Conference on Value Inquiry*, Tulsa, Oklahoma (26 April 2001) at 5.

52. K Yeung, “Quantifying regulatory penalties: Australian competition law penalties in perspective” (1999) 23 *Melbourne University Law Review* 440 at 453.

53. Yeung at 454.

54. Yeung at 454.

55. Yeung at 454.

The US Guidelines on sentencing organisations

6.40 In 1991, the United States adopted Guidelines for the sentencing of organisational offenders that were developed by the Sentencing Commission and contained in Chapter 8 of the US Federal Sentencing Guidelines Manual. Among other things, the Guidelines rationalise the system of setting fines for organisational offenders that commit certain federal offences.⁵⁶ Under the Guidelines, judges must set the fine according to a formula whereby a “base fine” is multiplied by a “multiplier”, which is intended to reflect the organisation’s “culpability”.

6.41 The first component of the formula, the base fine, is the greater of:

- (i) the Guidelines-prescribed minimum base fine, or
- (ii) the organisation’s pecuniary gain from having committed the offence, or
- (iii) the pecuniary loss from the offence caused by the organisation, to the extent the loss was caused intentionally, knowingly or recklessly.⁵⁷

6.42 The Guidelines assign a specific base fine⁵⁸ for each of the federal offences covered, which are meant to reflect the seriousness of the offence. However, a court should not use the prescribed base fine if the pecuniary gain or loss from the offence is higher in amount. “Pecuniary gain” means the additional before-tax profit to the offender resulting from the offence.⁵⁹ “Pecuniary loss” on the other hand means the pecuniary loss to a person other than the offender resulting from the offence.⁶⁰

6.43 The multiplier is a function of the organisation’s “culpability score”, which depends on certain aggravating and mitigating factors. These factors are:

- (1) level of authority;
- (2) size of the organisation;
- (3) prior criminal history;
- (4) violation of a court order, including a probation order;

56. The fine provisions of Chapter 8 of the Guidelines are limited to offences for which pecuniary loss or gain can be more readily quantified, such as fraud, theft and tax offences. They do not apply to most provisions that involve the environment, food, drug, agriculture and consumer products, individual rights, administration of justice and national defence.

57. United States Sentencing Commission, *Guidelines manual* (2002) § 8C2.4.

58. The base fine is set out in an offence level table, which is the result of the distillation and rationalisation of the numerous penalties the US Congress has enacted for federal crimes committed by organisations.

59. United States Sentencing Commission, *Guidelines manual* (2002) § 8A1.2. The commentary states that gain can result from either additional revenue or cost saving.

60. United States Sentencing Commission, *Guidelines manual* (2002) § 8A1.2.

- (5) obstruction of justice;
- (6) effective program to prevent violations of law; and
- (7) self reporting, cooperation with authorities and acceptance of responsibility.

6.44 The Guidelines prescribe a specific score for each, and the final “culpability score” of the corporation determines the minimum and the maximum multiplier of the base fine.⁶¹ If, for example, a corporation has more than 5,000 employees and its executive officer participated in, condoned or was recklessly ignorant of the offence, the court is required to add a further 5 points to its culpability score. If, for example, a corporation’s final culpability score reaches the highest possible score of 10 or more, the Guidelines provide for a maximum multiplier of 4.0, 2.0 being the minimum.

6.45 Hence, if the base fine was \$10 million in the above example, the judge must, using 2.0 and 4.0 as the minimum and maximum multipliers, impose a fine of at least \$20 million but not more than \$40 million. In determining the amount of the fine within the applicable Guidelines range, the court should consider other factors set out in the Guidelines.⁶² These factors are non-binding policy guidelines, unlike the factors that go to the culpability score, which are mandatory in nature.⁶³ It must be added that, even if the culpability score dictates a fine that is relatively low, the Guidelines mandate that the total sanction must always be greater than any gains from the offence.⁶⁴ Moreover, if the minimum Guidelines fine is greater than the maximum fine authorised by statute, the maximum fine authorised by statute is the one that should be imposed.⁶⁵

6.46 The principles underlying the Guidelines’ provisions relating to fines do not depart from traditional principles of sentencing. The seriousness of the offence, as measured by the loss or gain from the offence, remains a paramount consideration in setting the fine. At the same time, the Guidelines embody the “just punishment” principle by taking into account the culpability of the organisation in the calculation of the fine. For example, the Guidelines provide for a substantial increase in the culpability score if

61. The value of these variables was the result of a comprehensive study, unprecedented in the American criminal justice system, of every federal case from 1984-1990, in which about one hundred factual variables that can occur in organisational crimes were coded for computer analysis and Commission review. Using this information, the Commission was able to understand how such factors affect sentencing and was able to assign specific values to the aggravating and mitigating factors set out in the Guidelines.

62. United States Sentencing Commission, *Guidelines manual* (2002) § 8C2.8.

63. I Nagel and W Swenson, “The Federal Sentencing Guidelines for corporations: their development, theoretical underpinnings, and some thoughts about their future” (1993) 71 *Washington University Law Quarterly* 205 at 243.

64. United States Sentencing Commission, *Guidelines manual* (2002) § 8C2.9.

65. United States Sentencing Commission, *Guidelines manual* (2002) § 8C3.1(b).

the convicted organisation has encouraged, or has been indifferent to, violations by its employees;⁶⁶ but discount the fine if the organisation accepts responsibility for the offence.⁶⁷ In addition, the Guidelines contain principles derived from the deterrence model – for example, by discounting the fine if the convicted organisation is able to demonstrate that it took steps to prevent the commission of the offence by its employees.⁶⁸

6.47 The Guidelines, however, sharply constrain judges' discretion in the setting of fines. The fine provisions in the Guidelines are not mere policy statements, but mandatory provisions that impose the precise formula judges must use in determining the range of fine imposed on organisational offenders. The Guidelines also codify the factors that indicate the offender's level of culpability, and assign a specific value to each factor. The United States Sentencing Commission was explicit in its objective of structuring judicial discretion to attain certainty in sentencing organisational offenders and to ensure the imposition of serious penalties for such offenders.⁶⁹

6.48 The results of empirical studies to determine whether the Guidelines have achieved their objective of increasing the monetary penalties for corporate offenders have been mixed. One study, which used data from the United States Sentencing Commission, found that as a general rule, there was no evidence of a statistically significant change in the levels of monetary penalties imposed on corporations under the Guidelines as compared to pre-Guidelines cases.⁷⁰ Another study, using a different set of data and examining convictions of publicly held corporations only, found that these kinds of organisations have been subject to substantially higher criminal fines since the adoption of the Guidelines. Among other things, the study concluded that, "the Guidelines appear to have imposed a binding constraint on the exercise of judicial discretion, which caused an increase in criminal fines".⁷¹

66. United States Sentencing Commission, *Guidelines manual* (2002) § 8C2.5(b).

67. United States Sentencing Commission, *Guidelines manual* (2002) § 8C3.1(g).

68. United States Sentencing Commission, *Guidelines manual* (2002) § 8C2.5(f).

69. United States Sentencing Commission, "An overview of the federal sentencing guidelines" (as at 12 June 2003) «<http://www.ussc.gov/training/fsgovr03.pdf>». See also I Nagel and W Swenson, "The Federal Sentencing Guidelines for corporations: their development, theoretical underpinnings, and some thoughts about their future" (1993) 71 *Washington University Law Quarterly* 205 at 210.

70. J Parker and R Atkins, "Did the corporate criminal sentencing guidelines matter? Some preliminary empirical observations" (1999) 42 *Journal of Law And Economics* 423. The study, however, found that there was a marginally significant change for property offences and that this was the sole exception.

71. S Alexander, J Arlen and M Cohen, "Regulating corporate criminal sanctions: federal guidelines and the sentencing of public firms" (1999) 42 *Journal of Law And Economics* 393. The study constructed its own data obtained from the Sentencing Commission and a range of other sources such as the *Wall Street Journal Index*, *Corporate Crime Reporter*, *Lexis/Nexis*, *Westlaw*.

6.49 To date there have been no studies that indicate whether the Guidelines are reducing disparity in sentencing.⁷²

Relevance of US Guidelines in New South Wales

6.50 The United States Sentencing Guidelines system of setting fines for corporate offenders was introduced as part of a package of sentencing reforms which responded to evidence, or perceived evidence, of widespread, inexplicable and unjustifiable disparities in sentencing outcome; as well as to concerns of sentence leniency.⁷³ But these concerns were the product of a sentencing regime in which judges (who were often elected) were not required to give reasons for their sentences and seldom did so in practice, the sentences they imposed being essentially unreviewable on appeal.⁷⁴ Not surprisingly, before the sentencing reforms of the 1980s, no sentencing jurisprudence had developed in the United States.⁷⁵ The principle of consistency as an independent and important legal requirement of sentencing was simply unknown. Sentencing law in New South Wales is (and has always been) different to this.

6.51 Consistency is a clearly articulated principle of sentencing equally applicable to fines as to other sentencing dispositions. It applies to the exercise of the court's discretion in sentencing to avoid inappropriate disparities between co-offenders and offenders generally convicted of the same or similar types of offences.⁷⁶ The principle is reinforced by the existence of appellate control, which assists in the quest for consistency. In the Commission's view, there is no convincing empirical evidence of general sentencing disparity in New South Wales,⁷⁷ let alone in relation to the sentencing of corporate offenders.

6.52 Even if sentence disparity were demonstrated in practice in New South Wales, the Commission would not favour the response of the US Sentencing Guidelines, which seeks to achieve consistency in fine levels for federal offences by requiring judges to impose fines within compulsory and narrow ranges, absent extraordinary circumstances. Such a response to disparity is, essentially, the inappropriate and unjust creation of a rigid

72. Information from P Desio, Public Affairs Officer of the US Sentencing Commission (27 November 2002).

73. See especially M E Franklin, *Criminal sentences: law without order* (Hill and Wang, New York, 1972).

74. For example, *Dorszynski v United States* (1974) 418 US 424 at 431.

75. For a contemporary view see F Gaudet, G Harris and C St John, "Individual differences in the sentencing tendencies of judges" (1933) 23 *Journal of Criminal Law and Criminology* 883 at 893-895.

76. See para 6.27.

77. See NSW Law Reform Commission, *Sentencing* (Report 79, 1996) at para 1.11-1.12.

uniformity. Corporate cases are too complicated to be governed by binding “one size fits all” sentencing formulae.

6.53 The imposition of statutory maximum penalties is aimed at obviating sentence leniency in New South Wales. If fines in particular areas of the law are thought to be too lenient, the appropriate response is for Parliament to increase the statutory maximum penalty. A common law rule has developed whereby any increase in maximum penalties through legislation is considered a public expression by Parliament of the perceived seriousness of the offence,⁷⁸ which requires courts to give effect to the intention of the legislature that existing sentencing patterns move towards higher penalties.⁷⁹

6.54 There is some evidence to indicate that courts do in fact impose higher penalties following increases in the statutory maximum. Between 2000-2001 the NSW Land and Environment Court imposed an average fine of \$15,912 on corporate offenders for the offence of water pollution under the former *Clean Waters Act* in a sample of 21 cases, the largest single fine within this sample being \$40,000.⁸⁰ The maximum penalty for this offence for corporate offenders was increased from \$125,000⁸¹ to \$250,000 under the *Protection of the Environment Operations Act 1997* (NSW).⁸² In 15 convictions of corporate offenders for the same offence under the new Act in the same period (2000-2001), the Land and Environment Court imposed an average fine of \$27,617, with the largest individual fine in this sample being \$60,000.⁸³ It would appear that the legislative increase of statutory maximum penalties to adjust the sentencing patterns of judges seems an effective method of achieving higher penalties. The alternative route taken in the United States of constraining judicial discretion through

78. *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683; *R v H* (1980) 3 A Crim R 53 at 65; *R v Howland* (1999) 104 A Crim R 273.

79. See para 4.11-4.12.

80. *Environment Protection Authority v Sydney Water Corporation* [2000] NSWLEC 156.

81. See *Environmental Offences and Penalties Act 1989* (NSW) s 8B(1)(a), which provided that a corporation guilty of an offence against the *Clean Waters Act* is liable for a maximum penalty of \$125,000.

82. *Protection of the Environment Operations Act 1997* (NSW) s 123. If proceedings are brought in a local court, the maximum penalty able to be imposed is 200 penalty units: s 215.

83. This amount was imposed in the following cases: *Environment Protection Authority v Devro-Teepak Pty Ltd* [2000] NSWLEC 275; *Environment Protection Authority v Byron Shire Council* [2001] NSWLEC 54; *Environment Protection Authority v BHP Steel (AIS) Pty Ltd* [2001] NSWLEC 214.

a mandatory fine formula, which has had varied success in raising the level of fines for organisational offenders,⁸⁴ therefore seems unnecessary.

84. See S Alexander, J Arlen and M Cohen, "Regulating corporate criminal sanctions: Federal guidelines and the sentencing of public firms" (1999) 42 *Journal of Law and Economics* 393.

7. Equity fines

- Definition
- Suggested benefits
- Criticisms
- The Commission's view

DEFINITION

7.1 An alternative sentencing option to the monetary fine is share dilution. The concept of the equity fine,¹ has been succinctly described as follows:

[W]hen very severe fines need to be imposed on the corporation, they should be imposed not in cash, but in the 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 their return.²

7.2 The basic idea of a fine levied in shares is to water down the defendant corporation's market value,³ effectively punishing the corporation while avoiding the imposition of a liquidity crisis.

SUGGESTED BENEFITS

Avoidance of the "wealth ceiling"

7.3 The upper threshold of a cash fine is limited to the value of the existing cash reserves and finite assets of a defendant corporation. Corporate offenders may have insufficient wealth to pay the monetary penalty required for effective deterrence.⁴ One of the main barriers courts encounter in setting appropriately severe fines is the corporation's financial inability to pay.⁵ As discussed in Chapter 6, the "wealth ceiling" places an absolute limit on monetary fines.⁶ The equity fine avoids this problem, as its imposition does not depend on a corporation's solvency.

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1. This term is used in the American literature. "Securities fine" is a better description in the Australian context.
 2. J C Coffee, "No soul to damn: no body to kick': an unsandalized enquiry into the problem of corporate punishment" (1981) 79 *Michigan Law Review* 386 at 413.
 3. For an explanation of the practical issues that this sanction raises, such as how the equity fine is calculated, see Coffee at 414-415.
 4. See *United States v Danilow Pastry Co* (1983) 563 F Supp 1159; Castro, "Texaco's Star has fallen; facing a \$10 billion penalty, the company chooses bankruptcy", *Time* (20 April 1987) at 50, cited in B Fisse, "Sentencing options against corporations" (1990) 1 *Criminal Law Forum* 211 at 217.
 5. Courts will not impose a high penalty on a company if the penalty will be too oppressive or cause undue hardship on the company, or render its business unviable: *WorkCover Authority of NSW (Inspector Reynolds) v PF Thearle & Co Pty Ltd* [2001] NSWIRComm 105; *WorkCover Authority of NSW (Inspector McMartin) v Milltech Pty Limited* [2001] NSWIRComm 192.
 6. See para 6.2-6.4.

7.4 Further, the equity fine is capable of exacting greater punishment as the additional source of value of the corporation's expected earnings can be tapped. A sufficiently high penalty that incorporates both liquid and fixed assets can be imposed so that the infringing corporation is punished as well as deterred from future misconduct. For example, a young company with limited cash resources and high growth prospects may be tempted to commit crimes because it is essentially immune from a high cash fine.⁷ In this instance, the threat of share dilution would be entirely appropriate. In this way, the equity fine has a greater potential than the monetary penalty to prevent corporate crime.

7.5 There are however, two arguments why this potential benefit may not be realised in practice. First, it has been suggested that equity fines do not punish shareholders any more than the cash equivalent.⁸ While share dilution obviously reduces the per-share value of the corporation, an equivalent monetary fine may in the long run reduce the value of the corporation's share even more; for example, if the fine stifles growth or brings with it a risk of bankruptcy. In contrast, an equity fine does not affect the corporation's solvency any more than if an equivalent dividend were issued to its shareholders. Secondly, it has been argued that, despite the potential for larger fines being imposed, the introduction of equity fines might actually translate to lower penalties.⁹ Courts may view the equity fine as a penalty that has a more direct impact on so called "innocent shareholders" and consequently, they may be more cautious in setting the level of the fine to avoid any perceived injustice. In contrast, courts may be more willing to impose high cash fines on corporations because they are generally considered to fall on a faceless entity.¹⁰

Spillover

7.6 As discussed in Chapter 6, a major disadvantage of the monetary fine is the phenomenon of "spillover".¹¹ That is, the penalty is frequently passed on to "innocent" parties, such as employees, consumers, creditors and suppliers, while the corporate wrongdoers themselves go largely unpunished. The imposition of a monetary fine may prevent or delay corporate expansion, result in employee layoffs or wage freezes, and/or lead to price increases.

7.7 Share dilution avoids the problem of spillover, as the corporation's capital is relatively unaffected by the penalty. By avoiding a short-term

7. J C Coffee, "No soul to damn: no body to kick': an unsandalized enquiry into the problem of corporate punishment" (1981) 79 *Michigan Law Review* 386 at 414.

8. C Kennedy, "Criminal Sentences for corporations: alternative fining mechanisms" (1985) 73 *California Law Review* 443 at 468.

9. This outcome is suggested in Coffee at 416. Compare Kennedy at 464.

10. Coffee at 416.

11. See para 6.8-6.11.

financial crisis that may tempt or force managers into engaging in behaviour that is harmful to external parties, the burden of equity fines impacts squarely on the corporation's shareholders. The penalty falls more evenly across the entire class of shareholders, who assumed the risk in the first place, rather than falling disproportionately on a few, such as low level employees.

Compensating victims

7.8 Criminal fines are channelled to the State's general consolidated revenue. The rationale for this arrangement is that society at large is the ultimate victim of corporate crime, and hence, the State the appropriate beneficiary.¹² As such, it may be argued that the monetary fine does little to alleviate the financial harm caused to victims of corporate crime. On the other hand, the equity fine is intended to go to a fund to provide compensation to victims.¹³ The satisfaction of the ancillary sentencing goal of compensating the victim constitutes an advantage of equity fines over cash penalties.

7.9 Additionally, equity fines are capable of ensuring that the punishment fits the crime through specific targeting of compensation. Although penalty shares would typically go to a specially established victim compensation fund, it has been suggested that, in appropriate cases, share interests could go to other bodies designated by statute as alternative beneficiaries. For example, depending on the nature of the offence, shares could be issued to a suitable consumer protection organisation, or environmental organisation. Of course, this benefit is not dependent on the fine being levied in shares – the proceeds of a monetary fine could easily be distributed in the same way. However, by establishing a specific fund for victims of crime, it is more likely that the bulk of the penalty exacted will actually go towards the restitution of victims, rather than the State's general consolidated revenue.

7.10 There are however, several potential problems with the diversion of penalty shares to bodies other than a State-administered fund. First, it is possible that the channelling of fines to worthy causes may detract from the punitive nature of the penalty. Secondly, if worthy causes are the beneficiaries of penalties, courts might lessen the amount payable on the ground that the defendant's culpability is somehow ameliorated by this "good deed".¹⁴

12. C Kennedy, "Criminal sentences for corporations: alternative fining mechanisms" (1985) 73 *California Law Review* 443 at 455.

13. Market advantages gained by illegal conduct necessarily have negative consequences for competing corporations and society in general. Market growth may be stunted, employees made redundant and competition lessened, resulting in a lowered gross national product, an increased demand on social welfare, and less choice and possibly higher prices for consumers.

14. See Kennedy at 463, where the examples of *United States v Prescon Corp* (1982) 695 F2d 1236 and *United States v Wright Contracting Co* (1983) 563 F Supp 213 are cited.

Greater deterrence

7.11 Monetary penalties fail to provide an effective deterrent if the fine is so small that a company is able to treat it as mere licence fee for illegitimate corporate business operations.¹⁵ In contrast to a cash fine, an equity fine cannot be written off so easily by management as a mere expense or cost of doing business. It is argued that by their nature, equity fines provide an effective vehicle for deterrence.¹⁶

7.12 The prospect of future misconduct by the same corporation is greatly reduced where share dilution brings in new shareholders thereby altering the structure of ownership. Depending on the magnitude of the equity fine, the structure of ownership may be dramatically altered so that the new shareholders are able to demand internal reforms to ensure compliance with the law.

7.13 A further avenue for increased deterrence is that the creation of a substantial block of marketable shares might render the defendant corporation a more inviting target for hostile takeover.¹⁷ However, the equity fine would have to be quite substantial for takeover to become a serious risk to a large company.¹⁸ Even if the threat of corporate takeover remained remote, an increase in its likelihood would provide an added incentive for corporations to institute internal compliance programs as a preventive measure. Because the autonomy and tenure of senior management would potentially be compromised by the misconduct of subordinates, the equity fine would serve to impose a degree of vicarious liability on them for the actions of all employees. Individuals in management would view internal controls more favourably as the equity fine would threaten their positions more “than when the only consequence is a modest cash fine to the organization and possibly the criminal prosecution of the subordinate”.¹⁹

7.14 Equity fines would have a direct deterrent effect on both corporate management and investors, as the financial interests of each would be damaged by the imposition of a penalty.²⁰ Shareholder wealth would stand

15. *United States v Wise* (1962) 370 US 405. See also para 6.2, 6.7. Cash fines may be perceived by much of the business community as “a kind of public morality tax, but not ... a deterrent threat”: J C Coffee, “‘No soul to damn: no body to kick’: an unscandalized enquiry into the problem of corporate punishment” (1981) 79 *Michigan Law Review* 386 at 407.

16. Coffee at 413-414.

17. Coffee at 418.

18. B Fisse, “Sentencing options against corporations” (1990) 1 *Criminal Law Forum* 211 at 232.

19. Coffee at 418.

20. A criticism of this potential improvement to deterrence of shareholders and management, is that such a benefit is entirely attendant on a perceptible increase in the per share loss suffered. Some commentators (such as C Kennedy, “Criminal sentences for corporations: alternative fining mechanisms” (1985) 73 *California*

to be diluted, making it likely that shareholders would pressure management to remain within the bounds of the law despite the possible short-term gains to be made from misconduct.

7.15 Given that it is common for corporate managers to have substantial holdings of shares and share options, managerial interests would be better aligned with the interests of stockholders, as respective investments would suffer equally with the imposition of an equity fine.²¹ Of course, the efficacy of this factor as a deterrent is dependent on the proviso that managers hold shares or share options in their company at the relevant time. In time however, managers could seek to negotiate non-share remuneration packages, in which case the equity fine would provide a screen, enabling them to engage in illicit activities, knowing that only the shareholders would bear the penalty if detected. An additional consideration is that management is in a significantly better position than other shareholders to divest themselves of shares prior to the imposition of an equity fine.²²

CRITICISMS

Unfair burden on shareholders

7.16 The burden of equity fines falls evenly across the entire class of shareholders rather than falling disproportionately on a few (such as low-level employees), effectively reducing the spread of loss.²³ However, by failing to distinguish between powerful shareholders and those who exercise little or no control over the corporation's activities, the equity fine is not necessarily fairer.

7.17 It has been argued that the indiscriminate application of equity fines on shareholders can be justified on the basis that corporations are solely comprised of shareholders and, therefore, responsibility for corporate misconduct should rightly be sheeted home to them. Further, shareholders may just as easily profit as suffer loss as a result of criminal conduct and are, in any event, in the unique position of being able to diversify their interests and liabilities. The respective guilt or innocence of shareholders is dismissed as irrelevant for the reason that, unlike employees or consumers, shareholders voluntarily expose themselves to the uncertainties of the market.²⁴

Law Review 443 at 468) dispute that an equity fine would in fact affect a corporation's share value any more than an equivalent fine in cash.

21. J C Coffee, "No soul to damn: no body to kick": an unscandalized enquiry into the problem of corporate punishment" (1981) 79 *Michigan Law Review* 386 at 413-414, 417-418.
22. B Fisse, "Reconstructing corporate criminal law: deterrence, retribution, fault and sanctions" (1983) 56 *Southern California Law Review* 1141 at 1237.
23. Coffee at 416.
24. C Kennedy, "Criminal sentences for corporations: alternative fining mechanisms" (1985) 73 *California Law Review* 443 at 453-454.

7.18 However, by holding shareholders equally culpable for the actions of management, the power imbalance between large and small shareholders is ignored and the realities of corporate behaviour misrepresented. That a corporation may be defined simply as a conglomerate of shareholders is not disputed. However, in the event of corporate misconduct, a distinction should be made between those who were culpable and responsible, on the one hand, and those who were unaware of or powerless to stop the misconduct, on the other hand. It has been said that the notions of limited liability and bankruptcy demonstrate that, in some instances, shareholders are to be taken as possessing an identity that is distinct and separate to that of the corporation.²⁵ These principles recognise that in reality, the majority of shareholders are as innocent and impotent as low-level employees and creditors, often powerless to influence policy or regulate the corporation's conduct or bring about reforms following a corporate conviction.²⁶

7.19 A related criticism of the equity fine is that it “decreases the value of all stockholders’ common shares, yet offers no guarantee of managerial impact”.²⁷ Although it is often appropriate to apportion blame for corporate misconduct on large shareholders who either form part of management or have a degree of influence over corporate behaviour, punishing these “guilty” shareholders by way of individual sanctions would be fairer than imposing a penalty that penalises all shareholders.

7.20 In conclusion, although the equity fine would shift the burden of the penalty for corporate crime away from some innocent parties towards those more directly responsible for the violations, the sanction's indiscriminate impact on shareholders seems equally unsatisfactory and unfair in light of the limited capacity of the average shareholder to influence managerial conduct. In determining questions of responsibility and punishment for misconduct, a sanction that impacts on shareholders alone necessarily fails to fulfil the concurrent sentencing objectives of punishment, deterrence and rehabilitation.

Insufficient deterrence or rehabilitation

7.21 Equity fines share the same problem as monetary fines, in that they do not require the organisation to correct any systemic faults that may have given rise to the offence in the first place.²⁸ In short, the fine is a non-

25. C Stone, “A slap on the wrist for the Kepone mob” (1977) 22 *Business and Society Review* 4 at 9.

26. C Kennedy, “Criminal sentences for corporations: alternative fining mechanisms” (1985) 73 *California Law Review* 443 at 451.

27. B Fisse, “Reconstructing corporate criminal law: deterrence, retribution, fault and sanctions” (1983) 56 *Southern California Law Review* 1141 at 1238.

28. C Wells, *Corporations and criminal responsibility* (2nd ed, Oxford University Press, 2001) at 36.

interventionist sanction, as it does little to rectify a corporation's defective internal procedures or ensure that individuals in the company are disciplined.²⁹ Share dilution does not automatically necessitate any investigation into individual accountability, so there is no direct link between the sanction and prevention, its intended effect.

7.22 The desire or ability of shareholders to bring about fundamental change in a corporation's structure or conduct is critical to the rehabilitation of non-financial values. Although shareholders should, in theory, take an interest in ensuring that internal mechanisms are sufficient to prevent misconduct, many are simply focussed on short-term profit, and are no more likely to be concerned about an equity fine than they would an ordinary cash fine. Where the shareholder remains remote, the equity fine is little more of a deterrent than the monetary fine. Perhaps the more substantial the shareholder's holding and the more severe the potential loss, the greater the interest the shareholder would take in ensuring compliance.

Gravity of corporate crime not reflected

7.23 In the previous chapter, we noted that fines might trivialise the seriousness of corporate crime because they create the impression that corporate crime is permissible provided the offender pays the going price.³⁰ The same argument applies to equity fines: it emphasises the price of crime. Rather than deterring corporate crime, it makes it a share market commodity.³¹ Equity fines fail to reconfigure corporate crime as non-marketable, instead upholding the notion that corporate offences are merely regulatory and not truly criminal.

Difficulties in administration

7.24 Various regulatory agencies opposed equity fines in their submissions to the Commission, citing a number of administrative difficulties. Some agencies highlighted the problem of a government agency managing and investing the funds of a private company. A potential perception of a conflict of interest arises.³² For example, having an agency like the NSW Department of Fair Trading or the Australian Tax Office manage the shares of a

29. C Wells, *Corporations and criminal responsibility* (2nd ed, Oxford University Press, 2001) at 36. See also, B Fisse, "Sentencing options against corporations" (1990) 1 *Criminal Law Forum* 211 at 232-233.

30. See para 6.7.

31. B Fisse, "Reconstructing corporate criminal law: deterrence, retribution, fault and sanctions" (1983) 56 *Southern California Law Review* 1141 at 1236.

32. Department of Fair Trading, *Submission* at 7; Australian Taxation Office, *Submission* at 8.

corporation³³ that has contravened the laws that these agencies enforce raises issues relating to the proper relationship and dealings between them and convicted corporations.³⁴

7.25 The Australian Stock Exchange expressed concerns that the liquidation of securities to maximise their return would be a difficult topic on which to draft satisfactory and effective legislation. By their nature, securities increase and decrease in value. They will never have a definite value as opposed to a fixed fine amount. The ASX queried how one would decide when best to sell to maximise return.³⁵

Limited in application

7.26 Equity fines may not be appropriate for private companies. These companies often involve closely held securities in a family-type arrangement where it would be inappropriate to force a widening of the share base. There is also the difficulty of valuing the shares of these companies. Equity fines are therefore only possible for a limited number of companies.³⁶

THE COMMISSION'S VIEW

7.27 The Commission is not satisfied that the arguments in favour of equity fines outweigh the potential disadvantages of their introduction. Equity fines suffer from many of the same inadequacies as fines. They fall squarely on the shareholders, and do not discriminate between powerful shareholders and those who exercise little control over the corporation's activities. There is no evidence that fines levied in shares as opposed to cash would be any more effective in achieving the sentencing objectives of deterrence and rehabilitation. Share dilution does not affect individual accountability, and there is no direct link between the sanction and prevention. Like the cash fine, the equity fine does not guarantee future compliance with the law. Further, administrative complexities such as responsibility for a public share portfolio, unforeseeable effects of the sanction on the wider market and the volatile nature of the stock market,

33. The examples assume that the agencies may acquire, hold and dispose of personal property, ie, shares.

34. Commercial Law Association, *Consultation*. One instance when a regulatory agency can hold shares is under the *Corporations Act 2001* (Cth) s 601AD, which provides that on de-registration of a company, all its property vests in the Australian Securities and Investment Commission. However, as a matter of policy, ASIC prefers not to hold shares during the course of an enforcement action against a corporation: Information from L Macauley, ASIC (15 April 2003).

35. Australian Stock Exchange, *Submission* at 4.

36. Australian Stock Exchange, *Submission* at 4.

militate against the adoption of equity fines. In light of the other penalties recommended by the Commission, the need for equity fines is significantly diminished. For example, the proposals regarding community service orders³⁷ would achieve the dual aims of repairing the harm caused by the offence and compensating victims. Accordingly, the Commission considers that equity fines are not an appropriate sentencing option and should not be introduced.

RECOMMENDATION 5

Equity fines should not be a sentencing option.

37. See Chapter 10.

8. Incapacitation

- Disqualification
- Dissolution of corporations

8.1 One set of options for dealing with convicted corporations is to prevent them from conducting some or all of their usual activities. Broadly, there are two ways of incapacitating a corporation:

- **disqualification**, that is, preventing the company from carrying out certain activities or denying the company the right to enter into certain contracts; and
- **dissolution**, that is, preventing the company from existing at all.

These options aim, in varying degrees, to achieve the sentencing goals of incapacitation, retribution and deterrence.¹

DISQUALIFICATION

8.2 Disqualification (sometimes also referred to as “restraint of business”) is an option that has a more moderate impact than dissolution of a corporation (discussed below).² It may involve a number of orders designed to restrain the activities of corporations, for example, orders:

- to cease certain commercial activities for a particular period;
- to refrain from trading in a specific geographic region;
- revoking or suspending licences for particular activities;
- disqualifying the corporation from particular contracts (for example, government contracts); and
- freezing the corporation’s profits.

8.3 Some have suggested that disqualification is closely analogous to imprisonment so far as it can be applied to a corporation.³ In this context it has been suggested that the term of the disqualification could be related to the term of imprisonment that an individual offender would be required to serve for the same offence.⁴

8.4 However, forbidding a corporation to trade focuses primarily on deterrence and offers little, if any, scope for rehabilitation. In some cases, such a sanction will simply put the corporation out of business if it is unable to redirect its operations to permitted areas of activity.⁵

1. See Chapter 3.

2. See para 8.19-8.28.

3. F L Rush, “Corporate probation: invasive techniques for restructuring institutional behavior” (1986) 21 *Suffolk University Law Review* 33 at 83.

4. D J Miester, “Criminal liability for corporations that kill” (1990) 64 *Tulane Law Review* 919 at 946.

5. Rush at 83.

Disqualification also raises the issue of “spillover”,⁶ that is, consequential harm to shareholders, employees, consumers and trading partners.⁷

8.5 It can therefore be argued that disqualification is an extreme penalty and it should only be used on rare occasions,⁸ for example, when a corporation is convicted of homicide.⁹ If such an approach is taken, it could then also be argued that the more extreme penalty of dissolution is a more appropriate sanction.¹⁰

8.6 In the United States, federal sentencing law allows for the imposition of an optional condition on probation, namely that an offender may “engage in such a specified occupation, business or profession only to a stated degree or under stated circumstances”.¹¹ The legislative history of this provision suggests that the Congress deliberately avoided allowing the complete exclusion of a corporate offender from particular activities. It is said that the drafters revised the originally intended provision because of “complaints by business leaders that such authority might be used to put legitimate enterprises out of business following a regulatory offense”.¹²

8.7 A detailed discussion of various possible disqualification orders follows.

Prevention of commercial activities

8.8 A court could order a company to cease certain commercial activities for a particular period or to refrain from trading in a specific geographic region.¹³ A further possibility¹⁴ is to suspend the right of a corporation to trade “for a term to which an individual would have been sentenced for the same offence”.¹⁵ Advantages of this form of sentence, referred to as

6. See para 6.8-6.11.

7. See Criminal Law and Penal Methods Reform Committee of South Australia, *The substantive criminal law* (4th Report, 1977) at 357; M Levi, *Regulating fraud: white collar crime and the criminal process* (Tavistock Publications, London, 1987) at 239; D J Miester, “Criminal liability for corporations that kill” (1990) 64 *Tulane Law Review* 919 at 946.

8. E Lederman, “Criminal law, perpetrator and corporation: rethinking a complex triangle” (1985) 76 *Journal of Criminal Law and Criminology* 285 at 335.

9. Miester at 946.

10. F L Rush, “Corporate probation: invasive techniques for restructuring institutional behavior” (1986) 21 *Suffolk University Law Review* 33 at 84-85.

11. 18 USC §3563(b)(5).

12. R Gruner, “To let the punishment fit the organization: sanctioning corporate offenders through corporate probation” (1988) 16 *American Journal of Criminal Law* 1 at 45 n 258.

13. Miester at 946.

14. Originally proposed in a Senate bill presented to the United States Congress in 1973; S 1, 93rd Cong, 1st Sess (1973).

15. S 1, 93rd Cong, 1st Sess (1973) §1-441(c)(1). See S A Yoder, “Criminal sanctions for corporate illegality” (1978) 69 *Journal of Criminal Law and Criminology* 40 at 54.

“corporate quarantine”, include that it would overcome the problem of calculating fines based on the assets of the corporation and would impress upon the relevant communities the seriousness of the offence being punished. However, disadvantages include:

- the potentially serious harm, or spillover, to employees, shareholders, consumers and other trading partners of the corporation; and
- the difficulty of enforcing such an order, particularly in the case of large corporations with a wide range of operations.

It has also been suggested that the deterrent and retributive value of such orders “could probably be achieved by less draconian measures, such as a fine or limited publicity requirement”.¹⁶

Revocation or suspension of licences

8.9 Revocation or suspension of a licence is another means of preventing a corporation from engaging in certain specified activities. It is of more limited use than an order restraining specified activities because such an option can only be effective when a licence is required for the corporation’s activities.

8.10 Suspension of a licence is currently provided for as an administrative sanction in New South Wales, for example, by the *Fair Trading Act 1987* (NSW).¹⁷ The sanction is available with respect to licences, permits and other authorities granted or issued under any legislation administered by the Minister for Fair Trading. The Director General of the Department of Fair Trading may suspend a licence for a period of not more than 60 days if he or she has reasonable grounds to believe that:

- the licensee has engaged in conduct that “constitutes grounds for suspension or cancellation of the licence”;
- it is likely the licensee will continue to engage in the conduct; and
- there is a danger that others may suffer “significant harm, or significant loss or damage” as a result of the conduct “unless action is taken urgently”.

These provisions, however, are limited in application and do not relate specifically to proved criminal activity.

8.11 An example in the Commonwealth sphere is the power to suspend the licence of a manufacturer of therapeutic goods if the holder of the licence has been convicted of an offence against the *Therapeutic Goods Act 1989* (Cth) or if the holder controls a body corporate (“whether directly or indirectly through one of more interposed entities”) that has been convicted

16. S A Yoder, “Criminal sanctions for corporate illegality” (1978) 69 *Journal of Criminal Law and Criminology* 40 at 54.

17. *Fair Trading Act 1987* (NSW) s 64A.

of an offence against the Act.¹⁸ A similar example in the United States is the power of the Securities and Exchange Commission to revoke or suspend for up to 12 months the registration of any broker, upon finding that the broker has committed various prescribed felonies or misdemeanours, including larceny, extortion, forgery, counterfeiting and embezzlement.¹⁹

8.12 An argument can be made that such forms of disqualification should not be made generally available as a sentencing option as the regulatory bodies that currently administer such orders are better able to impose them than the courts who may lack the relevant expertise.²⁰

Disqualification from contracts

8.13 A corporate offender could be disqualified from engaging in certain business such as entering into government contracts.²¹ One example of an administrative disqualification of offenders from government contracts may be found in the United States' *Federal Acquisition Regulations* which apply to federal executive agencies in the acquisition of goods and services from government funds. The Regulations allow officials to exclude contractors from government contracts if they have been convicted of, among other offences, fraud, embezzlement, theft, forgery, bribery, tax evasion, receiving stolen property and also "any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor".²²

8.14 One advantage of such forms of disqualification is that they reward law-abiding companies by giving them a competitive advantage when dealing with the government.²³ However, in many cases, it may be considered inappropriate for the courts to interfere with the commercial decisions of the government.

Freezing of profits

8.15 The freezing of profits (that is, income over and above operating costs) for a specified period is another possible sanction that could be less harsh than other forms of incapacitation, in that it allows a corporation to continue with its legitimate activities and thereby does not impact so

18. *Therapeutic Goods Act 1989* (Cth) s 41(1).

19. 15 USC §78o(b)(4) (the *Securities Exchange Act of 1934* (US)). See also S A Yoder, "Criminal sanctions for corporate illegality" (1978) 69 *Journal of Criminal Law and Criminology* 40 at 54.

20. C A Wray, "Corporate probation under the new organizational sentencing guidelines" (1992) 101 *Yale Law Journal* 2017 at 2039.

21. See Australian Law Reform Commission, *Sentencing: penalties* (Discussion Paper 30, 1987) at para 293.

22. *Federal Acquisition Regulations* §9.406-2.

23. ALRC DP 30 at para 293.

harshly on employees, consumers or trading partners. Such an option is similar in many respects to the civil enforcement remedy of sequestration.²⁴

8.16 Sequestration can involve depriving a corporation of its rents and profits for a limited period of time. In New South Wales, sequestration in this form is invoked in situations where a company is guilty of civil contempt of court.²⁵ In such situations, the corporation does not ultimately lose possession of its property. Rather, possession is returned at the end of the period of sequestration, the sequestor's costs having been deducted. However, in this context, sequestration orders are said to be "coercive and compensatory rather than punitive".²⁶

8.17 In a sentencing context the freezing of the profits of a corporation may be seen as impacting on the decision-making power of its executives. Also by depriving shareholders and directors of a share in the corporation's profits, such orders could be used to bring home the seriousness of the offending conduct.

The Commission's view

8.18 Significant concerns remain in relation to orders that impact directly on commercial operations, mostly because of their potential effect on other parties, in particular employees and consumers. Such orders, while supported in principle, should be invoked only in extreme cases. The Commission has therefore recommended that courts have the power to place a corporate offender under a disqualification order on such terms as the court considers appropriate. In making a disqualification order, the court should be able to deny a corporation the use of its profits for a fixed period of time, perhaps for the same period that an individual offender would be sentenced to imprisonment. This would have the dual effect of both punishing the corporation and driving home the impact of the corporation's offending behaviour to its shareholders and directors, while still allowing the corporation to trade, thus having minimal impact on the corporation's employees, consumers and other trading partners.

RECOMMENDATION 6

As part of an order for disqualification a court may, among other matters:

- prevent the corporation from engaging in certain commercial activities;
- revoke or suspend a licence held by the corporation;
- disqualify the corporation from entering specified contracts;
- deny the corporation the use of its profits for a fixed period of time.

24. See, eg, *Supreme Court Rules 1970* (NSW) Pt 42 r 6.

25. *Supreme Court Rules 1970* (NSW) Pt 42 r 6. See also, NSWLRC DP 43 at para 13.49-13.56.

26. *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483 at 501.

DISSOLUTION OF CORPORATIONS

8.19 Dissolution (or “deregistration”) of a corporation is a more severe sentencing option when compared to disqualification. In broad terms, a corporation can be dissolved in two ways:

- by actually dissolving the corporation and placing its assets into the hands of receivers (liquidation) or government (nationalisation);²⁷ or
- by indirectly dissolving the corporation through use of a fine that divests it of all its assets.

Direct dissolution

8.20 An advantage of dissolution is that, in appropriate cases, “it would remove from the community a corporate entity which has flagrantly violated the rules of society”.²⁸ Disadvantages however, include:

- such an action could substantially harm employees, shareholders, consumers and other trading partners of the dissolved corporation;²⁹
- the members of the dissolved company can always incorporate under a new name (even in another jurisdiction) and carry out the same activities;³⁰ and
- as a rarely used sanction, it may not have sufficient deterrent effect on the behaviour of other corporations.³¹

8.21 However, the harming of “innocent” shareholders, employees, consumers and trading partners, otherwise referred to as “spillover”,³² may not be such a concern in cases where the corporation’s principal activities are criminal ones. For example, the United States Sentencing Commission’s Guidelines make special provision for organisations that are “operated primarily for a criminal purpose or primarily by criminal

27. See J Braithwaite and G Geis, “On theory and action for corporate crime control” [1982] *Crime and Delinquency* 292 at 307.

28. ALRC DP 30 at 292.

29. ALRC DP 30 at 292; M Jefferson, “Corporate criminal liability: the problem of sanctions” (2001) 65 *Journal of Criminal Law* 235 at 261; E Lederman, “Criminal law, perpetrator and corporation: rethinking a complex triangle” (1985) 76 *Journal of Criminal Law and Criminology* 285 at 335.

30. Australian Taxation Office, *Submission* at 8-9. See also, W B Fisse, “Responsibility, prevention, and corporate crime” (1973) 5 *New Zealand Universities Law Review* 250 at 252; ALRC DP 30 at 292; Jefferson at 261; S A Yoder, “Criminal sanctions for corporate illegality” (1978) 69 *Journal of Criminal Law and Criminology* 40 at 54; J Clough, “Sentencing the corporate offender: the neglected dimension of corporate criminal liability” (2003) 1 *Corporate Misconduct eZine*.

31. Yoder at 54; Jefferson at 261.

32. See para 6.8-6.11.

means”.³³ In such cases it can be said that most people and organisations who associate with such corporations have knowledge of, or have at least benefited from, the criminal activities. Nevertheless dissolution is an extreme penalty and as such it should be reserved for only the most heinous crimes, or where the substantial reason for the corporation’s existence is criminal activity.³⁴

8.22 It has been suggested that dissolution may be more appropriate to small closely-held corporations, on the basis that the impact on employees, consumers and trading partners would not be greater than if, for example, a sole trader or a key player in a small partnership were imprisoned.³⁵ The dissolution of a larger corporation would have far more severe flow-on effects on third parties.

8.23 Nationalisation (the acquisition of a corporation’s assets by the government), while providing a certain level of protection for employees, consumers and trading partners, may be viewed as “draconian and ideologically repugnant”.³⁶ However, liquidation, as an alternative, could achieve the protection of employees, consumers and trading partners by the selling of some or all of a corporation’s assets to new parent companies which could then continue the corporation’s legitimate trading activities.³⁷ It has been suggested that the possibility of a penalty that effectively involves a takeover of the corporation could deter some offending behaviour by playing on corporate managers’ fear of hostile takeovers.³⁸

Dissolution as a civil remedy

8.24 An example of a civil remedy providing for dissolution of a corporation may be found in the *Corporations Act 2001* (Cth) which allows for the winding up of a corporation if “the Court is of opinion that it is just and equitable that the company be wound up”.³⁹ There is, however, a limited number of persons and authorities entitled to apply to the court for winding up.⁴⁰ On at least one occasion the Supreme Court has ordered the winding up of a number of companies on the grounds of public interest in

33. United States Sentencing Commission, *Guidelines manual* (2002) §8C1.1.

34. F L Rush, “Corporate probation: invasive techniques for restructuring institutional behavior” (1986) 21 *Suffolk University Law Review* 33 at 87.

35. E Lederman, “Criminal law, perpetrator and corporation: rethinking a complex triangle” (1985) 76 *Journal of Criminal Law and Criminology* 285 at 335.

36. S Box, *Power, crime, and mystification* (Tavistock Publications, London, 1983) at 72.

37. See H Croall, *White collar crime: criminal justice and criminology* (Open University Press, Buckingham, 1992) at 158; See also J Braithwaite and G Geis, “On theory and action for corporate crime control” [1982] *Crime and Delinquency* 292 at 308.

38. J Coffee, “‘No soul to damn: no body to kick’: an unscandalized inquiry into the problem of corporate punishment” (1981) 79 *Michigan Law Review* 386 at 412, 418.

39. *Corporations Act 2001* (Cth) s 461(1)(k). Previously *Corporations Law* (Cth) s 461(k).

40. *Corporations Act 2001* (Cth) s 462(2).

order to protect investors. In the case in question the companies had been responsible for “improper dealings with moneys raised from the public, failure to keep or to produce appropriate records, and failure to provide that degree of basic public accountability as to the operations of each of the companies as is required under the *Corporations Law*”.⁴¹ The Federal Court has also ordered the winding up of corporations on a number of grounds including breaches of the *Corporations Law*.⁴²

8.25 Another example of a civil remedy that allows for the dissolution of a corporation may be found in the *Texas Business Corporation Act* which states that when a corporation is convicted of a felony the Attorney General may file an action to dissolve the corporation involuntarily. The dissolution is justified if the court finds that the corporation “has engaged in a persistent course of felonious conduct” and it is in the public interest to prevent similar offences.⁴³

Minimising the impact on other parties

8.26 Given the drastic nature of dissolution as a penalty, it should only be used in a very limited range of cases involving the most serious kind of criminal wrongdoing.⁴⁴ One approach would be to reserve it for cases where, the corporation was “operated primarily for a criminal purpose or primarily by criminal means”. In such egregious cases the effect of dissolution on employees, shareholders, consumers and other trading partners of the corporation will be of little, if any, concern. Such “victims” of dissolution would be of concern only if they were associated with a legitimate part of the corporation’s activities.

8.27 Where a corporation is not operated primarily for a criminal purpose or primarily by criminal means it may be appropriate in some cases for the court to order the liquidation of the corporation and sale of the legitimate part of the corporation’s operations to new parent companies on such terms and conditions as may be necessary to minimise the impact of the dissolution on other parties.

41. *ASIC v Barrack Mortgage Managers Pty Limited* [1999] NSWSC 272 at para 5.

42. *Australian Securities Commission v AS Nominees Ltd* (1995) 62 FCR 504 at 530-534.

43. *Texas Business Corporation Act* Art 7.01 s F. See also *Texas Non-Profit Corporation Act* Art 7.01 s F; and *Texas Limited Liability Company Act* Art 7.11 s F. Similar proposals were also made in s 6.04 of the United States Model Penal Code: Model Penal Code (Proposed Official Draft 1962) and see SA Yoder, “Criminal sanctions for corporate illegality” (1978) 69 *Journal of Criminal Law and Criminology* 40 at 54.

44. E Lederman, “Criminal law, perpetrator and corporation: rethinking a complex triangle” (1985) 76 *Journal of Criminal Law and Criminology* 285 at 334-335.

Potential inconsistency with Commonwealth corporations law

8.28 A question arises whether the inconsistency provisions of the Commonwealth *Constitution* would operate to render a New South Wales provision for the winding up of a corporate offender invalid. The interaction between the Commonwealth's corporations legislation and State laws is dealt with expressly by the *Corporations Act 2001* (Cth). First, the Commonwealth legislation is not intended to “exclude or limit the concurrent operation of any law of a State or Territory”.⁴⁵ Secondly direct inconsistencies are dealt with by limiting the operation of the Commonwealth legislation so that Commonwealth provisions relating to the external administration of a corporation do not apply to any winding up or administration carried out in accordance with a State provision and furthermore any New South Wales provision enacted after the commencement of the *Corporations Act* must be declared to be a “Corporations legislation displacement provision” in order to displace a Commonwealth provision.⁴⁶

RECOMMENDATION 7

A provision relating to the dissolution of corporations should contain a statement to the following effect: “to extent necessary to do so, this provision is declared a Corporations legislation displacement provision”.

Preventing reincorporation

8.29 The concern that corporations might circumvent a dissolution order by reincorporating can be met by allowing courts to issue further precautionary orders, such as orders disqualifying shareholders and directors of a corporation from reincorporating as well as other measures designed to pierce the corporate veil.⁴⁷ Existing procedures under the *Corporations Act 2001* (Cth) which provide for the disqualification of persons who have been involved in the management of a corporation may provide a useful model.⁴⁸ For example, one such provision allows ASIC to apply to the court to disqualify a person from managing a corporation for an appropriate period if the person:

has at least twice been an officer of a body corporate that has contravened [the *Corporations Act 2001* (Cth)] while they were an

45. *Corporations Act 2001* (Cth) s 5E(1).

46. *Corporations Act 2001* (Cth) s 5G.

47. E Lederman, “Criminal law, perpetrator and corporation: rethinking a complex triangle” (1985) 76 *Journal of Criminal Law and Criminology* 285 at 335.

48. See *Corporations Act 2001* (Cth) Pt 2D.6.

officer of the body corporate and each time the person has failed to take reasonable steps to prevent the contravention.⁴⁹

It is also required that the court must be satisfied that the disqualification is justified.⁵⁰

8.30 One proposal is that the court could order the disqualification of a person “where that person has been concerned in the management of a corporation which the court has ordered to be deregistered”.⁵¹

8.31 There are a number of problems involved with making such orders available. These problems flow from the fact that the courts would be ordering the disqualification of a person where it was not the person being disqualified but the corporation that was found guilty of an offence. This involves questions of natural justice and the constitutionality of such orders being available to a court that could potentially exercise federal jurisdiction.

8.32 These concerns may, however, be baseless by analogy with cases dealing with the forfeiture of property where the owner of the property is not the person who committed the offence. The High Court has held that, so long as the terms of the provision are clear, the punishment of forfeiture of property need not be inflicted only on the person who committed the offence. For example, a provision allowing for forfeiture of a fishing boat may be invoked even when the boat is owned by someone other than the person who committed the offence.⁵² The High Court has also held that the owner of the property need not be notified of the court’s intention to exact the penalty of forfeiture, the only person required to be notified being the person charged with the offence.⁵³

8.33 Such forfeiture orders can be justified on the grounds of incapacitation:

Forfeiture by way of penalty has an element of incapacitation which has no regard to the innocence or otherwise of the person who must bear the loss of property. Rather the concern of the law is that the offence will not be repeated by the same means.⁵⁴

49. *Corporations Act 2001* (Cth) s 206E(1)(a)(i). See also J Clough, “Sentencing the corporate offender: the neglected dimension of corporate criminal liability” (2003) 1 *Corporate Misconduct eZine*.

50. *Corporations Act 2001* (Cth) s 206E(1)(b).

51. J Clough, “Sentencing the corporate offender: the neglected dimension of corporate criminal liability” (2003) 1 *Corporate Misconduct eZine*.

52. *Cheatle v The Queen* (1972) 127 CLR 291; *Re Director of Public Prosecutions; Ex Parte Lawler* (1994) 179 CLR 270.

53. *Cheatle v The Queen* at 299 (Barwick CJ), 301 (McTiernan J), 304 (Menzies J) and 310-311 (Mason J), Walsh J dissenting at 307.

54. *Re Director of Public Prosecutions; Ex Parte Lawler* at 290 (Dawson J).

If this reasoning can be applied beyond forfeiture cases to the disqualification of directors and company officers who have not committed an offence, there should be no problem relating to the exercise of judicial power provided the punishment may be imposed in the discretion of the court. In order to avoid possible constitutional invalidity, it will be necessary to provide expressly that the court's discretion is preserved in deciding whether or not disqualification is justified in the circumstances of the case.

8.34 The Commission therefore recommends that a court should be able to issue orders preventing shareholders and directors from reincorporating in certain circumstances once a corporation has been dissolved. Such circumstances could include where the new corporation is intended to carry on the same activities as the dissolved corporation. It may also be necessary to prohibit the directors and shareholders of the dissolved corporation from having any beneficial interests in other corporations that conduct substantially similar activities to those of the dissolved corporation.

8.35 The Commission is of the view that natural justice concerns should be addressed by providing that any person bound by an order should be given an opportunity to be heard by the court prior to sentencing. Examples of provisions giving third parties rights when they are affected by punishments imposed on others can be found in legislation relating to the confiscation of proceeds of crime⁵⁵ and the imposition of home detention orders.⁵⁶

RECOMMENDATION 8

In ordering the dissolution of a corporation a court should have the power to order that shareholders and directors cannot reincorporate in certain circumstances, including where the new corporation is intended to carry on the same activities as the dissolved corporation.

The court may also order that the directors and shareholders of the dissolved corporation cannot have any beneficial interests in a corporation that substantially conducts the same activities as the dissolved corporation.

Such an order should be imposed only once any other person bound by it has been given an opportunity to be heard by the court prior to sentencing.

55. *Confiscation of Proceeds of Crime Act 1989* (NSW) s 20, where a third party with an interest in the property to be confiscated may make application for an exemption.

56. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 78(1)(c) where persons who are likely to live with the offender during a period of home detention must consent in writing to the making of the home detention order.

A fine to divest all assets of a company

8.36 The United States Sentencing Commission's Guidelines make special provision for organisations that are "operated primarily for a criminal purpose or primarily by criminal means". In such cases "the fine shall be set at an amount (subject to the statutory maximum) sufficient to divest the organization of all its net assets". "Net assets" means the assets remaining after the payment of all claims made by "known innocent bona fide creditors".⁵⁷ Examples of "criminal purposes" include:

a front for a scheme that was designed to commit fraud; an organization established to participate in the illegal manufacture, importation, or distribution of a controlled substance.⁵⁸

Examples of "operation by criminal means" include:

a hazardous waste disposal business that had no legitimate means of disposing of hazardous waste.⁵⁹

In Australia confiscation of the proceeds of crime under both State and Commonwealth statutes may achieve similar results in depriving some corporations, in extreme cases, of all their assets.⁶⁰

8.37 If adapted as a sentencing option, a fine aimed at divesting a corporation of all its assets will most likely force it into bankruptcy. It would also ensure that the government in effect received the value of the company's assets. Divestment could also be adapted to allow the payment of restitution for the benefit of the community or even of more specific victims of the offending conduct. However, such an approach is at best an indirect way of achieving dissolution. Further, the introduction of such "fines" as a sentencing option does not sit well with the view of fines in Chapter 6, since any fines would probably have to be far greater than any statutory maximum to achieve divestment in some cases.⁶¹ The more direct method of dissolving a corporation is, therefore, preferred.⁶² In any case, it

57. United States Sentencing Commission, *Guidelines manual* (2002) §8C1.1, Commentary.

58. United States Sentencing Commission, *Guidelines manual* (2002), §8C1.1, Commentary.

59. United States Sentencing Commission, *Guidelines manual* (2002), §8C1.1, Commentary.

60. *Confiscation of Proceeds of Crime Act 1989* (NSW); *Criminal Assets Recovery Act 1990* (NSW); *Proceeds of Crime Act 1987* (Cth); *Proceeds of Crime Act 2002* (Cth). See also Australian Law Reform Commission, *Principled regulation: federal civil and administrative penalties in Australia* (Report 95, 2002) at para 28.20.

61. Compare the proposal for punitive damages in civil matters, M Jefferson, "Corporate criminal liability: the problem of sanctions" (2001) 65 *Journal of Criminal Law* 235 at 248-249.

62. See J Clough, "Sentencing the corporate offender: the neglected dimension of corporate criminal liability" (2003) 1 *Corporate Misconduct eZine*.

is possible (although unlikely) that such a divestment would not be sufficient to prevent future criminal activity by the corporation since the corporate entity remains untouched and could obtain further assets, for example, by way of personal loans or guarantees from its directors, shareholders and related entities.

9. Correction orders

- Probation orders
- Punitive injunctions

9.1 For the purposes of this Report, a correction order is an order that a corporate offender do, or refrain from doing, a specified activity or thing. Its usual aim is to modify or control a corporation's behaviour in some way. Correction orders cover a wide range of possible orders and have been given a number of different names in the literature and relevant legislation. Orders may be as specific as requiring the corporation to undertake particular tasks, or as general as simply requiring that the corporation "be of good behaviour" or not offend further. The Commission is recommending that when sentencing a corporation, a court may, in addition to or instead of imposing a fine, make, on such terms and subject to such conditions as it sees fit, one or more correction orders that the court considers will best achieve the objects of sentencing. In this chapter correction orders are considered in two broad categories: probation orders and punitive injunctions.

PROBATION ORDERS

9.2 Probation usually involves the court suspending the imposition of a sanction, generally a serious one, on condition that the offender complies with certain requirements. The primary aim of probation is rehabilitation of the offender to prevent further offending.

9.3 In the case of individual offenders, probation generally involves the court setting the offender at liberty conditional upon good behaviour. The offender usually enters into a bond which imposes certain conditions upon their release, such as a condition placing the offender under the supervision of a probation officer. If an offender breaches a condition of probation they may be brought back before the court for re-sentencing.¹

9.4 Examples of probation in the current sentencing legislation include good behaviour bonds, conditional discharge of an offender and suspended sentences.² While good behaviour bonds cannot be imposed on corporate offenders (because they must be imposed as an alternative to imprisonment)³ it is possible that conditional discharges⁴ do apply to corporate offenders.⁵

1. NSWLRC Report 79 at para 4.1.

2. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9, s 10, s 12, s 13. See para 5.9.

3. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9. See para 5.9-5.10.

4. Under *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(1)(a).

5. *WorkCover Authority of NSW (Inspector Dubois) v Galicia Constructions Pty Ltd* [2000] NSWIRComm 195 at para 24 (Maidment J). However, such an order has only rarely been made in relation to breaches of the *Occupational Health and Safety Act 1983* (NSW): *WorkCover Authority of NSW v Genner Constructions Pty Ltd* [2000] NSWIRComm 87 at para 12-15. See also para 5.111-5.12 and *Environment Protection Authority v Virotec International Ltd* [2002] NSWLEC 110 at para 36.

9.5 In Issues Paper 20, the Commission asked whether corporate probation would be an effective sanction against a corporation and in what circumstances it should be imposed.⁶ One submission suggested that probation, along with other alternative sentencing options, has a strategic place, especially if one considers responsive regulation⁷ a compelling strategy.⁸

9.6 In principle, the Commission supports the adoption of corporate probation as one of a number of sentencing options available to the courts for dealing effectively with corporate offenders.

Specific types of corporate probation

9.7 There are a variety of models and types of probation available for dealing with corporate offenders. These are discussed in terms of proposals that have been mooted over the years as well as schemes that have actually been implemented. The proposals considered are internal discipline orders and organisational reform orders. Schemes that have already been implemented include those under the *Trade Practices Act 1974* (Cth), the *Protection of the Environment Operations Act 1997* (NSW) and the United States Sentencing Commission's Guidelines.

Internal discipline orders

9.8 Internal discipline orders would essentially involve a corporation:

- investigating its own criminal activity;
- conducting appropriate disciplinary proceedings; and
- returning a detailed and satisfactory compliance report to the court that issued the order.⁹

These activities would generally be carried out by a compliance officer or director acting on behalf of the corporation. The corporate officer would be answerable to the court in carrying out the order.

9.9 Such an order is basically a form of self-regulation (Braithwaite calls it “enforced self-regulation”),¹⁰ as it places the burden of enforcement on the corporation itself.¹¹ It has been suggested that internal discipline orders

6. NSWLRC IP 20 Issue 3.

7. See para 2.48.

8. J Braithwaite, *Submission* at 1.

9. Criminal Law and Penal Methods Reform Committee of South Australia, *The substantive criminal law* (4th Report, 1977) at para 5.6. See also B Fisse and J Braithwaite, *Corporations, crime and accountability* (Cambridge University Press, 1993) at 43.

10. J Braithwaite, “Enforced self-regulation: a new strategy for corporate crime control” (1982) 80 *Michigan Law Review* 1466.

11. Criminal Law and Penal Methods Reform Committee of South Australia, *The substantive criminal law* (4th Report, 1977) at para 5.6.

encourage individual accountability because they can be aimed at persons involved in the misconduct.¹²

9.10 Other general benefits of internal discipline orders include:¹³

- the resulting regulations and actions would be tailored to the particular corporation;
- they would encourage regulatory innovation;
- corporations might be more willing to comply with requirements that they had a hand in determining;
- they will transfer some of the economic burden of enforcing probation orders from government to the corporation.

9.11 One problem with internal discipline orders is that the individual officers and employees who are targeted in a corporation's own investigation may be denied the procedural protections that are available under a criminal investigation carried out by the State. For example, they could be subjected to entrapment.¹⁴ Such concerns could be met by including appropriate procedural safeguards in the corporate probation order.¹⁵ It should also be noted that employees would not be subject to the same outcomes, in terms of penalties and stigma, as they would if subjected to the processes of a criminal investigation.¹⁶

9.12 A further problem with applying internal discipline orders within a sentencing regime lies in their original conception in the literature. Braithwaite's treatment of "enforced self-regulation" envisages a regime where such orders are predominately imposed by regulatory agencies in response to perceived problems (as an alternative to more prescriptive government regulation), rather than by courts in the exercise of a sentencing discretion – although he does briefly mention instances where courts have imposed "monitored internal enforcement" on individual companies.¹⁷ The South Australian Committee's proposals also use the corporation as a delegate of the State in investigating and prosecuting

12. B Fisse, "Sentencing options against corporations" (1990) 1 *Criminal Law Forum* 211 at 238.

13. See J Braithwaite, "Enforced self-regulation: a new strategy for corporate crime control" (1982) 80 *Michigan Law Review* 1466 at 1474-1479; and R Gruner, "To let the punishment fit the organization: sanctioning corporate offenders through corporate probation" (1988) 16 *American Journal of Criminal Law* 1 at 84

14. See, for example, Braithwaite at 1469.

15. B Fisse, "Sentencing options against corporations" (1990) 1 *Criminal Law Forum* 211 at 234-235.

16. B Fisse, *Sanctions against corporations: economic efficiency or legal efficacy?* (Sydney University, Transnational Corporations Research Project Occasional Paper No 13, 1986) at 20.

17. Braithwaite, in particular at 1489 (court imposed orders).

criminal activity undertaken on its behalf. The focus of this Report, however, is the sentencing of corporations once liability has been determined.

9.13 Another concern is that corporations could implement probation regimes that assist technical compliance, while effectively allowing deviation from the “spirit” of the orders.¹⁸ A further drawback is the problem of ensuring that the corporation implements the recommendations of a duly appointed compliance officer.¹⁹ However, under a sentencing model the court that issued the internal discipline order will ultimately provide an enforcement mechanism,²⁰ for example, the court may have to ensure that adequate audits are carried out to ensure compliance.²¹ Such orders might also only be appropriate for corporations that have the resources to implement a compliance order.²²

Organisational reform orders

9.14 Organisational reform orders involve a limited period of judicial monitoring of the activities, policies and procedures of corporations, with a view to revision and organisational reform.²³ Proposals by the American Bar Association have suggested that 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 legitimate ‘business judgment’ decisions of the organization’s management or its stockholders or delay such decisions.²⁴

Another United States’ proposal has suggested that internal discipline could be achieved by the “use of a disinterested counsel whose selection is approved by the court”.²⁵ The Australian Law Reform Commission has also suggested that supervision could be undertaken on the court’s behalf by,

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18. R Gruner, “To let the punishment fit the organization: sanctioning corporate offenders through corporate probation” (1988) 16 *American Journal of Criminal Law* 1 at 85.
 19. Australian Law Reform Commission, *Principled regulation: federal civil and administrative penalties in Australia* (Report 95, 2002) at para 28.29; Australian Law Reform Commission, *Securing compliance: civil and administrative penalties in federal regulation* (Discussion Paper 65, 2002) at para 18.98.
 20. See J Braithwaite, “Enforced self-regulation: a new strategy for corporate crime control” (1982) 80 *Michigan Law Review* 1466 at 1496-1497. Problems relating to court supervision are discussed further at para 13.11-13.14.
 21. See Braithwaite at 1499; Gruner at 104-105.
 22. See Braithwaite at 1471.
 23. See B Fisse, “Sentencing options against corporations” (1990) 1 *Criminal Law Forum* 211 at 235-236.
 24. American Bar Association, 3 *Standards for Criminal Justice*, 18.2.8(a)(v).
 25. J Coffee, “No soul to damn: no body to kick’: an unscandalized inquiry into the problem of corporate punishment” (1981) 79 *Michigan Law Review* 386 at 455.

“experienced professional accountants, auditors or corporate lawyers”.²⁶ The United States’ proposal also suggested that a real deterrent effect could be achieved by submitting the consultant’s report to the corporation’s shareholders.²⁷

9.15 One criticism of such orders is that they may be seen as a soft sentencing option because their emphasis is on rehabilitation rather than deterrence or retribution.²⁸ However, there is no reason why they cannot be available as a sentencing option so long as other, more stringent, options are available, for example, punitive injunctions.²⁹

Reforms to the Trade Practices Act 1974 (Cth)

9.16 The *Trade Practices Act 1974* (Cth) provides that when a person (including a corporation) has contravened certain provisions of the Act,³⁰ the court may make a probation order for a period of not longer than three years.³¹ A probation order is stated to be:

an order that is made by the Court for the purpose of ensuring that the person does not engage in the contravening conduct, similar conduct or related conduct during the period of the order, and includes:

- (a) an order directing the person to establish a compliance program for employees or other persons involved in the person’s business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct; and
- (b) an order directing the person to establish an education and training program for employees or other persons involved in the person’s business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct; and
- (c) an order directing the person to revise the internal operations of the person’s business which lead to the person engaging in the contravening conduct.³²

26. Australian Law Reform Commission, *Sentencing: penalties* (Discussion Paper 30, 1987) at para 297. See also B Fisse, *Sanctions against corporations: economic efficiency or legal efficacy?* (Sydney University, Transnational Corporations Research Project Occasional Paper No 13, 1986) at 21.

27. J Coffee, “No soul to damn: no body to kick’: an unsandalized inquiry into the problem of corporate punishment” (1981) 79 *Michigan Law Review* 386 at 455.

28. B Fisse, “Sentencing options against corporations” (1990) 1 *Criminal Law Forum* 211 at 236-237.

29. Punitive injunctions are dealt with in para 9.35-9.50.

30. *Trade Practices Act 1974* (Cth) Pt 4 (restrictive trade practices), Pt 4A (unconscionable conduct), Pt 4B (industry codes), Pt 5 (consumer protection) or s 75AU (price exploitation in relation to New Tax System changes), s 75AYA (misrepresentation of the effect of New Tax System changes).

31. *Trade Practices Act 1974* (Cth) s 86C(2)(b).

32. *Trade Practices Act 1974* (Cth) s 86C(4).

These probation orders, which were introduced in 2001,³³ are not alternative to, nor dependent upon, any other sentencing option. This accords with a recommendation of the Australian Law Reform Commission that “a court should be able to impose a number of sanctions in whatever combination it considers appropriate, taking into account the overall penalty impact imposed”.³⁴

Environmental penalties

9.17 The *Protection of the Environment Operations Act 1997* (NSW) provides for additional orders that the courts may make at the sentencing of offenders (including corporations). Of particular relevance, the courts may:

- (d) order the offender to carry out a specified environmental audit of activities carried on by the offender.³⁵

The courts also have an open discretion to fix the period and other such conditions of the orders as may be necessary to ensure enforcement.³⁶

9.18 The policy behind the audits and the broader range of sentencing options was explained in the New South Wales Parliament in 1997:

The Government sees environmental audits as a useful tool that should be employed by industry in working for continuous improvement, and wants to promote this type of approach. It is only the poor performers who have anything to worry about from mandatory requirements. ...

... In addition to doubling the penalty regime for application by the courts, the bill ... gives the courts a wider range of sentencing options. We are working to broaden the options available to the courts. We want changed behaviour and improved environmental performance and are giving the courts an opportunity to teach a salutary lesson to those who have been found guilty. For example, the court can require a guilty party to publicise the facts of their offence in the media or require them to perform an environmental service, such as restoring a public place.³⁷

United States Sentencing Commission's Guidelines

9.19 In addition to providing for fines for corporations, the United States Sentencing Commission's Guidelines provide for corporate probation. The Guidelines establish probation as a sentence in its own right and not

33. *Trade Practices Amendment Act (No 1) 2001* (Cth).

34. Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974* (Report 68, 1994) at para 10.4. The ALRC, in addition to recommending that the courts retain a discretion to impose probation orders according to the circumstances of the case, also recommended that specific forms of order could be provided for expressly, using as its model the conditions set out in the United States Sentencing Commission's Guidelines: ALRC, Report 68 at para 10.9.

35. *Protection of the Environment Operations Act 1997* (NSW) s 250(1).

36. *Protection of the Environment Operations Act 1997* (NSW) s 250(2).

37. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 13 November 1997, the Hon P Allan, 2nd reading at 1836-1837.

conditional upon the suspension of another sentence.³⁸ They state that a court must impose a term of probation in a number of circumstances, including:

- where an organisation, having 50 or more employees, “does not have an effective program to prevent and detect violations of the law”;
- where it is necessary “to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct”; and
- where it is necessary “to accomplish one or more of the purposes of sentencing”.³⁹

9.20 The Guidelines set out two groups of recommended conditions of probation for organisations. One set of conditions aims at ensuring that organisations will continue to be able to pay any deferred fines or other monetary impositions. The other set of conditions is aimed at altering corporate behaviour in order to prevent future offending. The conditions that may be imposed relate to the corporation’s development and implementation of a “program to prevent and detect violations of law”, requiring:

- that the organisation develop and submit to the court the program together with an implementation schedule;
- that the organisation notify (in a form prescribed by the court) its employees and shareholders about the organisation’s conviction and the program that has been developed;
- that the organisation report periodically to the court or a probation officer on its progress in implementing the program; and
- that the organisation submit to a reasonable number of regular or unannounced inspections of its books by the probation officer or experts appointed by the court and also to the interrogation of “knowledgeable individuals” within the organisation to ensure that the program is being followed.⁴⁰

9.21 The duration of a corporate probation order must be between one and five years in the case of a felony, and of no more than five years’ duration for all other offences.⁴¹ Certain minimum conditions are also imposed as part of a probation order, including that the corporation not commit other offences during the term of probation.⁴²

38. See also R Gruner, “To let the punishment fit the organization: sanctioning corporate offenders through corporate probation” (1988) 16 *American Journal of Criminal Law* 1 at 31 for the introduction of corporate probation as a sentence in its own right in the US.

39. United States Sentencing Commission, *Guidelines manual* (2002) §8D1.1(a)(3), (6), (8).

40. United States Sentencing Commission, *Guidelines manual* (2002) §8D1.4(c).

41. United States Sentencing Commission, *Guidelines manual* (2002) §8D1.2(a).

42. United States Sentencing Commission, *Guidelines manual* (2002) §8D1.3(a).

9.22 It has been suggested that the enactment of the United States Sentencing Commission's Guidelines, setting out a systematic means of determining a sentence for a corporate offence, has helped to deter future offending. One commentator has noted that the Guidelines have led to an increase in the number of "indicted corporations" and that corporations in the United States have therefore "devoted increased attention to "self-policing" programs".⁴³ This has been confirmed, for example, by a survey of corporate ethics officers, 47% of whom reported that the sentencing Guidelines were an "influential determinant of their organization's commitment to ethics as evidenced by adoption of a compliance program".⁴⁴

Alternatives to probation orders

9.23 The Department of Fair Trading has observed that it can achieve the effect of internal discipline orders and organisational reform orders through enforceable undertakings or civil orders under the *Fair Trading Act 1987* (NSW), or in the case of holders of licences, licence conditions under legislation which is administered by the Department.⁴⁵ These can also be compared with enforceable undertakings under s 87B of the *Trade Practices Act 1974* (Cth).⁴⁶ A similar issue has been raised in the United States in relation to consent decrees obtained by regulatory agencies. However a total reliance on these civil options is not entirely desirable for a number of reasons. For example, the relevant regulatory agencies may not have a jurisdiction extensive enough to deal with all forms of corporate offending and they may also not have the resources that are available through the criminal justice system to bring corporations to account.⁴⁷

Evaluation of corporate probation

The goals of sentencing

9.24 The general appropriateness of probation orders for corporations is dependent on their ability to achieve the goals of sentencing satisfactorily. The sentencing of corporations often occurs in the context of regulatory regimes that relate to how corporations conduct business. This is reflected in the approach of various authorities that regulate aspects of corporate behaviour. For example, the New South Wales Department of Fair Trading

43. J C Poling and K M White, "Corporate criminal liability" (2001) 38 *American Criminal Law Review* 525 at 539.

44. J R Steer, "Changing organizational behaviour - the Federal Sentencing Guidelines experiment begins to bear fruit", paper presented at the 29th Annual Conference on Value Inquiry, Tulsa, Oklahoma (26 April 2001) at 10.

45. NSW Department of Fair Trading, *Submission* at 8.

46. See N Andrews, "If the dog catches the mice: the civil settlement of criminal conduct under the Corporations Act and the Australian Securities and Investments Act" (2003) 15 *Australian Journal of Corporate Law* 137.

47. J Coffee, "'No soul to damn: no body to kick': an unsensationalized inquiry into the problem of corporate punishment" (1981) 79 *Michigan Law Review* 386 at 452-453.

sees itself as having a broad regulatory role in the marketplace and aims to achieve compliance with the regulatory legislation that it administers.⁴⁸

9.25 In general, corporate probation orders, if properly targeted at corporations, can be seen as achieving the following goals:

- **prevention**, or stopping the offending conduct,⁴⁹ for example, by ordering that companies establish compliance programs or education and training programs, or revise the internal operations of their business;⁵⁰
- **rehabilitation**, or the promotion of future compliance with the relevant regulatory regime,⁵¹ especially with respect to small firms upon which fines may impact harshly and whose offences can often be attributed to ignorance of the law or poor financial management;⁵² and
- **detering or punishing offenders**,⁵³ where a fine would prove useless in relation to a corporation with few liquid assets,⁵⁴ or where dissolution would be inappropriate.⁵⁵

The notion of punishment becomes more important in the context of sentencing corporations because, unlike probation for individuals, a corporate probation order will be an independent sanction rather than a more lenient alternative to the harsher penalty of imprisonment.⁵⁶

9.26 Corporate probation orders may also be particularly suited to achieving rehabilitation. It has been suggested that corporations may have a greater capacity to be rehabilitated than individual offenders because they are more amenable to analysis and reform.⁵⁷

The organisational defects of a company – its “psyche” – can be meddled with in ways which would be inappropriate in the case of an individual.⁵⁸

48. NSW Department of Fair Trading, *Submission* at 1.

49. NSW Department of Fair Trading, *Submission* at 1.

50. See, for example, *Trade Practices Act 1974* (Cth) s 86C(4).

51. ALRC DP 30 at para 295; ALRC DP 65 at para 18.96; ALRC Report 95 at para 28.27; NSW Department of Fair Trading, *Submission* at 1. See also *United States v William Anderson Co Inc* (1982) 698 F 2d 911 at 914.

52. See M Jefferson, “Corporate criminal liability: the problem of sanctions” (2001) 65 *Journal of Criminal Law* 235 at 249; H Croall, *White collar crime* (1992) at 159.

53. Jefferson at 249; NSW Department of Fair Trading, *Submission* at 1.

54. See, for example, ALRC Report 68 para 10.9.

55. See ASX, *Submission* at 4.

56. See B Fisse, “Reconstructing corporate criminal law: deterrence, retribution, fault and sanctions” (1983) 56 *Southern California Law Review* 1141 at 1224.

57. See para 3.20-3.22.

58. D Bergman, “Corporate sanctions and corporate probation” (1992) 142 *New Law Journal* 1312 at 1313. See also D Bergman, “Crime and punishment” (1999) *Health and Safety Bulletin* (No 275, January/February) 13 at 13; and the views of the organisation Disaster Action reported in England and Wales, Law Commission, *Legislating the Criminal Code: involuntary manslaughter* (Report 237, 1996) at para 7.15.

Specific advantages

9.27 Some advantages of corporate probation orders include:

- their focus on organisational and management reform may reduce the problem of “spillover” (that is, the effect of the sanction on third parties such as shareholders, consumers, employees and trading partners);⁵⁹
- their flexibility (as to possible conditions) enables them to be tailored to the individual circumstances of each case;
- they can affect “nonfinancial values of corporate decisionmaking” such as corporate and managerial power and prestige;⁶⁰
- certain conditions of probation may have the effect of lowering the company’s reputation in the eyes of the public and thereby may act as a greater punishment and deterrent than fines;⁶¹
- they may achieve organisational reform more effectively than fines, which have been characterised as an indirect and ineffective means of achieving corporate compliance⁶² (this is particularly so in the case of subsidiary companies which may have few liquid assets to pay a fine);⁶³
- properly tailored, they may be used to rehabilitate corporate offenders who continue to incur monetary penalties without apparent effect on their behaviour;⁶⁴
- in appropriate cases they may be targeted at relevant staff, thereby promoting individual accountability for some corporate offending;⁶⁵

59. See M Jefferson, “Corporate criminal liability: the problem of sanctions” (2001) 65 *Journal of Criminal Law* 235 at 251. See also para 6.8-6.11.

60. B Fisse, “Sentencing options against corporations” (1990) 1 *Criminal Law Forum* 211 at 237. See also R Gruner, “To let the punishment fit the organization: sanctioning corporate offenders through corporate probation” (1988) 16 *American Journal of Criminal Law* 1 at 73; J C Coffee, “‘No soul to damn: no body to kick’: an unscandalized inquiry into the problem of corporate punishment” (1981) 79 *Michigan Law Review* 386 at 412; B Fisse and J Braithwaite, *Corporations, crime and accountability* (Cambridge University Press, 1993) at 43.

61. D Bergman, “Corporate sanctions and corporate probation” (1992) 142 *New Law Journal* 1312 at 1313. But see G Slapper, “Corporate punishment” (1994) 144 *New Law Journal* 29 at 30.

62. For example, the management of a corporation may not find it so easy to transfer the burden of probation orders as they may in the case of the economic impact of fines: Bergman at 1313. But see Slapper at 30. See also B Fisse, “Sentencing options against corporations” (1990) 1 *Criminal Law Forum* 211 at 226; ALRC Report 68 para 10.9; ALRC DP 30 at para 299.

63. ALRC Report 68 para 10.9. See also ALRC DP 30 at para 299.

64. C A Wray, “Corporate probation under the new organizational sentencing guidelines” (1992) 101 *Yale Law Journal* 2017 at 2041.

65. ALRC Report 68 para 10.9. See also ALRC DP 30 at para 299.

- by dealing with specific instances of corporate offending, they may forestall the need for more elaborate and costly regulatory regimes that will apply to all corporations.⁶⁶

Specific disadvantages

9.28 There are a number of potential disadvantages, including that:

- the community and government may not be prepared to bear the costs associated with corporate probation (for example, the costs of monitoring compliance);⁶⁷
- probation may punish “innocent” shareholders as well as the corporation itself⁶⁸ (a similar but less severe problem than that of “spillover” in relation to fines);⁶⁹ and
- such sanctions might subject corporations to inefficient and excessively intrusive government intervention, which might “stifle innovation and reduce competitiveness”;⁷⁰ and
- some probation orders may expend social resources that fines do not.⁷¹

Some answers to these concerns include that society already pays the high social costs of imprisonment in relation to individual offenders;⁷² probation orders can be imposed in such a way as to avoid inefficient and excessively intrusive forms of government control;⁷³ and supervision could be paid for by the corporations themselves.⁷⁴

9.29 Economic analyses, however, tend to focus more on the question of general deterrence arising from the severity of a punishment rather than

66. R Gruner, “To let the punishment fit the organization: sanctioning corporate offenders through corporate probation” (1988) 16 *American Journal of Criminal Law* 1 at 6.

67. ALRC DP 30 para 300; M Jefferson, “Corporate criminal liability: the problem of sanctions” (2001) 65 *Journal of Criminal Law* 235 at 252; Gruner at 80.

68. See ASX, *Submission* at 4.

69. See B Fisse, “Sentencing options against corporations” (1990) 1 *Criminal Law Forum* 211 at 228.

70. Jefferson at 252. See also B Fisse and J Braithwaite, *Corporations, crime and accountability* (Cambridge University Press, 1993) at 43-44; and ALRC DP 30 para 300.

71. This concern arises in the law and economics discussion of “optimal penalty theory”: See S Kennedy, “Probation and the failure to optimally deter corporate misconduct” (1998) 71 *Southern California Law Review* 1075 at 1085; G S Becker, “Crime and punishment: an economic approach” (1968) 76 *Journal of Political Economy* 169 at 207-208. See also para 6.31-6.39.

72. Fisse and Braithwaite at 43-44; B Fisse, *Sanctions against corporations: economic efficiency or legal efficiency?* (Sydney University, Transnational Corporations Research Project Occasional Paper No 13, 1986) at 24; Jefferson at 252.

73. Fisse and Braithwaite at 44; Fisse (1986) at 24-25; Jefferson at 252.

74. S Box, *Power, crime, and mystification* (Tavistock Publications, London, 1983) at 72.

the consideration of such factors as the value of rehabilitation and the specific deterrence arising from it in appropriate circumstances.⁷⁵ In any case, such law and economics analyses acknowledge that probation may be an appropriate sanction where corporations are “judgment-proof” with respect to fines (for example, because of near-bankruptcy or the distribution of assets within a corporate structure).⁷⁶

9.30 Other more practical problems include whether judges are equipped to determine appropriate forms of corporate probation,⁷⁷ and also whether it would be possible to recruit the professionals that would be needed to act as corporate probation officers.⁷⁸ Federal sentencing provisions in the United States allow a court, in circumstances where it requires further information on an offender, to order a study of the offender “by qualified consultants”.⁷⁹ It has been suggested that such qualified consultants might be executives, management consultants or “academics from graduate business schools”.⁸⁰

Adopting forms of corporate probation

9.31 While a specific list of orders (or conditions to a bond) is not desirable as it may limit the court’s ability to impose an order that achieves the purposes of sentencing in a particular case, a non-exclusive list of options may provide useful guidance to the courts in determining appropriate orders in a particular case. For example, the Australian Law Reform Commission recommended that the courts should retain the discretion to impose orders according to the circumstances of the case, but also recommended that specific forms of orders could be provided for expressly.⁸¹

75. See G S Becker, “Crime and punishment: an economic approach” (1968) 76 *Journal of Political Economy* 169 at 208.

76. See S Kennedy, “Probation and the failure to optimally deter corporate misconduct” (1998) 71 *Southern California Law Review* 1075 at 1091-1092.

77. R Gruner, “To let the punishment fit the organization: sanctioning corporate offenders through corporate probation” (1988) 16 *American Journal of Criminal Law* 1 at 50.

78. M Jefferson, “Corporate criminal liability: the problem of sanctions” (2001) 65 *Journal of Criminal Law* 235 at 252; J C Coffee, “‘No soul to damn: no body to kick’: an unsandalized inquiry into the problem of corporate punishment” (1981) 79 *Michigan Law Review* 386 at 453.

79. 18 USC §3552(b).

80. Gruner at 75. See also Coffee at 451-452; and F L Rush, “Corporate probation: invasive techniques for restructuring institutional behavior” (1986) 21 *Suffolk University Law Review* 33 at 77 for a proposal for an “independent board comprised of exonerated corporate personnel, disinterested businessmen, probation officers, or a mix of all three”.

81. ALRC Report 68 at para 10.9.

9.32 Minimum conditions to be imposed as part of a probation order could include that the corporation not commit another crime during the term of probation.⁸²

Internal discipline orders

9.33 The court should be able to require that specified officers or employees of the corporation:

- investigate the corporation's activities;
- undertake appropriate disciplinary action; and
- return a detailed and satisfactory compliance report to the court or an officer appointed by the court.⁸³

The court should also be able to order that the corporation be subjected to regular or unannounced audits to monitor compliance.

Organisational reform orders

9.34 There are numerous types of orders that a court can make to encourage or ensure organisational reform. The orders can range from those requiring quite intrusive external inspection regimes to those requiring that corporations undergo educational programs. Orders that a court can make to promote organisational reform should include those which:

- appoint a person with relevant experience (where appropriate at the expense of the corporation⁸⁴) to subject a corporation to recognised reporting, record keeping and auditing controls aimed at organisational reform to prevent future offending behaviour;
- order a corporation to establish compliance programs or education and training programs for officers and employees designed to ensure awareness of the responsibilities and obligations in relation to the offending or similar conduct;⁸⁵
- order a corporation to revise its internal operations or activities which led to the offending conduct.⁸⁶

The appointment of a person with relevant experience (for example, an accountant or auditor) would be similar in some respects, to the appointment of a parole officer in the case of an individual offender.⁸⁷

82. See United States Sentencing Commission, *Guidelines manual* (2002) §8C1.3(a).

83. See United States Sentencing Commission, *Guidelines manual* (2002) §8D1.4(c); and Criminal Law and Penal Methods Reform Committee of South Australia, *The substantive criminal law* (4th Report, 1977) at para 5.6

84. See para 13.11-13.14, Recommendation 17.

85. See *Trade Practices Act 1974* (Cth) s 86C(4)(b).

86. See *Trade Practices Act 1974* (Cth) s 86C(4)(c); *Protection of the Environment Operations Act 1997* (NSW) s 250(1)(d).

87. On the appointment of consultants to act as parole officers see 13.11-13.14.

PUNITIVE INJUNCTIONS

9.35 Punitive injunctions are similar in many respects to probation orders. However, they are at the harsher (or more directly-focussed) end of the scale of possible correction orders. In its Discussion Paper on sentencing, the Australian Law Reform Commission referred to “punitive injunctions”, in addition to internal discipline orders and organisational reform orders, as a “more severe form of intervention into the affairs of a corporate offender”. A punitive injunction was stated to be:

an order which requires the convicted corporate offender to introduce specific court-ordered internal controls, at the risk of a further punishment for failure to do so.⁸⁸

9.36 Punitive injunctions are also similar in some respects to civil mandatory injunctions.⁸⁹ Fisse has also used the term “managerial intervention” to describe what can be achieved by punitive injunctions.⁹⁰ Some forms of punitive injunctions may also bear close similarities to orders for disqualification.⁹¹

Forms of punitive injunction

South Australian proposals

9.37 Some specific proposals were set out by the Criminal Law and Penal Methods Reform Committee of South Australia which suggested that “preventive orders” could be used where a corporation has engaged in a course of conduct, or is about to engage in a course of conduct, that is criminal. A preventive order would involve the court in:

- setting out in detail the conduct that the corporation must not engage in; or
- specifying particular actions that the corporation must undertake; or
- identifying particular personnel who will be responsible for failure to comply with the order.⁹²

The South Australian Committee also suggested that a corporation that fails to comply with an order should, in some cases, be held criminally liable and also raised the possibility of imposing individual criminal liability on personnel responsible for ensuring the corporation’s compliance.⁹³

88. ALRC DP 30 at para 298.

89. B Fisse, “Sentencing options against corporations” (1990) 1 *Criminal Law Forum* 211 at 237.

90. B Fisse, “Reconstructing corporate criminal law: deterrence, retribution, fault and sanctions” (1983) 56 *Southern California Law Review* 1141 at 1221.

91. See para 8.2-8.18.

92. Criminal Law and Penal Methods Reform Committee of South Australia, *The substantive criminal law* (4th Report, 1977) at para 5.5.1.

93. Criminal Law and Penal Methods Reform Committee of South Australia, *The substantive criminal law* (4th Report, 1977) at para 5.6.

Environmental penalties

9.38 The *Protection of the Environment Operations Act 1997* (NSW) allows courts to make “orders for restoration and prevention” and specifies the steps that an offender must take:

- (a) to prevent, control, abate or mitigate any harm to the environment caused by the commission of the offence; or
- (b) to make good any resulting environmental damage; or
- (c) to prevent the continuance or recurrence of the offence.⁹⁴

The Act further provides that failure to comply with such an order is an offence and imposes a maximum penalty on corporations of \$120,000 for each day the offence continues.⁹⁵

Occupational health and safety

9.39 **New South Wales.** The *Occupational Health and Safety Act 2000* (NSW) provides that a court may order an offender to take steps “to remedy any matter caused by the commission of the offence that appears to the court to be within the offender’s power to remedy”.⁹⁶ The Act also provides that a court may order an offender “to carry out a specified project for the general improvement of occupational health, safety and welfare”.⁹⁷ However, because of the potentially harsh application of such orders, Local Courts are limited to imposing them in cases where “the cost of complying with the order does not exceed the maximum amount for which the General Division of a Local Court has jurisdiction”.⁹⁸

9.40 **United Kingdom.** The United Kingdom’s legislation relating to health and safety in the workplace includes a provision which gives a court additional powers when a person (including a corporation) is convicted of a relevant offence. This provision allows the court, where it appears that the offender can take steps to remedy the matters that gave rise to the offence, to order the offender to take certain specified steps for remedying the matters. The offender must act within such time as is specified in the order. Such an order can be issued either in addition to, or instead of any other punishment.⁹⁹ As of early 1999, it appeared that no court had ever exercised the powers available to it in this regard.¹⁰⁰

94. *Protection of the Environment Operations Act 1997* (NSW) s 245.

95. *Protection of the Environment Operations Act 1997* (NSW) s 251.

96. *Occupational Health and Safety Act 2000* (NSW) s 113(1).

97. *Occupational Health and Safety Act 2000* (NSW) s 116(1).

98. *Occupational Health and Safety Act 2000* (NSW) s 116(3). See *Local Courts (Civil Claims) Act 1970* (NSW).

99. *Health and Safety at Work etc Act 1974* (UK) s 42(1).

100. D Bergman, “Crime and punishment” (1999) *Health and Safety Bulletin* (No 275, January/February) 13 at 15.

Trade practices legislation

9.41 The *Trade Practices Act 1974* (Cth) does not contain an express provision for punitive injunctions in the sentencing context. However, injunctions under s 80 of the Act could, conceivably, be employed to achieve the same effect. Section 80 relevantly provides that the ACCC or “any other person” may apply to the court for an injunction and the court may grant such an injunction if it is satisfied that a person has engaged ... in conduct that constitutes, amongst other things, a contravention of a number of provisions of the Act.¹⁰¹ The Court may, in granting the injunction, impose “such terms as the Court determines to be appropriate”. While such injunctions would normally be used as a civil remedy, there would appear to be nothing to prevent an application being made for an injunction during sentencing proceedings for breaches of the *Trade Practices Act* especially since an injunction may be issued if the court is satisfied that a person has engaged in conduct that constitutes a contravention of the Part that details offences under the Act.¹⁰² There would also appear to be nothing to stop the court from framing the injunction as a punitive injunction so long as it can be expressed with sufficient particularity. Justice French has observed in relation to s 80 injunctions:

There is room within the statutory framework and the policy that underlies it for an injunction which is intended not to restrain an apprehended repetition of contravening conduct but to deter an offender from repeating the offence. That deterrence is effected by attaching to the repetition of the contravention the range of sanctions available for contempt of court. ...

The remedy is flexible and may be applied in service of a variety of functions to support the policy of the Act.¹⁰³

9.42 The Australian Law Reform Commission in its report on compliance with the *Trade Practices Act*, noted concerns that punishment was not normally an aspect of civil injunctions but did not accept that “injunctions must necessarily be used only in a remedial capacity”. However, the Commission chose not to recommend that express provision be made for punitive injunctions, preferring instead to rely on its recommendations for corporate probation and community service orders.¹⁰⁴

101. *Trade Practices Act 1974* (Cth) Pt 4 (restrictive trade practices), Pt 4A (unconscionable conduct), Pt 4B (industry codes), Pt 5 (consumer protection), Pt 5C (offences) or s 75AU (price exploitation in relation to New Tax System changes), s 75AYA (misrepresentation of the effect of New Tax System changes).

102. *Trade Practices Act 1974* (Cth) Pt 5C and s 80.

103. *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 268.

104. See ALRC Report 68 at para 10.23-10.24.

Law Commission proposals

9.43 The Law Commission of England and Wales has recommended a form of punitive injunction as a sentencing option in relation to a proposed new offence of “corporate killing”. The Commission proposed that a court should have the power upon conviction for “corporate killing”:

to order the corporation to take such steps, within such time, as the order specifies for remedying the failure in question and any matter which appears to the court to have resulted from the failure and been the cause or one of the causes of the death.¹⁰⁵

However, this recommendation relates only to the proposed offence of “corporate killing” and could only be used by a court upon application by the prosecution specifying the terms of the proposed order.

Appropriateness of punitive injunctions

9.44 Punitive injunctions can be seen as more effective than fines because they “clearly signal the unacceptable nature of corporate crime” by stating that corporate offences may “not be dismissed as mere business expenses but constitute deprivations of important personal and social values that society will prevent by forcible restraint upon corporate decisionmaking”.¹⁰⁶

9.45 Punitive injunctions will, like corporate probation, achieve in different degrees, the sentencing objects of prevention, rehabilitation and deterrence. They will additionally achieve the aim of restitution, or obtaining redress for those affected by the offending conduct,¹⁰⁷ for example, by requiring environmental offenders to restore an affected public area.¹⁰⁸

9.46 Another advantage of such orders is that their specific focus enhances the prospect of preventing corporations from engaging in further criminal behaviour. They are, therefore, more effective than monetary sanctions in some instances, for example, where the penalty is being imposed on a subsidiary company with few assets.¹⁰⁹ However, the order’s focus on preventing future activity may be problematic since the South Australian Committee’s proposal appears to allow that orders could be made even when

105. England and Wales, Law Commission, *Legislating the Criminal Code: involuntary manslaughter* (Report 237, 1996) at para 8.76.

106. B Fisse, “Sentencing options against corporations” (1990) 1 *Criminal Law Forum* 211 at 237-238.

107. NSW Department of Fair Trading, *Submission* at 1.

108. See NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 13 November 1997, the Hon P Allan, 2nd reading at 1837. See also United States Sentencing Commission, *Guidelines manual* (2001) Chapter 8 Part B.

109. Fisse at 238.

no offence has yet been committed.¹¹⁰ The focus of this Report, however, is on the sentencing of corporate offenders once a finding of guilt has been made.

9.47 Punitive injunctions could also offer a means of reducing the spillover¹¹¹ effect of fines so that, for example, a court could prohibit a corporation from passing on the cost of a fine to consumers.¹¹²

9.48 Criticisms of punitive injunctions (in addition to the criticisms that also relate to corporate probation) include that they:

- force the courts into a supervisory role;
- are inefficient; and
- “interfere with legitimate managerial authority”.¹¹³

Availability of punitive injunctions

9.49 The Commission supports the availability of punitive injunctions as one of a number of correction orders available to the courts in sentencing corporate offenders. Punitive injunctions are more tightly focussed than, for example, probation orders, in that they are directed at enforcing or preventing particular actions on the part of a corporation, its officers and employees.

9.50 Accordingly, the Commission is of the view that a court should be able to issue a punitive injunction:

- setting out in detail the conduct that the corporation must not engage in;¹¹⁴
- specifying particular actions that the corporation must undertake, or internal controls that the corporation must be subject to;¹¹⁵ and
- identifying individuals who will be responsible for failure to comply with the order.¹¹⁶

110. Criminal Law and Penal Methods Reform Committee of South Australia, *The substantive criminal law* (4th Report, 1977) at para 5.5.2. This could be seen as too much like preventive detention: See NSWLRC Report 79 at para 10.21-10.28.

111. See para 6.8-6.11.

112. M Jefferson, “Corporate criminal liability: the problem of sanctions” (2001) 65 *Journal of Criminal Law* 235 at 256.

113. D J Miester, “Criminal liability for corporations that kill” (1990) 64 *Tulane Law Review* 919 at 940. But see R Gruner, “To let the punishment fit the organizations: sanctioning corporate offenders through corporate probation” (1988) 16 *American Journal of Criminal Law* 1 at 73.

114. See Criminal Law and Penal Methods Reform Committee of South Australia, *The substantive criminal law* (4th Report, 1977) at para 5.5.1.

115. See ALRC DP 30 at para 298; Criminal Law and Penal Methods Reform Committee of South Australia, *The substantive criminal law* (4th Report, 1977) at para 5.5.1.

116. See Criminal Law and Penal Methods Reform Committee of South Australia, *The substantive criminal law* (4th Report, 1977) at para 5.5.1.

Orders that require corporations to carry out certain remedial works, for example, the restoration of an environment damaged by the actions of a corporation,¹¹⁷ may be more appropriately framed as community service orders.

RECOMMENDATION 9

A court should have the power to make a correction order on such terms and subject to such conditions as it sees fit, including, but not limited to:

- (a) internal discipline orders;
- (b) organisational reform orders; and
- (c) punitive injunctions.

117. See, for example, *Protection of the Environment Operations Act 1997* (NSW) s 250(1)(c).

10.

Community service orders

- The nature of community service orders
- Application to corporate offenders
- Use of community service orders
- Miscellaneous issues

10.1 Community service orders involve a corporate offender undertaking or contributing to work or projects that benefit the community or a part of the community in some way. In Chapter 5 the Commission recommended the adoption of community service orders as one of the options for sentencing corporate offenders. This chapter discusses the nature of community service orders, their application to corporate offenders and precedents for their imposition on corporate offenders in Australia and overseas. Finally the chapter considers diverse issues that relate specifically to community service orders as corporate punishments and makes recommendations to deal with some of them.

THE NATURE OF COMMUNITY SERVICE ORDERS

10.2 Community service orders, which direct an offender to perform community service work,¹ have been used in the case of individual offenders as an alternative to imprisonment for quite some time because of a number of benefits both to the offender and to society. For offenders, community service orders obviate the oppressive and brutalising effects that the prison environment can have on inmates.² This sentencing option, while providing a means to punish offenders, also assists their rehabilitation. Some community-based correction programs involve education and training aimed at rehabilitation. Offenders learn new skills that help their re-integration into society and reduce the likelihood of recidivism.

10.3 Community service orders allow society to reduce prison costs. Moreover, the recipients of the service to be rendered by the offender, such as non-profit organisations, charities, nursing homes, children's homes and community centres, benefit in numerous ways from the penalty. Further, this mode of punishment addresses society's need to attain a sense of justice, especially in cases where the resulting harm transcends an individual victim and affects an entire community. Requiring the offender to perform some service to the community as a penal sanction not only underlines the community's disapproval of the offence, but may also help towards repairing the harm done to society.

APPLICATION TO CORPORATE OFFENDERS

10.4 Some of the advantages of community service orders are equally applicable in cases involving corporate offenders. First, the community stands to benefit from a project that a corporate offender may be required to do. Secondly, by requiring the expenditure of time and effort, community

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1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8.
 2. See S O'Toole, "Prisons: the politics of punishment" (2002) 27 *Alternative Law Journal* 242. For an examination of a wide range of issues relating to conditions in prisons and the rights of inmates in Australia, see D Brown and M Wilkie (ed), *Prisoners as citizens: humans rights in Australian prisons* (Federation Press, 2002).

service orders emphasise the social unacceptability of corporate offences.³ Thirdly, community service orders are a useful means of achieving reparation when the harm that resulted from an offence affects the wider community rather than individual victims. In cases involving breaches of environmental laws, courts are increasingly using community service orders instead of fines to punish corporate offenders as they are more likely than fines to repair the harm caused to the environment.⁴

10.5 In addition, community service orders avoid the “deterrence trap” that limits the use of fines on corporations that are in financial difficulties.⁵ Corporate offenders may have insufficient cash resources to pay the appropriate amount of fine required for effective deterrence. Community service orders that require corporations to render a service or use non-cash resources, provide a means of punishment without forcing the company into liquidation (which courts must generally avoid because of the spillover effects on innocent parties such as the corporation’s employees, creditors and consumers).⁶

10.6 Community service orders may also enhance rehabilitation and specific deterrence against future commission of offences. When the officers and employees of a convicted corporation are involved in a community service project, they are made aware of the seriousness of the offence and this may increase accountability and discipline in the organisation and prompt revision in company systems to avoid future violations.⁷

10.7 Some commentators have noted the possible danger of a corporation gaining favourable publicity from undertaking community projects.⁸ However, given that a corporation would undertake such projects by order of a court as a result of a conviction, it is unlikely that the corporation will generally use it to bolster its reputation as a good corporate citizen.

10.8 There was general support for the adoption of community service orders for corporate offenders both during the consultation meetings conducted by the Commission⁹ and in written submissions.¹⁰

3. B Fisse, “Sentencing options against corporations” (1990) 1 *Criminal Law Forum* 211 at 247.

4. Ms Kerry Palmer, Principal Legal Officer (Legal Services Branch), NSW Environment Protection Authority, *Consultation*.

5. See para 6.2-6.5.

6. See *United States v Danilow Pastry Co* (1983) 563 F Supp 1159 at 1167. See also para 6.8-6.11.

7. Fisse at 247-248.

8. See for example M Jefferson, “Corporate criminal liability: the problem of sanctions” (2001) 65 *Journal of Criminal Law* 235 at 252.

9. Government Regulatory and Prosecution Agencies, *Consultation*; Ms Kerry Palmer, Principal Legal Officer (Legal Services Branch), NSW Environment Protection Authority, *Consultation*.

10. Australian Taxation Office, *Submission* at 8; Department of Fair Trading, *Submission* at 8; J Braithwaite, *Submission*.

USE OF COMMUNITY SERVICE ORDERS

United States

10.9 Courts in the United States have used community service orders as a sentencing option for corporate offenders for some time. Such orders are usually imposed as conditions of organisational probation orders.¹¹ In one of the leading cases on the matter, *United States v Danilow Pastry Corporation*, six bakeries convicted of price fixing were excused from paying substantial portions of the fines imposed on condition that they provided baked goods to various organisations assisting the needy for one year. The court gave a number of reasons for imposing such an order. First, the imposition of monetary fines commensurate with the gravity of the offences would have bankrupted the bakeries. This outcome would have caused widespread unemployment among the bakeries' employees and in the economies of the communities in which the plants were located; and (somewhat ironically) diminished competition in the bakery industry. Secondly, the substituted payment required the bakeries to make symbolic restitution for their offences by doing something more organisationally onerous and thought provoking than merely paying the potential fines. The community service orders in this case also brought the offences to the attention of the public, thereby increasing the punishment without harming the needs of employees, consumers or communities that would otherwise be affected by a fine.¹²

10.10 In another case, a corporation was ordered to contribute US\$8 million towards the establishment of the Virginia Environment Endowment.¹³ In yet another example, a highway construction company convicted of fraudulent bidding on highway contracts was required to donate \$1.5 million to endow a professorship in ethics at a local university.¹⁴ The community service orders made in these cases were not any different to a fine to the extent that all that was required was for the corporations to write a cheque.

Australia

10.11 Environmental protection legislation in New South Wales, Victoria and South Australia contains provisions that give courts the power to order

11. United States Sentencing Commission, *Guidelines manual* (2002) §8B1.3. Prior to the adoption of the Guidelines, community service could be ordered under the corporate probation provisions of the *Sentencing Reform Act 1984*: 18 USC §3563(a)(2), (b)(13).

12. *United States v Danilow Pastry Co* (1983) 563 F Supp 1159 at 1166-1167.

13. *United States v Allied Chemical Corporation* (1976) 420 F Supp 122. See also B Fisse, "Sentencing options against corporations" (1990) 1 *Criminal Law Forum* 211 at 244.

14. *United States v Missouri Valley Construction Co* (1984) 741 F2d 1542.

an offender to carry out specified projects for the restoration or enhancement of the environment.¹⁵ Courts have used these provisions on a number of occasions.¹⁶ The *Occupational Health and Safety Act 2000* (NSW) also gives courts the power to order an offender to carry out a specified project for the general improvement of occupational health, safety and welfare.¹⁷

MISCELLANEOUS ISSUES

Funding community projects

10.12 One issue with respect to community service orders to be undertaken by corporate offenders is whether they should be able to take the form of a monetary contribution to charity or some community project. Prior to the adoption of the Federal Sentencing Guidelines for Organizations, United States' courts were able to use a particular form of community service order, referred to as "community restitution", involving community service through charitable contributions or other monetary support to social programs that benefited the community as a whole, rather than the victims of an offence.¹⁸ Community service orders crafted in this form are criticised on a number of grounds. First, they impose insufficient punishment on corporations in relationship to the seriousness of some crimes (just as a fine would in the circumstances).¹⁹ Secondly, they divert from public use funds what might otherwise have been collected as fines.²⁰ Thirdly, the introduction of community restitution orders creates an opportunity for judicial officers to channel corporate resources into pet charity programs,²¹ or at least create the perception that that has happened. If a judge is personally affiliated with an organisation that is the beneficiary of the community service order, an erosion of public confidence in judicial

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15. *Protection of the Environment Operations Act 1997* (NSW) s 250(c); *Environment Protection Act 1979* (Vic) s 67AC(2)(c); *Environment Protection Act 1993* (SA) s 133(b). Under the Victorian Act the environment project that a court may order the offender to do may or may not be related to the offence.
 16. See, for example, *EPA v Nestle Australia Ltd* (Magistrates' Court of Victoria, Warrnambool, No P01858191, 22 January 2002, Magistrate Bolger, court order); *EPA v Rosedale Leather Pty Ltd* (Magistrates' Court of Victoria, Moe, No P01251370, 4 February 2002, court order); *Environment Protection Authority v Simplot Australia Pty Ltd* [2001] NSWLEC 264.
 17. *Occupational Health and Safety Act 2000* (NSW) s 116.
 18. R Gruner, "Beyond fines: innovative corporate sentences Under Federal sentencing guidelines" (1993) 71 *Washington University Law Quarterly* 261 at 295.
 19. Gruner at 295; C Stone, "A slap on the wrists for the Kepone mob" (1977) 22 *Business and Society Review* 4.
 20. Gruner at 295.
 21. B Fisse, "Sentencing options against corporations" (1990) 1 *Criminal Law Forum* 211 at 248.

integrity could result.²² Fourthly, the rehabilitative value of such orders is limited because the corporation's management and employees may not "internalise" the seriousness of the offence committed, nor its consequences.²³

10.13 The opposing view is that that community service orders aimed at achieving restitution to the general community (or a section of it), through charitable contributions or monetary support to social programs, should be permitted because they benefit both the offender and society. Unlike fines, which merely punish an offender, community restitution orders can have a more direct and positive impact on the community affected by the offence.²⁴ The corporation is forced to pay for its crime, and the community also benefits from a direct contribution to charity or a social project. Designed properly, these forms of community service will not necessarily decrease the amount or severity of the punishment, but will in fact increase its usefulness.²⁵

10.14 Advocates of this form of community service order point out that in a number of corporate crimes, such as those involving the environment or public health and safety, victims are not readily identifiable due to the widespread nature of the harm or a delay in the manifestation of the injury.²⁶ Community service orders in the form of monetary contributions to a charity or social project, so long as there is a reasonable nexus between the offence and the charity selected, may be a good way of repairing the harm in those circumstances.

10.15 In the United States, the Federal Sentencing Guidelines on Organizations have tightened the use of community service orders by providing that they may be ordered only where such community service is reasonably designed to repair the harm caused by the offence.²⁷ The United States Sentencing Commission's commentary states that requiring a corporation to endow a chair at university or to contribute to charity would not be consistent with this provision.²⁸

22. M Levin, "Corporate probation conditions: judicial creativity or abuse of discretion?" (1984) 52 *Fordham Law Review* 637 at 656.

23. Levin at 653.

24. L Gattozzi, "Charitable contributions as a condition of probation for convicted corporations: using philanthropy to combat corporate crime" (1987) 37 *Case Western Reserve University* 569.

25. Gattozzi at 581-582.

26. M L Howard, "Charitable contributions as a condition of federal probation for corporate defendants: a controversial sanction under new law" (1985) 60 *Notre Dame Law Review* 530.

27. United States Sentencing Commission, *Guidelines manual* (2002) §8B1.3.

28. United States Sentencing Commission, *Guidelines manual* (2002) §8B1.3, Commentary.

10.16 In Australia, the legislative provisions that authorise the use of community service orders on corporate offenders give courts the authority to “order an offender to carry out specified projects”.²⁹ Courts have construed these provisions liberally and used them to order offenders to pay a sum of money to meet the costs of some relevant social project rather than ordering the offenders to implement the project themselves. For example, in an air pollution case, a magistrate in Victoria ordered the corporation to pay \$25,000 to the Warrnambool City Council for beautification of a playground and a road reserve on the Princes Highway.³⁰ In another Victorian case, where the corporation pleaded guilty to polluting the atmosphere, the court ordered it to pay \$35,000 to the City of Greater Geelong to be spent on improvements to a local park.³¹

10.17 The Commission is of the view that the practice of ordering monetary contributions to social projects pursuant to community service order provisions in specified legislation, should be permitted under the general corporate sentencing regime proposed in Recommendation 4.³² This form of community service increases the usefulness of a sentence by achieving some form of reparation to a dispersed group of victims, the general community or a section of it. The community project to be funded should, however, bear a reasonable relationship to the offence. Such a requirement would ensure the attainment of the objectives of the sentence, in particular the reparation of any harm caused by the offence. It would also avoid perceptions of arbitrariness or bias on the part of judges in their choice of community projects.

RECOMMENDATION 10

Where a court orders a corporate offender to fund a community project, the project should bear a reasonable relationship to the offence and/or the objectives of the sentence.

Involving the corporation’s personnel and resources in the community project

10.18 The proponents of the use of community service orders for corporate offenders have suggested that the law should require that, as a general rule, the employees of the offender should perform the community service

29. *Protection of the Environment Operations Act 1997* (NSW) s 250(1)(c); *Occupational Health and Safety Act 2000* (NSW) s 116; *Environment Protection Act 1979* (Vic) s 67AC(2)(c); *Environment Protection Act 1993* (SA) s 133(b).

30. *EPA v Nestle Australia Ltd* (Magistrates’ Court of Victoria, Warrnambool, No P01858191, 22 January 2002, Magistrate Bolger, court order).

31. *EPA v Pivot Ltd* (Magistrates’ Court of Victoria, Geelong, 6 September 2001).

32. See Chapter 5.

project.³³ Fisse suggests that the legislation should require “the personnel by whom a community project is to be performed [to] include representatives from managerial, executive and subordinate ranks of the offender’s organisation, whether or not persons in all these ranks were implicated in the offence subject to sentence”.³⁴ It is argued that by forcing the company’s officers and employees to participate in fulfilling the terms of a community service order, it is more likely that the punishment will be internalised by the corporation. In short, conditions in community service orders that require participation by the company’s personnel better achieve the rehabilitative objectives of a sentence.³⁵

10.19 The Commission is of the view that details of the design of a community project to be undertaken by a corporation, including the engagement of the corporation’s personnel, should be left to the discretion of the court. It agrees with the view that such a requirement would increase the prospect of the corporation’s personnel internalising the seriousness of the offence and perhaps prompt the corporation to take measures to prevent recidivism. In addition, where the convicted organisation possesses facilities, technical knowledge or skills that qualify it to repair damage caused by the offence, these resources should be used in the execution of the community service order. It may, however, not always be appropriate to specify these requirements. There may be instances when the restoration of the harm resulting from the offence is the paramount consideration, and using the corporation’s personnel and/or resources may not be the most efficient way of achieving this. Accordingly, the determination of the conditions of community service orders is best left to the discretion of the sentencing court.

10.20 There are a number of ways in which the court may order that a corporation’s personnel be involved in the carrying out of a community service order. These include:

- naming individual members of staff personally;
- identifying groups of personnel (for example officers at a certain level of seniority) from whom individuals may be selected;
- simply stating that company personnel must participate.

In the latter two cases it is left to the discretion of the corporation which particular personnel will be used.

10.21 The naming of individuals may have consequences for these individuals if the terms of the community service order are breached. Persons named in the order who fail to carry out its terms so far as they

33. B Fisse, “Sentencing options against corporations” (1990) 1 *Criminal Law Forum* 211 at 246. See also M Levin, “Corporate probation conditions: judicial creativity or abuse of discretion?” (1984) 52 *Fordham Law Review* 637.

34. Fisse at 245.

35. Levin at 654.

relate to them expose themselves to contempt proceedings. This is of particular concern if staff from all levels of a corporation are to be involved in carrying out the order and some of these fail to carry out the terms of the order simply because management did not provide appropriate supervision or guidance. Unless a court deliberately wishes to put a particular person in the corporation at risk of contempt proceedings, it may, therefore, be generally desirable for the court to frame the order in such a way as to require that the corporation use a particular officer or employee or group of employees, rather than to require directly that particular named individuals participate. In this way the consequences that arise from a breach of the order with respect to the involvement of particular individuals will flow to the corporation. Officers or employees of the corporation who deliberately refuse to carry out the terms of an order will be guilty of an offence in accordance with Recommendation 21 in Chapter 13.

10.22 A community service order imposed on a corporation but naming individual officers or employees of the corporation may have the appearance of punishing those individuals. The Commission is of the view that such individuals should have a right to be heard before the order is made,³⁶ bearing in mind that they will be liable for contempt for failure to comply with the order. The Commission is not persuaded that such protection needs to be extended where the community service order identifies a group or category of officers or employees. Non-compliance with the order by members of such group is an internal matter for the company to resolve.

RECOMMENDATION 11

Before sentencing a corporation to community service, the court must give any individual named in the order an opportunity to be heard.

Using a community service order in combination with other penalties

10.23 Community service orders, by themselves, may not always be capable of achieving the various objectives of sentencing. They do not emphasise corporate reform to prevent re-offending. Hence, it has been suggested that in cases where corporate reform is an important issue, community service might still be used in combination with a correction order that requires the corporation to reform its work practices.³⁷

10.24 The Commission also notes that a community service order requiring payment of the costs of a community project may, like a fine, be susceptible of conveying the message that the crime committed by the

36. This right may not exist at sentencing in the case of individuals who are not offenders: See para 8.32-8.33.

37. B Fisse, "Sentencing options against corporations" (1990) 1 *Criminal Law Forum* 211 at 248.

corporation is not serious and that corporations can buy their way out of trouble. A publicity order, under those circumstances, may also be used in order to achieve the denunciatory aim of sentencing.³⁸

10.25 The legislation generally authorising community service orders for corporate offenders should allow the court to combine the penalties that it considers necessary to achieve the objectives of sentencing appropriate to the particular circumstances of each case. The issue of combining a range of different sentencing options is discussed in greater detail in Chapter 5.

The maximum cost of the community service project

10.26 A community service order could have the effect of circumventing the upper limit of the fine set by the legislature for the offence in question.³⁹ As the statutory maximum is indicative of Parliament's and the community's view of the objective seriousness of the offence in question, the Commission is of the view that the cost to the offender of performing a community service order, together with the cost of any other penalty imposed, should not exceed the statutory maximum amount of the fine applicable to the offence for which the order is made.⁴⁰ This issue, while probably most relevant in relation to community service orders, also arises in respect to other sentencing options and so it is comprehensively discussed in Chapter 13.⁴¹

Securing compliance and supervision

10.27 Another issue that arises in relation to supervising the implementation of a community service order is the risk of non-compliance. Some potential problems that can occur in the execution of a community service order include failure to assign the appropriate personnel to the community project, falsification of compliance reports, and recycling projects that have been undertaken in the normal course of business to discharge the obligations imposed by the order.⁴² A real concern is that the courts may not have the time or resources to supervise the implementation of community service orders. As this issue is also relevant to some of the other sentencing options, it is dealt with in Chapter 13.⁴³

38. In *EPA v Nestle Australia Ltd* (Magistrates' Court of Victoria, Warnnambool, No P01858191, 22 January 2002, Magistrate Bolger, court order), the court imposed a community service order (to enhance the environment) and a publicity order.

39. J Gobert, "Controlling corporate criminality: penal sanctions and beyond" [1998] 2 *Web Journal of Current Issues*.

40. This was suggested in B Fisse, "Sentencing options against corporations" (1990) 1 *Criminal Law Forum* 211 at 245.

41. See para 13.2-13.4, Recommendation 15.

42. Fisse at 245.

43. See para 13.11-13.14, Recommendation 17.

11. Publicity orders

- The rationale of publicity orders
- Use of publicity orders
- Particular issues

11.1 Publicity orders involve the publication of an offender's conviction and other relevant facts (such as the consequences of the offence), to either a specific group of people or to the general public. In Chapter 5 of this Report, the Commission recommended the adoption of publicity orders as one of the sentencing options that should be made available in sentencing corporations. This chapter discusses the rationale of publicity orders and some legislative precedents that authorise their imposition in Australia and overseas. This chapter also considers various issues that relate particularly to this penalty.

THE RATIONALE OF PUBLICITY ORDERS

11.2 The rationale for such orders stems from the notion of shaming: their purpose is to damage the offender's reputation.¹ The sanction fits in with the general theory about the expressive dimension of the criminal law, that social censure is an important aspect of criminal punishment.² Criminal penalties must not only aim at achieving deterrence and retribution, but must also express society's disapproval of the offence.³ One of the deficiencies of the fine as a criminal sanction is its susceptibility to convey the message that corporate crime is less serious than other crimes and that corporations can buy their way out of trouble.⁴ In contrast, adverse publicity orders may be more effective in achieving the denunciatory aim of sentencing.

11.3 Adverse publicity may:

- threaten the corporation's good reputation;
- affect consumer confidence in the corporation; and
- compromise the corporation's autonomy.

11.4 One or a combination of any of these consequences may sufficiently punish a corporation and also deter it from re-offending.

11.5 The written submissions and the consultation meetings undertaken by the Commission were generally supportive of the introduction of publicity orders as a sentencing option for corporate offenders.⁵

1. D Skeel, "Symposium norms and corporate law: shaming in corporate law" (2001) 149 *University of Pennsylvania Law Review* 1811.

2. See para 2.35, 3.13.

3. See generally the discussion on the objectives of sentencing in Chapter 3 of this Report.

4. B Fisse, "Sentencing options against corporations" (1990) 1 *Criminal Law Forum* 211 at 220. See also para 6.7.

5. J Braithwaite, *Submission*; Australian Taxation Office, *Submission* at 8; NSW Department of Fair Trading, *Submission* at 7; Kerry Palmer, Principal Legal Officer (Legal Services Branch), NSW Environment Protection Authority, *Consultation*.

Threat to the corporation's good reputation

11.6 Adverse publicity may deter corporate crime because corporations generally view their reputation as a valuable asset. Many corporate executives consider corporate prestige as “an independent good or an instrumental good” that assists in enhancing profits and in achieving other objectives. Adverse publicity stigmatises the corporation and consequently diminishes corporate prestige.⁶

11.7 At least one relatively old empirical study supports the view that the prestige-lowering capacity of adverse publicity is perceived by organisations as significant. Fisse and Braithwaite conducted a survey of seventeen corporations that had experienced extensive negative publicity following conviction. The corporate executives in all but two of the seventeen organisations reported that the adverse publicity had caused a perceived drop of corporate prestige. The study affirmed the view that corporate prestige and reputation are highly valued within large organisations.⁷

11.8 Corporate prestige is valued both for financial and non-financial reasons. Customer goodwill stemming from the company's prestige enhances profits as it influences consumers to buy more goods and services. It has been estimated that a corporation's image accounts for up to four percent of its stock price.⁸

11.9 A favourable reputation also engenders less tangible benefits. For example, it reflects positively on employees, both on lower level employees who get satisfaction from working with what they deem to be a reputable company, but more so on senior managers, who are often people concerned about their status.⁹ Negative publicity can affect morale and self-esteem within the organisation. In the study by Fisse and Braithwaite, it was found that adverse publicity is likely to have some potency as a non-financial sanction because of its impact on an organisation's collective morale.¹⁰

6. A Cowan, “Scarlet letters for corporations? Punishment by publicity under the new sentencing guidelines” (1992) 65 *Southern California Law Review* 2387 at 2398.

7. B Fisse and J Braithwaite, *The impact of publicity on corporate offenders* (State of New York Press, New York, 1983) at 289.

8. A Cowan, “Scarlet letters for corporations? Punishment by publicity under the new sentencing guidelines” (1992) 65 *Southern California Law Review* 2387 at 2398, citing B Fisse and J Braithwaite, *The impact of publicity on corporate offenders* (State of New York Press, New York, 1983).

9. A Curcio, “Painful publicity – an alternative punitive damage sanction” (1996) 45 *DePaul Law Review* 341 at 368-369.

10. B Fisse and J Braithwaite, *The impact of publicity on corporate offenders* (State of New York Press, New York, 1983) at 306.

Adverse effects on the corporation's business

11.10 Negative publicity has the potential to affect consumer confidence in the corporation, which in turn may affect the corporation's business.¹¹ Studies in the United States show that negative publicity about a product's safety may affect consumer confidence and lead to a decline in sales, profitability, and stock market values.¹² Another study suggests that negative publicity surrounding indictments for fraudulent business dealings often results in higher costs of obtaining suppliers.¹³ The submission from the New South Wales Department of Fair Trading noted that the "reputation of traders, especially corporations, as law abiding persons is a significant factor in their marketplace performance".¹⁴

11.11 With respect to consumer behaviour, it has been suggested that for adverse publicity to have an impact, the publicity must be product-specific. The publicity must link the corporate misbehaviour to flaws in particular products or services. A substantial number of corporate crimes are however, "product independent". The violation of an environmental protection law for example, may not directly relate to the corporate offender's goods and services. It is argued that when the company's product does not pose an immediate threat to consumers, it is uncertain whether the public will be sufficiently angered or concerned to boycott the corporation's product or services.¹⁵

11.12 Others hold the contrary view that adverse publicity generally (whether product specific or not) has the potential to change consumer behaviour towards a corporation.¹⁶ An example is the negative publicity suffered by Exxon following the 1989 oil spill. Thousands of consumers returned their Exxon credit cards.¹⁷ It might be argued that even if adverse publicity does not result in the voluntary boycott of a corporate offender's business, it will probably be one contributing factor if a change in consumer behaviour and attitude towards particular products is registered. Such publicity

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11. A Cowan, "Scarlet letters for corporations? Punishment by publicity under the new sentencing guidelines" (1992) 65 *Southern California Law Review* 2387 at 2403.
 12. M Block "Optimal penalties, criminal law and the control of corporate behavior" (1991) 71 *Boston University Law Review* 395 at 411-12; G Jarrell and S Peltzman "The impact of product recalls on the wealth of sellers" (1985) 93 *Journal of Political Economy* 512.
 13. Block at 412.
 14. NSW Department of Fair Trading, *Submission* at 7.
 15. Cowan at 2403.
 16. See B Fisse and J Braithwaite, *The impact of publicity on corporate offenders* (State of New York Press, New York, 1983) at 292-293; A Curcio, "Painful publicity – an alternative punitive damage sanction" (1996) 45 *DePaul Law Review* 341 at 369-370.
 17. Curcio at 369.

may, for example, provide further justification for an organised consumer movement that targets a particular company and its products.

A threat to the corporation's autonomy

11.13 Adverse publicity may generate a range of other non-financial consequences for a corporation. Negative publicity may attract further media scrutiny, investigation by regulatory agencies, or lawsuits by those affected by the company's offence.¹⁸ These potential difficulties, in addition to the financial costs of adverse publicity discussed above, may threaten the capacity of the corporation to operate its normal course of business.

USE OF PUBLICITY ORDERS

United Kingdom

11.14 Several provisions were available in 19th century Britain that allowed courts to order the publication of certain details of convicted offenders and their offence (although the sanctions were probably used chiefly against individuals).¹⁹ In cases where the offender adulterated bread, a statute provided for the offender's name, abode and offence to be published in a local newspaper, the cost of publication being defrayed from the fine also imposed.²⁰ In the case of adulteration of seeds, the court could order publication of the offender's name, occupation, abode, place of business and the particulars of the punishment to be carried out. The cost of publication, in such newspapers as the court thought fit, was to be met directly by the offender. This sanction, however, unlike the bread provisions, was only available for a second or subsequent offence.²¹ In the case of the sale of contaminated food, the court could, upon conviction for a second offence within a 12 month period, order that a notice of the facts of the offences be affixed to premises occupied by the offender. The offender was also required to pay the costs of affixing the notice.²² In the case of

18. A Cowan, "Scarlet letters for corporations? Punishment by publicity under the new sentencing guidelines" (1992) 65 *Southern California Law Review* 2387 at 2402.

19. M Jefferson, "Corporate criminal liability: the problem of sanctions" (2001) 65 *Journal of Criminal Law* 235 at 257.

20. *London Bread Act 1822* (3 Geo 4 c 106) s 10; *Bread Act 1836* (6 & 7 Will 4 c 37) s 8.

21. *Adulteration of Seeds Act 1869* (32 & 33 Vict c 112) s 3. See also a similar provision in *Adulteration Act 1872* (35 & 36 Vict c 74) s 2.

22. *Public Health (London) Act 1891* (54 & 55 Vict c 76) s 47(4). A similar provision relating to the adulteration of alcohol required the district police authority to affix a notice upon conviction when the licensee otherwise retained his or her licence: *Licensing Act 1874* (35 & 36 Vict c 94) s 19.

offences relating to weights and measures, the court could “cause the conviction to be published in such manner as it thinks desirable”.²³

New Zealand

11.15 Similar provisions were also once available in New Zealand in instances where a person was convicted under the *Food and Drugs Act 1947* (NZ). In such cases the court could order the Director-General of Health to publish a notice, in such newspapers or magazines as were thought fit, detailing the “name, occupation, and place or places of business of the defendant, the nature of the offence, and the fine, forfeiture, or other penalty inflicted”.²⁴

United States

11.16 In the United States, the Federal Sentencing Commission Guidelines for Organisational Sentencing allow the court “to order an organization, at its expense and in the format and media specified by the court, to publicize the offence committed, the fact of conviction, the nature of the punishment imposed, and the steps that will be taken to prevent the recurrence of similar offenses”.²⁵

Australia

11.17 In Australia, the *Black Marketing Act 1942* (Cth), a statute enacted to protect war time price control and rationing which was in force until shortly after the Second World War, provided that, in the event of a conviction under the Act, a court could require the accused (which could include corporations) to publish details of the conviction at the offender’s place of business continuously for not less than three months. If the convicted person failed to comply with such order, the court could order the sheriff or the police to execute the order and the accused would again be convicted of the same offence. If the court was of the opinion that the exhibition of notices would be ineffective in bringing the fact of conviction to the attention of persons dealing with the convicted person, the court could direct that a similar notice be displayed for three months on all business invoices, accounts and letterheads.

11.18 More recently, adverse publicity as a penal sanction has been adopted in New South Wales and other Australian jurisdictions:

23. *Weights and Measures Act 1889* (52 & 53 Vict c 21) s 14.

24. *Food and Drugs Act 1947* (NZ) s 28. The provision was not included when the new *Food and Drug Act 1969* (NZ) was enacted.

25. United States Sentencing Commission, *Guidelines manual* (2002) §8D1.4.

- Under the *Protection of the Environment Operations Act 1997* (NSW),²⁶ *Occupational Health and Safety Act 2000* (NSW),²⁷ and *Fair Trading Act 1987* (NSW),²⁸ courts in New South Wales may order a convicted defendant to publicise the offence and its consequences.
- In Victoria and South Australia, environment protection legislation contains provisions giving courts in those jurisdictions the power to publicise the offence, any environmental or other consequences of the offence, and the penalty imposed.²⁹
- At the Commonwealth level, new sanctions introduced recently to the *Trade Practices Act 1974* (Cth) include the publicity order, which is defined as either an order requiring an advertisement regarding the contravention of the Act, or alternatively, disclosure of information in the possession of the offender to certain people (for example consumers and other businesses).³⁰

PARTICULAR ISSUES

Publicity order may have uncertain effects

11.19 One criticism of the use of adverse publicity is that its impact is uncertain and uncontrollable. It has been described as a “loose canon”³¹ because the penalty’s impact on the corporation cannot be predicted. To a large extent, the effect of a publicity sanction depends on the public’s response (in particular, the market the company caters for) to the company’s criminal activity. This incalculable result contrasts with the imposition of a fine where the penalty is quantified through a specific amount of money that the offender must pay. It is claimed that in extreme cases, adverse publicity may lead to a decline in sales, closure of the company and loss of jobs. If that were to happen, the force of the sanction may fall disproportionately on innocent workers, suppliers and distributors.³²

11.20 Case studies conducted by Fisse and Braithwaite showed, however, that serious financial spillovers are likely to be the exception rather the rule. In those cases where spillovers were likely to occur, there was no evidence that the financial impact would fall disproportionately on workers

26. *Protection of the Environment Operations Act 1997* (NSW) s 250.

27. *Occupational Health and Safety Act 2000* (NSW) s 115.

28. *Fair Trading Act 1987* (NSW) s 67.

29. *Environment Protection Act 1970* (Vic) s 67AC(2)(a) and (b); *Environment Protection Act 1993* (SA) s 133(c).

30. *Trade Practices Act 1974* (Cth) s 86D.

31. J C Coffee, “No soul to damn: no body to kick’: an unsandalized inquiry into the problem of corporate punishment” (1981) 79 *Michigan Law Review* 386 at 427.

32. J Gobert, “Controlling corporate criminality: penal sanctions and beyond” [1998] 2 *Web Journal of Current Issues*.

at the bottom of the hierarchy.³³ Moreover, there is no evidence that spillover is a greater problem in respect of publicity orders than it is in relation to other sentencing dispositions. The fine in particular can potentially have unforeseen and harsh consequences on third parties.³⁴

Courts as propagandists

11.21 It has been suggested that courts should not engage in propaganda campaigns against corporate offenders and, further that they would not in any case know how to harness the benefits of the mass media. Consequently, the courts' ability to use publicity sanctions to their fullest effect has been doubted.³⁵

11.22 The adoption of publicity orders as a penal sanction need not necessarily burden the courts with the role of propagandist against corporate offenders. Courts should be given a wide discretion as to who should implement the publicity sanction. The convicted corporation, for example, may be ordered to undertake the publicity. Most existing legislative provisions give courts the power to order the corporation to prepare the publicity, subject to any terms and conditions that a court may impose, in addition to its final approval.³⁶

11.23 Alternatively, in cases involving regulatory offences, courts could order a relevant regulatory agency to implement the publicity order, subject to payment of the cost by the convicted corporation. For example, if the offence related to the breach of laws to protect the environment, the court might order the New South Wales Environment Protection Agency to implement the order. This approach will enable courts to rely on relevant government agencies that have developed expertise in public communication and media relations. Such agencies, in view of their regulatory role in the particular area where the offence was committed, would have a sound knowledge of which particular audience should be targeted in implementing the publicity order. This approach also addresses the situation where there are concerns that the corporation will not be effective in being its own detractor.

33. B Fisse and J Braithwaite, *The impact of publicity on corporate offenders* (State of New York Press, New York, 1983) at 308.

34. See para 6.8-6.11.

35. J C Coffee, "No soul to damn: no body to kick': an unsandalized inquiry into the problem of corporate punishment" (1981) 79 *Michigan Law Review* 386 at 425-426.

36. See *Occupational Health and Safety Act 2000* (NSW) s 115; *Protection of the Environment Operations Act 1997* (NSW) s 250; *Environment Protection Act 1970* (Vic) s 67AC(2)(a) and (b); *Environment Protection Act 1993* (SA) s 133(c); *Trade Practices Act 1974* (Cth) s 86D.

RECOMMENDATION 12

The court should have the power to order that:

- (a) the corporate offender itself carry out a publicity order;
- (b) the assistance of any relevant government agency be enlisted for this purpose.

The costs of the publicity order should be borne by the offender.

Getting the attention of the intended audience

11.24 A concern about publicity sanctions is that they may not generate any interest from the general public.³⁷ The public might be indifferent to corporate crime or the nature of corporate offences may be too bland or unintelligible to compel audience interest.³⁸ This concern should not be exaggerated.

11.25 First, public opinion studies undertaken in Australia and overseas indicate that, since the 1970s, corporate crimes have attained greater significance in the mind of the populace. Those that have a tangible impact on identifiable victims are particularly perceived as meriting severe punishment.³⁹

11.26 Secondly, the concern reflects an assumption that adverse publicity is exclusively a sanction directed to a broad audience using mass media, such as newspaper advertisements. However, the general public need not always be the intended audience of a publicity order. The adverse publicity ordered might focus directly on those who are concerned about the corporation's wrongdoing, particularly those whose goodwill is valued by the company.⁴⁰ In the case of offences involving goods and services, for example food adulteration, consumers of the product may be notified using mass-media techniques. When the crime is one of environmental pollution, it may be appropriate to target the community surrounding the offending plant.⁴¹ Targeting tightly defined demographic groups may better ensure that the publicity reaches its intended audience.

11.27 It may not even be necessary to use the mass media in every case. A court may, for example, order a shareholder mail-out, informing them of

37. B Fisse and J Braithwaite, *The impact of publicity on corporate offenders* (State of New York Press, New York, 1983) at 293.

38. A Cowan, "Scarlet letters for corporations? Punishment by publicity under the new sentencing guidelines" (1992) 65 *Southern California Law Review* 2387 at 2407.

39. See para 1.16-1.18.

40. Cowan at 2407-2408.

41. M Levin, "Corporate probation conditions: judicial creativity or abuse of discretion?" (1984) 52 *Fordham Law Review* 637 at 657.

the corporation's conviction. This may prompt the shareholders to press for change in their company. A court might also order publication of the conviction in the company's annual report. This would inform both the shareholders and those who might be interested in investing in the corporation about its misconduct.

11.28 Some New South Wales statutes that authorise publicity orders recognise that the mass media is not the only means of publicising a conviction and allow for other forms of publicity.⁴²

11.29 To ensure the effectiveness of publicity orders, it is important that legislation gives courts the discretion to stipulate conditions such as the target audience of the publicity, content and the media, or method of implementation.

RECOMMENDATION 13

The courts should have the power to stipulate in a publicity order:

- (a) the target audience of the publicity;
- (b) the content of the publicity, including the fact of conviction, the nature of the offence, its consequences, the nature of any punishment imposed and such other information the court deems relevant;
- (c) the media to be used, or other method of implementation.

Counter-publicity

11.30 A further concern in relation to publicity orders is that the corporation might use counter publicity to thwart the impact of adverse publicity flowing from a court order. Available empirical evidence does not support this hypothesis. The study by Fisse and Braithwaite⁴³ found that corporate attempts to create counter-publicity would likely be the exception rather than the rule. A large majority of the companies in the study that were subjected to adverse publicity made a conscious decision not to resort to anything that could be described as counter publicity. The main reason for not launching counter-publicity was the risk of generating further negative publicity: companies are likely to try to reduce the "time window" of exposure to adverse publicity.⁴⁴

42. *Occupational Health and Safety Act 2000* (NSW) s 115; *Protection of the Environment Operations Act 1997* (NSW) s 250.

43. B Fisse and J Braithwaite, *The impact of publicity on corporate offenders* (State of New York Press, New York, 1983).

44. Fisse and Braithwaite at 297-298.

11.31 Even if counter-publicity is unlikely to occur with frequency, the law should provide a means by which the courts can deal with it when it happens. A possible solution is for the law to give courts the power to restrain the publication or continued publication of any material that, in their judgment, may have the effect of countering a publicity order. Such authority is not intended to give courts the power to censor advertising undertaken by a corporation in the normal course of its business, for example, the advertisement of its products and services, or even general image advertising.⁴⁵ Rather, it should be used only in extreme cases where the publicity that follows the court-sanctioned publicity is patently intended to counter the effectiveness of the latter.

RECOMMENDATION 14

The court should have the power to restrain the publication or continued publication of any material that may have the effect of countering the intended effects of a publicity order.

Imposing the penalty selectively

11.32 A publicity sanction should not be used in every case where a corporation is convicted of an offence. The routine publication of convictions may have a desensitising effect on the public, which may result in publicity orders losing their efficacy. Situations where a publicity order might be useful include the following:

- Where a judge reduces the monetary penalty because of the corporation's financial circumstances but the discounted penalty has a tendency to trivialise the offence, the additional penalty of a publicity order may help achieve the objective of expressing the community's reprobation for the corporation's wrongdoing.
- Where the corporation has a poor record of compliance with the law, or has demonstrated an inadequate corporate response to past breaches, such as failing to undertake internal disciplinary action or to rectify poor standard operating procedures.⁴⁶ A publicity order under these circumstances may put pressure on the corporation to take rehabilitative steps that should prevent it from re-offending. It may also be used in

45. For the suggestion of judicial review of corporate advertising during the publicity sanction period, see A Cowan, "Scarlet letters for corporations? Punishment by publicity under the new sentencing guidelines" (1992) 65 *Southern California Law Review* 2387 at 2418-2419.

46. B Fisse and J Braithwaite, *The impact of publicity on corporate offenders* (State of New York Press, New York, 1983) at 307-308.

conjunction with a probation order as a means of ensuring compliance with the terms of the probation.⁴⁷

- When the corporation's customers, creditors and shareholders should be informed as to the violation, or when news coverage has been, or is likely to be, insufficient.⁴⁸

11.33 The decision to impose this sanction will largely depend on the objectives of the particular sentence, the seriousness of the offence and the circumstances of the convicted corporation. For example, in a submission to the Commission, the Australian Taxation Office wrote that it "fully supported" the introduction of publicity orders, but added that repayment of any tax avoided or evaded should also be required.⁴⁹ It is unnecessary for the legislation to spell out the situations or set criteria as to when a publicity order might be used. This must be left to the discretion of the court.

47. A Cowan, "Scarlet letters for corporations? Punishment by publicity under the new sentencing guidelines" (1992) 65 *Southern California Law Review* 2387 at 2394.

48. Cowan at 2414.

49. Australian Taxation Office, *Submission* at 8.

12. Reparation

- New South Wales provisions
- Restitution for groups of victims
- Conclusion

12.1 The term “reparation” denotes both compensation and restitution. Restitution, in the narrowest sense, means the restoration of an item of property to its lawful owner. It is often used more broadly however, to include compensation, which is when an offender makes good the damage that results from the commission of a crime.¹ Reparation requires the offender to indemnify the victim for the injury caused as a result of the offender’s criminal conduct.

12.2 Reparation, by linking punishment to the victim’s need for restitution or compensation, rather than to the gravity of the offender’s conduct, has traditionally posed a philosophical challenge to the idea that punishment is imposed for the breach of the State’s criminal law.² For this reason, reparation has more commonly been regarded as an adjunct to the options available to the courts when imposing punishment on an offender.³ This is qualified to some extent in recent years by the incorporation of concerns about victims into the statutory law of New South Wales.⁴

12.3 Matters have progressed further in the United States where, the court must, whenever practicable order restitution as part of an increasing move to recognise victims’ concerns and victims’ needs.⁵ Legislation in that jurisdiction allows courts to order restitution in addition to, or in the case of misdemeanours, in lieu of, any other penalty⁶ and the court is required to consider “the amount of the loss sustained by each victim as a result of the offense”.⁷ Restitution can be a sentencing option, either by itself, or ancillary to, or in conjunction with, other sanctions. For example, the United States Sentencing Guidelines allow for restitution to be imposed as a stand-alone order in certain circumstances, but also to be imposed as a term of a probation order,⁸ including a remedial order, or a community service order.⁹

1. Parliament of Victoria, Law Reform Committee, *Restitution for victims of crime: interim report* (PP 54, 1993) at xv and 13.

2. See NSWLRC DP 33 at para 10.27-10.30.

3. See, for example, *Criminal Procedure Act 1986* (NSW) s 126; *Crimes Act 1914* (Cth) s 21B(1); *Penalties and Sentences Act 1992* (Qld) s 35(2); *Sentencing Act 1995* (WA) s 110(1). See also NSWLRC DP 33 para 3.21, 10.27-10.30; Report 79 para 13.2.

4. See para 14.10.

5. F L Rush, “Corporate probation: invasive techniques for restructuring institutional behavior” (1986) *Suffolk University Law Review* 33 at 60.

6. 18 USC §3663(a)(1)(A).

7. 18 USC §3663(a)(1)(B)(i)(I).

8. United States Sentencing Commission, *Guidelines manual* (2002) §8B1.1, Commentary.

9. United States Sentencing Commission, *Guidelines manual* (2002) §8D1.1(a)(1).

12.4 The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power also relevantly contains the following provisions:

8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.

9. Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.¹⁰

NEW SOUTH WALES PROVISIONS

12.5 Provisions in New South Wales deal with both restitution and compensation of victims.

- Section 126 of the *Criminal Procedure Act 1986* (NSW) provides for the restitution of property stolen, embezzled or received by an offender in contravention of the Act. It simply supplies a means of restoring property to its rightful owner.
- The *Victims Support and Rehabilitation Act 1996* (NSW) provides for compensation to victims. It allows a court, upon conviction, to order that the offender pay up to \$50,000 to a victim for injury or loss arising from “an offence for which the offender has been convicted”.¹¹

Both provisions can be applied in situations where there are corporate offenders and individual, identifiable victims.¹² As such, the Commission is of the view that no recommendation needs to be made with respect to restitution for individual identifiable victims.

10. United Nations, *Declaration of basic principles of justice for victims of crime and abuse of power* adopted by General Assembly resolution 40/34 (29 November 1985).

11. *Victims Support and Rehabilitation Act 1996* (NSW) s 71 and s 77B. These provisions are generally intended to cover victims of crime (including property crime) rather than victims of violent crime who are compensated through the Victims Compensation Tribunal: see NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 18 November 1987, 2nd Reading, the Hon T Sheahan, Attorney General, at 16272.

12. This is because only identifiable victims are entitled to compensation: *Victims Support and Rehabilitation Act 1996* (NSW) Pt 4. See also United States Sentencing Commission, *Guidelines manual* (2002) §5E1.1.

RESTITUTION FOR GROUPS OF VICTIMS

12.6 Because of the nature of some corporate activities, corporate offences do not always involve readily identifiable victims for the purposes of achieving restitution. For example, in the case of certain environmental offences, such as pollution, the harm is sometimes spread over a large group of people and may even be said to encompass the “community”.¹³ In some cases, the victims may not even be aware of the offence. This is also the case with respect to certain trade practices offences where the harm, for example, in the form of increased prices, is spread over a large number of consumers.¹⁴

12.7 Where the harm is spread widely, or where victims cannot be readily identified, restitution can be incidentally achieved by some of the other sentencing options that are dealt with in this Report. For example, restitution can be ordered as part of a correction order or achieved through the imposition of community service orders. However, if imposed as a sole condition of a probation order, restitution might take the emphasis away from structural reform or rehabilitation, which is understood to be the primary aim of such an order in relation to corporations.¹⁵ Some victims may also be able to recover losses as part of a group by way of representative proceedings.¹⁶

The position in the United States

12.8 The United States Federal Sentencing Guidelines for Organisations set out three ways of remedying the harm caused by corporate offenders:

- restitution orders;
- remedial orders; and
- community service orders.¹⁷

13. This can be seen as analogous to drug offences in the United States which, while not involving identifiable victims, may result in the court ordering “community restitution”: United States Sentencing Commission, *Guidelines manual* (2002) §5E1.1(d).

14. See F L Rush, “Corporate probation: invasive techniques for restructuring institutional behavior” (1986) *Suffolk University Law Review* 33 at 62.

15. See C A Wray, “Corporate probation under the new organizational sentencing guidelines” (1992) 101 *Yale Law Journal* 2017 at 2038.

16. For example, in the Federal Court: *Federal Court of Australia Act 1976* (Cth) Pt 4A, *Federal Court Rules 1979* (Cth) Order 73; in the Supreme Court of NSW: *Supreme Court Rules 1970* (NSW) Pt 8 r 13. See also *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398.

17. See A Geraghty, “Corporate criminal liability” (2002) 39 *American Criminal Law Review* 327 at 341-342.

Restitution is mandatory to compensate fully the victims of certain crimes listed in the Guidelines. However, a restitution order is not mandatory when the corporation has already provided full compensation to its victims, or when the large number of victims or the complexity of the factual issues to be determined, would unnecessarily delay the sentencing process. Sentencing courts can also make payment of restitution part of a probation order.¹⁸

12.9 A remedial order, which may be imposed when a restitution order does not sufficiently address a victim's injuries, may require the corporation "to remedy the harm caused by the offense and to eliminate or reduce the risk" of future harm from the offence. A clean-up order for an environmental violation is one example of a remedial measure.¹⁹

12.10 A court may also order community service where such a remedy is "reasonably designed to repair the harm caused by the offense". The commentary to the Guidelines observes that community service may be an "efficient" means of remedying any harm in cases where the corporate offender "possesses knowledge, facilities, or skills that uniquely qualify it to repair damage caused by the offense".²⁰

12.11 It has been said that a community service order should be used when victims cannot be readily identified due to the widespread nature of the harm, or because of a delay in the manifestation of the injury. Among other things, community service orders avoid the administrative difficulty of identifying all the victims.²¹

The position in New South Wales

12.12 Existing New South Wales legislation provides the courts with the necessary means to achieve restitution in respect of some corporate offences. For example, the *Protection of the Environment Operations Act 1997* (NSW) enables courts to:

- order compensation if a person suffered loss or damage to property as a result of the offence or if that person has incurred costs and expenses in preventing or mitigating the loss or damage;

18. United States Sentencing Commission, *Guidelines manual* (2002) §8B1.1.

19. United States Sentencing Commission, *Guidelines manual* (2002) §8B1.2 and Commentary.

20. United States Sentencing Commission, *Guidelines manual* (2002) §8B1.3 and Commentary.

21. M L Howard, "Charitable contributions as a condition of federal probation for corporate defendants: a controversial sanction under new law" (1985) 60 *Notre Dame Law Review* 530, especially at 546-547.

- make “orders for restoration and prevention” with the aim to “prevent, control, abate or mitigate any harm to the environment caused by the commission of the offence” or to “make good any resulting environmental damage”; and
- order that the corporation undertake community service.²²

These provisions are consistent with the United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* which relevantly provides:

In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.²³

CONCLUSION

12.13 The Commission is of the view that no specific provision need be made for the courts to order corporations to make restitution. This is because restitution is currently possible in New South Wales in the case of identifiable individual victims, and may also be achieved incidentally, especially in relation to broader categories of victims, by several of the other proposed alternative sanctions and orders (particularly community service orders). Such other orders may be made in circumstances where restitution is appropriate and can involve not only compensation for particular victims but could also involve such things as remedial work designed to compensate a broader range of victims or particular parts of the community.

12.14 Any changes to the law relating to groups of victims could be equally applicable to all victims, not just victims of corporate offenders, and should, therefore, be considered in that broader context. Any further development in respect of individuals or groups of victims should take place within the context of the developing law in relation to victims.

22. *Protection of the Environment Operations Act 1997* (NSW) s 245, s 246, s 250(1)(c).

23. United Nations, *Declaration of basic principles of justice for victims of crime and abuse of power* adopted by General Assembly resolution 40/34 (29 November 1985) Art 10.

13.

A comprehensive sentencing regime

- Jurisdictional limits
- Duration of orders
- Supervising performance
- Enforcement

13.1 In recommending a comprehensive sentencing regime that applies to corporate offenders, there will necessarily be a degree of overlap between various provisions. The overlap between the various possible orders has already been noted in relation to the form of the orders and their intended outcome.¹ However, another significant area of overlap occurs in relation to various “machinery” provisions, for example, provisions relating to jurisdictional limits, duration of orders, supervision of performance and enforcement. Separate provision for each of these issues in relation to each of the possible orders would introduce an unnecessary level of complexity. As such, the following recommendations are intended to apply equally to the sentencing options proposed in relation to correction orders, disqualification, community service orders, and publicity orders (to the extent that they are required to be carried out by the corporation itself). The recommendations cannot apply to orders which require action solely by a person or body other than the corporation, that is, orders for the dissolution of a corporation and some publicity orders (where the court requires a third party to undertake the publicity), because the common provisions recommended below relate to orders that are essentially about making corporate offenders do or not do certain things.

JURISDICTIONAL LIMITS

13.2 Jurisdictional limits, or limits on the amount of penalty, are already in place generally in the New South Wales sentencing regime. For example, fines, when provided for expressly, are set as maximum amounts so that a court cannot impose a fine exceeding the statutory upper limit. In cases where imprisonment is the only penalty, the higher courts² may impose a fine not exceeding 2,000 penalty units, while other courts may impose a fine not exceeding 100 penalty units.³

13.3 Because some of the alternative sentencing options recommended in the preceding chapters may have serious financial implications for corporations in a way not comparable to the effect of equivalent orders on individual offenders, it is necessary to establish jurisdictional limits that take this into account. Jurisdictional limits are already in place in relation to some orders. For example, the *Occupational Health and Safety Act 2000* (NSW) prevents Local Courts from imposing remedial orders in cases where the cost of complying with the order exceeds the maximum amount for which

1. See para 5.20.

2. Supreme Court, Court of Criminal Appeal, Land and Environment Court, Industrial Relations Commission and District Court: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 16(a).

3. A penalty unit is currently set at \$110: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 16(b).

the General Division of a Local Court has jurisdiction.⁴ The jurisdiction of the General Division of a Local Court is currently \$40,000.⁵ Another example of a limitation in the law of New South Wales may be found in the *Young Offenders Act 1997* (NSW) where any sanctions resulting from a youth justice conference cannot be “more severe than those that might have been imposed in court proceedings for the offence concerned”.⁶

13.4 The chief concern is that the costs of carrying out some alternative orders, for example, community service, publicity and correction orders, may far exceed the maximum fine set for the offence in question. Indeed concerns have been expressed about the potential for such orders to circumvent the upper limits of the fine set by Parliament.⁷ The fine set by Parliament is intended to reflect the community’s view of the seriousness of the offence in question and the imposition of penalties that may have the effect of far exceeding the limit of the fine may be seen as arbitrary and offending against the principle of proportionality.⁸ One commentator has suggested that the law should provide that the maximum cost of community service, including the cost of any other penalty imposed, should not exceed the maximum amount of the fine applicable to the offence for which the order is made.⁹ To do otherwise would leave open the possibility of almost unlimited punishment in some cases. This Report has recommended the adoption of a general statute providing a comprehensive sentencing regime for corporations. This recommendation cannot itself become the vehicle for penalty escalation. The Commission’s view is that the fine levels currently in existence should be a ceiling for punishment as they represent the Parliament’s (and hence the community’s) view of the gravity of the various offences.

RECOMMENDATION 15

The cost to a corporation of carrying out any sentencing orders together with the cost of any fine should not exceed the maximum amount of the fine applicable to the offence.

In any case, a Local Court may not impose orders the cost of which exceeds the maximum amount for which the General Division of a Local Court has jurisdiction.

4. *Occupational Health and Safety Act 2000* (NSW) s 116(3).

5. *Local Courts (Civil Claims) Act 1970* (NSW) s 12.

6. *Young Offenders Act 1997* (NSW) s 52(6)(a).

7. J Gobert, “Controlling corporate criminality: penal sanctions and beyond” [1998] 2 *Web Journal of Current Issues*.

8. NSWLRC DP 33 at para 3.35.

9. B Fisse, “Sentencing options against corporations” (1990) 1 *Criminal Law Forum* 211 at 245.

DURATION OF ORDERS

13.5 Given the wide variety of possible orders and their diverse purposes and effects, it is not desirable to impose too rigid a restriction as to the timeframes in which such orders will operate. In the case of orders aimed at preventing specific corporate activities, for example, polluting a river, it may be necessary that such orders remain effective for a considerable period of time. In the case of orders requiring remedial work, a corporation may need a substantial period of time to comply with the order's terms, for example, where an order requires extensive environmental remediation work to be carried out. In this regard, the adoption of provisions similar to that contained in the *Protection of the Environment Operations Act 1997* (NSW), which simply allows the court to fix a period for compliance that "the court considers necessary or expedient for enforcement of the order",¹⁰ has its attractions.

13.6 The South Australian Criminal Law and Penal Methods Reform Committee flagged the issue of the period for which a preventive order "might reasonably remain in effect",¹¹ but did not arrive at a conclusion.

13.7 Some form of upper limit is necessary to ensure that the corporation complies within a reasonable time. A maximum time limit should be imposed for orders given in the Local Courts given their generally restricted jurisdiction. In all other jurisdictions however, there should be a presumption in favour of a maximum time limit, with the possibility of the courts going beyond that where there is good reason.

13.8 The time limits on various court orders with respect to individual offenders are not, at present, uniform. For example, good behaviour bonds must not exceed five years.¹² However, when entered into as part of a conditional discharge or suspended sentence, bonds cannot exceed two years.¹³ The *Trade Practices Act 1974* (Cth), which also applies to corporate offenders, allows for a probation period of no longer than three years.¹⁴ The United States Sentencing Commission on the other hand, requires a minimum period of one year for felonies and a maximum period of five years for all offences.¹⁵

10. *Protection of the Environment Operations Act 1997* (NSW) s 250(2).

11. Criminal Law and Penal Methods Reform Committee of South Australia, *The substantive criminal law* (4th Report, 1977) at 360.

12. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9(2).

13. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(1)(b) and s 12(1).

14. *Trade Practices Act 1974* (Cth) s 86C(2)(b). This accords with a recommendation of the ALRC: Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974* (Report 68, 1994) at para 10.10.

15. United States Sentencing Commission, *Guidelines manual* (2002) §8D1.2(a).

13.9 In the view of the Commission, a period of less than three years should be appropriate to orders issued by a Local Court. A general period of less than three years should also be sufficient to allow for compliance with orders issued by most other courts. However, these courts should be able to provide reasons for issuing an order that has effect for longer than three years.

13.10 Most orders need only have effect so long as they are necessary to ensure that the corporation carries out their terms. The proposal of the Australian Law Reform Commission, that an order can be “discharged upon proof by the contravener of satisfactory compliance”, therefore has merit.¹⁶

RECOMMENDATION 16

A court may fix such a period as it considers necessary or expedient for carrying out the terms of an order, subject to the following:

- (a) orders issued by Local Courts shall have effect for a maximum period of 3 years;
- (b) orders issued by higher courts shall have effect for a maximum period of 3 years, except when the court considers there is good reason for a longer period (and has provided reasons in writing);
- (c) any order may be discharged at any time before the time limit fixed by the court when the corporation provides proof of satisfactory compliance.

SUPERVISING PERFORMANCE

13.11 A well-established system currently exists for the purpose of supervising individuals who are subject to alternative sentencing options. For example, probation officers, employed by the Probation and Parole Service (a division of the Department of Corrective Services), supervise offenders who are subject to probation orders and home detention orders. The Probation and Parole Service also administers the Community Service Orders scheme. The Probation and Parole Service, which deals with individual offenders, cannot currently be expected to undertake the professional supervision that may be required in the case of orders made against corporate offenders.

13.12 The type of supervision required for each corporate offender will depend on the circumstances of the case. For example, there have been proposals in both the US and Australia for particular professionals or groups of professionals, such as accountants, auditors, audit committees,

16. ALRC Report 68 at para 10.10.

special counsel or corporate lawyers to supervise organisational reform orders.¹⁷ The New South Wales Land and Environment Court recently ordered a corporation convicted of water pollution to carry out specified projects for the restoration the environment in consultation with representatives of Charles Sturt University and the Macquarie River Care Bathurst Inc.¹⁸

13.13 The courts should be given a wide discretion to ensure the management, control, administration and supervision of their orders. In some cases it may be possible for the court to supervise the probation, for example, by requiring regular reporting by the corporation. However, courts may not have the time and/or other resources to ensure that corporations are complying with their orders. The system should therefore be flexible enough to allow the appointment of a suitable person or persons to supervise and/or report on a corporation's compliance with a sentencing order. Where appropriate, a court should be able to appoint:

- a relevant regulatory agency to monitor compliance with some of the orders; or
- a suitable person or organisation with relevant expertise to monitor compliance.

Where appropriate, the courts should also have the power to order regular unannounced audits to ensure compliance with relevant orders.

13.14 It should also be possible, in appropriate circumstances, for a court to make orders that a corporation pay the costs of supervision. Although some would argue that, in almost all cases, corporations should pay the costs of their own rehabilitation,¹⁹ there may be circumstances where it is not appropriate for the corporation to meet the costs of supervision, for example, where the costs place undue hardship on the corporation or lead to undesirable spillovers.²⁰

17. American Bar Association, *Standards for criminal justice* (3rd edition), 18.2.8(a)(v); J C Coffee, "No soul to damn: no body to kick': an unsensationalized inquiry into the problem of corporate punishment" (1981) 79 *Michigan Law Review* 386 at 455; Australian Law Reform Commission, *Sentencing: penalties* (Discussion Paper 30, 1987) at para 297. See also B Fisse, *Sanctions against corporations: economic efficiency or legal efficacy?* (Sydney University, Transnational Corporations Research Project Occasional Paper No 13, 1986) at 21.

18. *Environment Protection Authority v Simplot Australia Pty Ltd* [2001] NSWLEC 264.

19. S Box, *Power, crime, and mystification* (Tavistock Publications, London, 1983) at 72.

20. Compare the proposal of the ALRC Report 68 at para 10.10; and also the optional probation condition in United States Sentencing Commission, *Guidelines manual* (2002) §8D1.4(c)(4). See the general discussion on "spillover" at para 6.8-6.11.

RECOMMENDATION 17

Courts should have a wide discretion to order the management, control, administration and supervision of their sentencing orders, including the appointment of suitable persons or organisations to supervise and/or report on a corporation's compliance.

Courts should have the power to order that the corporate offender pay the costs of the supervision.

ENFORCEMENT

13.15 A system that includes alternative sentencing orders must also have mechanisms in place for dealing with offenders who fail to adhere to the terms of their orders. In some respects, the question of dealing with corporations who fail to adhere to the terms of their orders is more difficult than dealing with individual offenders, because the ultimate sanction of imprisonment is not available. Options available for dealing with corporations that breach an order include:

- making the breach an offence that attracts the imposition of a further penalty (usually a fine);
- allowing proceedings against the corporation for contempt of court; and
- requiring that the matter be returned to court so that the order can be changed or the offender re-sentenced.

Offence attracting further penalty

13.16 Current provisions making it an offence not to comply with a sentencing order include those in:

- the *Protection of the Environment Operations Act 1997* (NSW), which make failure to comply with certain orders (including orders “for restoration and prevention” and publicity orders) an offence and impose a maximum penalty on corporations of \$120,000 for each day the offence continues;²¹ and
- the *Occupational Health and Safety Act 2000* (NSW), which make it an offence to fail to comply with various orders (including publicity orders and orders to carry out a specified project for the general improvement of occupational health, safety and welfare).²²

21. *Protection of the Environment Operations Act 1997* (NSW) s 251.

22. *Occupational Health and Safety Act 2000* (NSW) s 117. The penalty is 1,000 penalty units (\$110,000) for first time offenders and 1,500 penalty units (\$165,000) for repeat offenders. This provision also applies to other non-fine orders that a court may impose for offences under the Act.

Contempt of court

13.17 Another option, in situations where the threat of re-sentencing is insufficient to ensure compliance, is to make breach of an order of the court punishable by contempt proceedings. The *Environment Protection Act 1970* (Vic) leaves open the possibility that an offender who fails to comply with certain orders (including publicity orders and orders to carry out a project for the restoration and enhancement of the environment) may be found to be in contempt of court. The statute makes no provision as to the penalty for contempt, but at common law, there is no limit to the amount of fine that may be imposed. The Act also authorises the Environment Protection Authority to take the following courses of action when a offender is found to be in contempt of court:

- do anything that is necessary or expedient to carry out any action that remains to be done under the order and that it is still practicable to do;
- publicise the failure of the person to comply with the order; and
- recover any cost it incurs in taking these actions.²³

13.18 In the United States, it seems to be accepted, at least in the case of individual offenders, that the availability of harsh penalties on re-sentencing is sufficient to ensure compliance with probation orders. However, since the ultimate sanction on re-sentencing – imprisonment – is not available with respect to corporate offenders, it has been suggested that the availability of contempt proceedings may achieve a greater level of compliance.²⁴

13.19 A significant disadvantage of allowing the common law on contempt to deal with such situations is the uncertainty of the penalty. However, the additional remedies in the Victorian statute are useful when it is necessary to implement some of the terms of an order, (for example, publicity or community service), after the corporation has failed to do so.

Re-sentence or change the existing order

13.20 The Australian Law Reform Commission, in its report on compliance with the *Trade Practices Act 1974* (Cth), recommended that when corporations fail to comply with corporate probation orders, the court should be able to:

- continue or extend the period of corporate probation subject to such additional requirements as the court may consider necessary; or

23. *Environment Protection Act 1970* (Vic) s 67AC(5) and (8).

24. R Gruner, "To let the punishment fit the organizations: sanctioning corporate offenders through corporate probation" (1988) 16 *American Journal of Criminal Law* 1 at 78.

- re-sentence the corporation, taking into account the extent to which the corporation may have complied with the probation order before the default.²⁵

13.21 The United States Sentencing Commission's Guidelines suggest that when a corporation breaches a condition of probation:

the court may extend the term of probation, impose more restrictive conditions of probation, or revoke probation and resentence the organization.²⁶

13.22 Our preferred approach is to bring the corporate offender back before the court when the terms of an order are breached so that the court may then:

- continue or extend the term of the order;
- impose additional or more restrictive conditions on the order; and
- revoke the order(s) and re-sentence the corporation.²⁷

On re-sentencing the court should be able to take into account the extent to which the corporation complied with the order(s) before its ultimate failure to comply.²⁸

13.23 Making the breach of an order an offence should not be necessary so long as the option to revoke the order and re-sentence the corporation is available. This approach is consistent with recommendations in our 1996 sentencing report in relation to community service orders, as well as consistent with current provisions with respect to other non-custodial sentences.²⁹

13.24 In most cases, re-sentencing will result in a fine being imposed. This is effectively the same result that would be achieved if the breach of an order were made a separate offence attracting the penalty of a fine only. However, the flexibility of imposing another combination of penalties to achieve the purposes of sentencing is preserved for appropriate cases.

25. ALRC Report 68 para 10.13.

26. United States Sentencing Commission, *Guidelines manual* (2002) §8D1.5.

27. See United States Sentencing Commission, *Guidelines manual* (2002) §8D1.5; ALRC Report 68 at para 10.13.

28. See ALRC Report 68 at para 10.13.

29. NSWLRC Report 79 at para 5.13-5.15 and Recommendation 22. *Community Service Orders Act 1979* (NSW) s 23(1) was not re-enacted when the *Community Service Orders Act 1979* (NSW) was repealed by the *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW).

RECOMMENDATION 18

Upon breach of an order, the corporation should be brought before the sentencing court to be re-sentenced. The court may do any of the following:

- (a) continue or extend the term of the order;
- (b) impose additional or more restrictive conditions on the order; and
- (c) revoke the order(s) and re-sentence the corporation.

Responsibility for returning the offender to court

13.25 There may be a problem in finding a person who will be responsible for taking a corporation back before the court for breach of a sentencing order. In most cases it is assumed that the original “prosecutor” will maintain a continuing interest in enforcement and compliance. However, this problem is not unique to the sentencing of corporations. In some cases it may be desirable for the court to nominate who will be responsible for monitoring compliance and notifying the court of any breaches.³⁰ No change in the law is necessary to allow this to happen.

Ancillary orders

13.26 The Commission adopts the provisions as to ancillary orders contained in the *Environment Protection Act 1970* (Vic)³¹ as being desirable in some cases when a corporation has been returned to a court for resentencing for failure to carry out the terms of an existing order.

RECOMMENDATION 19

The court may authorise a relevant regulatory agency to:

- (a) do anything that is necessary or expedient to carry out any action that remains to be done under the order;
- (b) publicise the failure of the corporation to comply with the order; and
- (c) recover from the corporation any cost the agency incurs in taking these actions.

Enforcing fines

13.27 In New South Wales there are special provisions for enforcing fines contained in the *Fines Act 1996* (NSW). The Act provides a number of ways for dealing with offenders who do not pay their fines, including, ultimately,

30. *Australian Industrial Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Australia* (2001) 188 ALR 653 at para 17.

31. *Environment Protection Act 1970* (Vic) s 67AC(5). See para 13.17.

imprisonment. Other options include driver licence or vehicle registration suspension or cancellation; civil enforcement, including seizure of property and garnishment; and community service orders.³² These enforcement mechanisms (other than community service orders and imprisonment) also apply to fines payable by corporations.³³ However, as already noted,³⁴ such options as may apply to corporations may not be feasible, for example, when the corporation is part of a corporate group. Some of the sentencing options proposed in this Report should be incorporated into the *Fines Act* so that they can apply to corporations which default in the payment of fines. These options should include orders for incapacitation, both disqualification and dissolution (to take the place of the ultimate sanction of imprisonment for individuals), community service orders and correction orders.

RECOMMENDATION 20

Penalties that apply specifically to corporations should be included in the enforcement procedures in the *Fines Act 1996* (NSW), namely orders for incapacitation, community service orders and correction orders.

Enforcement by punishing individuals

13.28 In the United States, general provision has been made for the punishment of persons who impede “the performance of duties under any order, judgment, or decree of a court of the United States”.³⁵ Presumably, this would extend to the acts of individual corporate officers and employees who impede compliance with the terms of corporate probation orders.³⁶

13.29 The Commission is of the view that a provision should also be included making it an offence for individual corporate officers and employees to impede compliance with the terms of any court order.

RECOMMENDATION 21

It should be an offence for individual corporate officers and employees to impede compliance with the terms of any order.

32. *Fines Act 1996* (NSW) Pt 4.

33. *Fines Act 1996* (NSW) s 98.

34. See para 6.12.

35. 18 USC §1509.

36. R Gruner, “To let the punishment fit the organization: sanctioning corporate offenders through corporate probation” (1988) *American Journal of Criminal Law* 1 at 79.

14. Procedural issues

- Pre-sentence reports
- Victims
- Requiring officers of the corporation to be present at sentencing

PRE-SENTENCE REPORTS

The current law

14.1 Pre-sentence reports are normally prepared in relation to individual offenders. In either oral or written form, they contain information prepared for a court about an offender's social background and other matters relevant to sentencing. Such reports aim to assist the court in its determination of an appropriate sentence.

14.2 In New South Wales, officers of the Probation and Parole Service provide pre-sentence reports upon the court's request. Pre-sentence reports fall into two general categories:

- those prepared during a pre-sentence adjournment, which are written and provide considerable detail; and
- those produced at court at short notice, which are either oral or in writing and concentrate on the availability of particular sentencing options and the offender's suitability for them.

14.3 There is no general legislative backing for pre-sentence reports in New South Wales, although sentencing legislation does require the Probation and Parole Service to prepare assessment reports before a court can order periodic detention, home detention or community service.¹ A court will usually order a pre-sentence report when an offender's legal representative requests one. However, the need for such a report will depend on the circumstances of the case. It is for the sentencing court to determine whether it is appropriate to defer sentencing pending the production of a pre-sentence report.² The information contained in pre-sentence reports can sometimes be presented in other ways. For example, much of the information can be compiled and presented by the offender's legal representative before the conclusion of the trial. In Report 79, the Commission recommended against compelling the production of pre-sentence reports in all cases.³ There is currently no requirement that a pre-sentence report be produced prior to the sentencing of a corporation.

Submissions to the Issues Paper

14.4 In Issues Paper 20, the Commission asked whether a sentencing court should be entitled or required to consider a pre-sentence report in determining an appropriate sentence for a corporate offender. The Commission also asked what information would be relevant to include in such a report.

1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 66, s 68, s 69, s 80, s 81, s 86, s 88, s 89.

2. *R v Majors* (1991) 27 NSWLR 624.

3. NSWLRC Report 79 at para 2.5.

14.5 Submissions to Issues Paper 20 generally supported the provision of relevant information about a corporate offender prior to sentencing. Suggestions for the information to be supplied in a pre-sentence report included:

- prior convictions of the corporation;⁴
- whether new compliance systems have been implemented to prevent a future occurrence of the same behaviour (and an independent audit of such systems);⁵
- whether existing effective compliance systems are already in place to prevent and detect criminal activity;⁶
- previous positive and negative behaviour of the corporation;⁷
- any attempts at reparation;⁸ and
- prior convictions of high-level personnel of the corporation.⁹

Providing information to the court

14.6 Much of the information identified in the previous paragraph does not need to be provided by way of a formal pre-sentence report. For example, the prosecution would normally tender details of previous convictions and negative behaviour of the corporation, while the defence would usually tender details of positive behaviour, such as the establishment of compliance programs or payment of compensation. It is then for the court to assess the relevance of the material presented by the parties.

14.7 However, issues such as the effectiveness of compliance programs and the management of a corporation's finances might need to be the subject of a report from an expert. In such cases where some form of professional assessment of the corporation's present situation is required, the sentencing court should be able to request a report, similar to a pre-sentence report, from a relevant expert.

14.8 The Probation and Parole Service, which deals with individual offenders, cannot currently be expected to undertake the professional assessment required in the cases mentioned above. The use of experienced professional accountants, auditors or corporate lawyers, where required by the court, has already been suggested for supervising corporations subject

4. Australian Taxation Office, *Submission* at 10.

5. Australian Stock Exchange, *Submission* at 4; J Braithwaite, *Submission* at 1.

6. United States Sentencing Commission, *Guidelines manual* (2002) §8C2.5(f).

7. Australian Taxation Office, *Submission* at 10; H Glasbeek, *Seminar*.

8. J Braithwaite, *Submission* at 1.

9. Australian Taxation Office, *Submission* at 10. See also United States Sentencing Commission, *Guidelines manual* (2002) §8C2.8(a)(6).

to probation.¹⁰ The type of professional engaged will depend on the type of assessment required. Any provisions should be flexible enough to allow the appointment of a suitable person or persons to prepare a report on the corporation for the benefit of the sentencing court. It should also be possible, where appropriate, for the court to make orders that the corporation pay the costs of preparing the report. This is also consistent with the recommendations concerning the costs of supervising sanctions.¹¹

14.9 While there is no need to provide a list of the type of information that should be supplied in a pre-sentence report, special provision will be required to allow access to and consideration of the criminal records of high-level personnel of a corporation. This is because criminal records of high-level personnel may, in the context, be relevant to the sentencing court but the courts may normally only consider the criminal records of the persons being sentenced.¹²

RECOMMENDATION 22

In cases where professional assessment of a corporation's characteristics is required, a court should have the power to appoint a suitable person or persons to prepare a report on the corporation.

The Court should also be able to order that the corporation pay the costs of preparing the report.

The Court should be able to consider all relevant information prior to the sentencing of a corporation including, where relevant, the criminal records of its high-level personnel.

VICTIMS

14.10 There has been a move in recent years to accommodate the legitimate concerns of victims in the criminal justice system.¹³ For example, in New South Wales there are now provisions relating to victims' rights,¹⁴ victims' compensation¹⁵ and victim impact statements.¹⁶ Further, the

10. See para 13.11-13.13.

11. See para 13.14, Recommendation 17.

12. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(d) s 21A(3)(e).

13. On the victims' movement see NSWLRC DP 33 at para 11.4-11.13. See also, for example, E Erez, L Roeger and F Morgan, *Victim impact statements in South Australia: an evaluation* (South Australia, Office of Crime Statistics, Research Report, Series C, No 6, 1994) at 2-4.

14. *Victims Rights Act 1996* (NSW).

15. *Victims Support and Rehabilitation Act 1996* (NSW) Pt 4. See also para 12.5.

16. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26-30.

purposes of sentencing contained in the *Crimes (Sentencing Procedure) Act 1999* (NSW) include the recognition of the harm done to the victim of the crime and the community.¹⁷

Who are victims of corporate crime?

14.11 In Australia's criminal justice system, victims of crime are often seen only as victims of personal violence. However, the term "victim" can cover a much broader range of persons. The United Nations' *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* provides:

"Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.¹⁸

14.12 In Australia groups of these victims can be quite large and include such categories as consumers who have been deceived or been sold dangerous products, investors or creditors who have been defrauded, employees who have been killed or injured and persons whose health has been affected by the release of toxic pollutants. In a broader sense the public bear a considerable burden in relation to the costs imposed by some corporate crimes, including the mismanagement of hazardous waste and the breaching of occupational health and safety standards.¹⁹

Victim impact statements

14.13 A victim impact statement (VIS) is, in broad terms, a statement by a victim of crime of the effect of that crime on the victim. The chief aim of a VIS in the sentencing process is to assist the sentencing court in imposing an appropriate sentence in all the circumstances of the case.

The present position in New South Wales

14.14 Sentencing legislation in New South Wales currently allows for the tendering of a VIS to a sentencing court in certain circumstances.²⁰

17. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g).

18. United Nations, *Declaration of basic principles of justice for victims of crime and abuse of power* adopted by General Assembly resolution 40/34 (29 November 1985).

19. P Grabosky, "Crime victims in Australia" in *Australian discussion papers* (Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders, Milan, Italy, 26 August-6 September 1985, Australian Institute of Criminology, 1985) at 82. See also J Gardner, *Victims and criminal justice* (South Australia, Office of Crime Statistics, Research Report, Series C, No 5, 1990) at 4.

20. *Crimes (Sentencing Procedure) Act 1999* (NSW) Pt 3 Div 2.

At present, the tendering of a VIS is limited to situations where the victim has suffered “personal harm”, that is “actual physical bodily harm, mental illness or nervous shock”.²¹

14.15 The current provisions apply to victims who meet the definitional requirements regardless of the identity of the offender. So a person who is physically injured is entitled to tender a VIS (and the VIS may be received in the court’s discretion) even when a corporation has caused the injury.

The value of a VIS

14.16 In Report 79, the Commission recognised that a VIS could be useful in so far as it provides the sentencing court with an indication, which the court may not otherwise have, of the seriousness of the offence.²²

14.17 The current provisions, in dealing only with questions of physical and emotional harm to victims, apply only to a small number of victims of corporate offenders. For example, in the period 1993-2001 only 21 convictions relating to offences against the person²³ were recorded against corporations in New South Wales Local Courts.²⁴

VIS in other jurisdictions

14.18 Other Australian jurisdictions have extended the harm that may be addressed in a VIS beyond personal physical injury. For example, in the Australian Capital Territory, the harm that may be addressed in relation to an indictable offence carrying a penalty of at least 5 years’ imprisonment extends to “economic loss” and “substantial impairment of rights accorded by law”.²⁵ In Victoria a VIS may address “any injury, loss or damage suffered ... as a direct result of the offence”,²⁶ and can be made by another person on behalf of a victim “that is not an individual”.

14.19 In addition to providing for a VIS, Northern Territory legislation provides for the prosecutor to tender a “victim report” to the sentencing court. Victim reports contain “details of the harm suffered by a victim of an offence arising from the offence”.²⁷ Such reports are prepared by the prosecutor in circumstances where an individual’s VIS cannot be produced (because, for example, the victim has refused to prepare a statement, or cannot be found), provided that “there are readily ascertainable details of

21. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26.

22. Report 79 at para 2.15-2.16. See also DP 33 at para 11.38-11.43.

23. *Crimes Act 1900* (NSW) s 35A(1), s 58, s 61, s 61O(2), s 562AB(1); *Dog Act 1966* (NSW) s 6(1).

24. See para 1.24.

25. *Crimes Act 1900* (ACT) s 429AB(4). This provision resulted from recommendations of the Community Law Reform Committee of the Australian Capital Territory, *Victims of crimes* (Report 6, 1993) at para 27-38.

26. *Sentencing Act 1991* (Vic) s 95B.

27. *Sentencing Act* (NT) s 106A.

the harm suffered by the victim ... that are not already before the court as evidence or as part of a pre-sentence report”.²⁸

14.20 The South Australian provisions appear to be the broadest. In addition to providing specifically for a limited form of VIS,²⁹ there also exists a provision that could easily allow the tendering of statements about the effect of corporate offences on groups of victims and various parts of the community:

the prosecutor must, for the purpose of assisting a court to determine sentence for an offence, furnish the court with particulars (that are reasonably ascertainable and not already before the court in evidence or a pre-sentence report) of ... injury loss or damage resulting from the offence.³⁰

14.21 Most relevant New South Wales legislation simply states what matters ought to be taken into account by the sentencing court without suggesting how these matters might be disclosed. For example, the *Protection of the Environment Operations Act 1997* (NSW) provides that one of the matters that a court can consider in imposing a penalty is “the extent of the harm caused or likely to be caused to the environment”.³¹ Such matters could conceivably be brought to the attention of the court by means of a VIS or other victim report prepared by either the victim or a representative of a group of victims.

The need for a VIS for corporate offences?

14.22 The effects of some corporate criminal activities may require quantification. For example, some environmental offences may affect many individual victims, victims who are not readily identifiable, victims who may be identified more readily as a group (for example, a particular community) or even future victims (when the effect of the criminal activity is delayed). The same can be said about some trade practices offences where the harm, in the form of increased prices, is spread over a large number of consumers. In such cases, a VIS in the form of a statement by an individual victim would be either not appropriate, because no individuals can be identified, or not practical, because there may be a large number of victims each suffering only a small amount of harm.

14.23 However, there are a number of arguments against extending the coverage of VIS to include offences of the type more commonly committed by corporations:

28. *Sentencing Act* (NT) s 106B(2).

29. *Criminal Law (Sentencing) Act 1988* (SA) s 7A.

30. *Criminal Law (Sentencing) Act 1988* (SA) s 7(1).

31. *Protection of the Environment Operations Act 1997* (NSW) s 241(1)(a).

- such an extension may have resource implications in the already financially stretched criminal justice system;³²
- many of the offences committed by corporations involve no real victims at all, in that they involve the failure to pay or report certain matters to the government or government agencies (for example, taxation matters); and
- VIS are also not so necessary in addressing property loss and damage, since these may be more readily quantifiable by other means.

14.24 Relevant information concerning property loss and damage can already be obtained by the prosecution and tendered from other sources regardless of whether the offender is an individual or a corporation. No specific provision would appear to be necessary to prescribe the content or form of information that the prosecution can provide to the court in relation to such damage. As already noted, current VIS provisions already deal adequately with offences involving direct personal physical or emotional injury.

REQUIRING OFFICERS OF THE CORPORATION TO BE PRESENT AT SENTENCING

14.25 A corporation cannot be physically present in sentencing proceedings. The question, therefore, arises whether the courts should have the power, when they consider it desirable, to compel representatives of a corporation to attend sentencing proceedings.

14.26 Compelling the attendance of officers or directors of a corporation (whether in all cases or only when the court considers it necessary) may achieve the following aims of sentencing:³³

- **denunciation**, by giving the court a representative to whom it can express the community's disapproval of the corporation's offending behaviour, and also to bring home its seriousness;
- **deterrence**, for example, by officers wanting the corporation to avoid conduct that might lead to the shame and inconvenience of them having to make a public appearance at a sentencing hearing, and also by officers having the orders of the court as to the future conduct of the corporation personally impressed upon them.

Compelling the attendance of officers at sentencing may also overcome some of the theoretical concerns about the value of denouncing corporate

32. See, for example, Community Law Reform Committee of the Australian Capital Territory, *Victims of crimes* (Report 6, 1993) at para 137 and 140.

33. See also J W Barnard, "Reintegrative shaming in corporate sentencing" (1999) 72 *Southern California Law Review* 959 at 964. Compare B Schunemann, "The role of the victim within the criminal justice system: a three-tiered concept" (1999) 3 *Buffalo Criminal Law Review* 33 at 33-34.

offenders, given the view held by some that a corporation is an incorporeal entity that lacks the capacity to suffer moral condemnation.³⁴

Current position in New South Wales

14.27 At common law a court cannot sentence an offender convicted of a felony³⁵ in his or her absence unless the offender has voluntarily absented him or herself from the court.³⁶ The common law position has been altered slightly by legislation, which provides that a Local Court cannot impose a sentence of imprisonment, periodic detention, home detention or community service on an absent offender, or order that an absent offender enter into a good behaviour bond.³⁷ A Local Court also has the power to order an offender's arrest on warrant so that they may be brought before the court for sentencing.³⁸ It is not clear whether the higher courts have the power to require the presence of an offender at a sentencing hearing.

14.28 None of the above provisions apply directly to a corporation given that corporations cannot be physically present in the court for the purposes of sentencing. Since the current laws only apply to the offender, they cannot at present, apply to a representative of a corporation.³⁹ It is noted that some procedures are available to the courts that provide for the attendance of persons at proceedings to give evidence⁴⁰ and, in very limited circumstances, for other purposes.⁴¹ However, there are no express provisions that compel representatives of a corporate offender to attend sentencing proceedings.

United States Sentencing Commission's Guidelines

14.29 Under the United States Sentencing Commission's Guidelines a court, in setting an appropriate fine, must determine the level of culpability

34. See para 3.14.

35. The distinction between felonies and misdemeanours has been abolished in NSW with the result that "in all matters in which a distinction has previously been made between felony and misdemeanour, the law and practice in regard to indictable offences is to be the law and practice [formerly] applicable ... to misdemeanours": *Crimes Act 1900* (NSW) s 580E.

36. *R v Hallogoglu* (1992) 29 NSWLR 67 at 71-72; *R v Cornwell* [1972] 2 NSWLR 1 at 3.

37. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25(1).

38. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25(2).

39. A detailed discussion of the law surrounding the attendance of corporations at legal proceedings may be found in J Clough and C Mulhern, *The prosecution of corporations* (Oxford University Press, Melbourne, 2002) at 57-63.

40. Under subpoena: *District Court Act 1973* (NSW) s 64; *Supreme Court Rules 1970* (NSW) Pt 37.

41. For example, the procedures relating to the production of an inmate "otherwise to take part in any proceedings or matter before any court": *Supreme Court Rules 1970* (NSW) Pt 54 r 5.

of the corporation. Among the factors that the court must have regard to as reducing the culpability of the corporation, are the self-reporting of the offence, cooperation with any investigation and acceptance of responsibility.⁴² The commentary to this provision makes the following statement:

In making [such a determination] the court may determine that the chief executive officer or highest ranking employee of an organization should appear at sentencing in order to signify that the organization has clearly demonstrated recognition and affirmative acceptance of responsibility.⁴³

This has the effect of allowing a sentencing court to require, in its discretion, that the person who performs the job of chief executive officer be present at the sentencing proceeding.⁴⁴ Such an order is said to have a number of positive effects, including:

- impressing upon the officer the seriousness of the corporation's offence;
- showing that the management of the corporation has accepted responsibility for the offence; and
- securing an indication of the corporation's future compliance.⁴⁵

14.30 The provisions in the Guidelines appear to have had their immediate origins in 1989 when a US Federal District Court Judge required the Chief Executive Officer of a polluting corporation to appear in person to enter the corporation's plea of guilty and to accept responsibility on behalf of the corporation for its actions. The predominant motivation for this action appears to have been the deterrence of future corporate crimes.⁴⁶

14.31 However, the provisions in the United States Sentencing Commission's Guidelines have their limitations. First, they only apply to the fixing of fines and, therefore, presumably do not apply to the imposition of alternative sentencing options, such as probation. Secondly, they do not apply to corporations that have been found guilty after trial, since a plea of guilty is generally considered necessary to establish self-reporting of the

42. United States Sentencing Commission, *Guidelines manual* (2002) §8C2.5(g).

43. United States Sentencing Commission, *Guidelines manual* (2002) §8C2.5(g), Commentary n 14.

44. The commentary has effect as an explanation of how §8C2.5(g) should be applied: See United States Sentencing Commission, *Guidelines manual* (2002) §1B1.7.

45. See J W Barnard, "Reintegrative shaming in corporate sentencing" (1999) 72 *Southern California Law Review* 959 at 961-963.

46. T Egan, "Putting a face on corporate crime" *New York Times* (14 July 1989) Section B at 8; "Boss called to face court for pollution" *Los Angeles Times* (9 August 1989) Section A at 2; R G Morvillo, "Corporate plea bargain" *New York Law Journal* (6 February 1990) at 3.

offence, cooperation with investigations or acceptance of responsibility.⁴⁷ Thirdly, they apply only to a person doing the work of a chief executive officer and not to other people who may have a significant impact on the governance of a corporation, for example, directors or the company secretary.

14.32 One American commentator has suggested some changes to make the provision more effective:

- requiring the presence of the person acting as chief executive officer in all cases regardless of whether the corporation pleaded guilty or not; and
- allowing the option of compelling the board of directors to appear at the sentencing.⁴⁸

Both proposals are designed to achieve improved “internal accountability” of corporate offenders.⁴⁹

Introducing attendance provisions in NSW

14.33 There are a number of issues that need to be considered if a provision allowing a court to order the attendance of a corporate officer at sentencing is to be introduced in New South Wales.

14.34 One problem lies in identifying the “chief executive officer” or “highest ranking employee”. Australian corporations law recognises a number of “officers” of a corporation, among them, directors, the secretary and the executive officer.⁵⁰ Directors and secretaries of corporations are easy to identify and have specific tasks to perform under the relevant legislation.⁵¹ An “executive officer” however, is not required for a corporation to operate under the corporations law, and is merely described as “a person who is concerned in, or takes part in, the management of the body (regardless of the person’s designation and whether or not the person is a director of the body)”.⁵² A “chief executive officer” does not appear to be a position recognised in Australian company law, even though chief executive officers are usually readily identified in large corporations.

14.35 In any case, it may not always be desirable for the “chief executive officer” or equivalent to be singled out. For example, the “chief executive officer” may have been recently brought in to reform the corporation, and it might also be the case that other officers of the corporation could be more appropriately targeted as having a more direct personal role in the offence,

47. See J W Barnard, “Reintegrative shaming in corporate sentencing” (1999) 72 *Southern California Law Review* 959 at 961-963.

48. Barnard at 959-1007.

49. Barnard at 964.

50. See *Corporations Act 2001* (Cth) s 82A(1).

51. See, for example, *Corporations Act 2001* (Cth) s 120, s 127, s 129(2), s 188, Pt 2D.4.

52. See *Corporations Act 2001* (Cth) s 9.

or in ensuring that the offence does not happen again. It would therefore be better for the sentencing court to decide which corporate officers would be most effectively targeted depending on the circumstances of the case.

14.36 There are also problems in requiring the attendance of an officer of the corporation in all cases. The attendance of such an officer may not be appropriate in circumstances when, for example, the offence is clearly a one-off occurrence, or the “chief executive officer” or firm does not have a sufficient public profile for any meaningful deterrence to be achieved.

14.37 Another more general argument against the adoption of such provisions is that it may be objectionable in some instances for a person not directly charged with the crime in question to be made to face a sentencing hearing.⁵³ One response to this objection is that the people being targeted may in fact best be able to ensure that the corporation complies with the law in future.

The Commission’s view

14.38 The Commission considers that there are benefits to be gained, in appropriate cases, from making a corporate officer attend in person to receive the sentence of the court on behalf of the corporation. Particular benefits include that it may bring home the seriousness of the corporation’s conduct to the people who are ultimately responsible; provide an appropriate forum for expressing denunciation of the corporation’s conduct; and may also deter future corporate criminal conduct by reason of the prospect of a personal court appearance at sentencing.

14.39 The sentencing court, therefore, should be able to require the presence at a corporation’s sentencing hearing of any or all of the following: directors, company secretary and executive officer. It should be left to the discretion of the judge which, if any, representative of the company should attend the sentencing proceedings in order to achieve one or more of the purposes of sentencing.

RECOMMENDATION 23

The court should be able to require the attendance at the sentencing proceedings of any of the officers of a corporation it considers appropriate in the circumstances.

“Officers of the corporation” include its directors, company secretary and executive officer.

53. See T Egan, “Putting a face on corporate crime” *New York Times* (14 July 1989) Section B at 8.

15.

Penalties imposed on related offenders

- The penalty imposed on the owners of a defendant corporation
- Determining the penalties for closely related corporations
- The Commission's conclusion

15.1 This Chapter examines the relevance in setting the penalty on a corporate offender of any penalty imposed (or to be imposed) on other offenders that are convicted for the same offence, namely:

- the owners of the defendant corporation, where the corporation is owned by one director or by a relatively small number of people, or
- a related corporation (eg, a subsidiary or parent company)

THE PENALTY IMPOSED ON THE OWNERS OF A DEFENDANT CORPORATION

15.2 If the owners of a corporation have been prosecuted and fined for the same offence, or if they are co-defendants with the corporation, an issue that arises is whether or not the fine imposed on the owners is relevant in determining the amount of fine to be imposed on the corporation. This issue is important in the context of a corporation owned by one director or by a relatively small number of people. In such instances, it may be argued that the corporation is the alter ego of its owner-managers and so an appropriate punishment may be achieved by offsetting the fine imposed on the corporation by the amount imposed on its owners. It may be argued that a failure to do so would result in the imposition of a double (and therefore excessive) penalty.

15.3 There is a dearth of New South Wales case law on the issue. In *Gosford City Council v Build Max Developments Pty Ltd*,¹ where the corporation and a director were convicted of the same environmental offence, the NSW Land and Environment Court found the fact that the defendant director was wholly identified with the corporate defendant relevant in setting the penalty for each:

Mr Ciliegi as a Director of the Company is, it seems, wholly identified with the corporate Defendant. As I say, he is now conducting his building development activities through the corporate identity. This seems to me to require regarding the offences against each of the Defendants as requiring application in sentence of the totality principle. That is, it is appropriate to have regard to the totality of culpability reflected in both offences and to apportion responsibility between the corporate Defendant and the individual Defendant.²

15.4 The Court determined the appropriate penalty for the offence to be \$20,000, but instead of imposing the same amount for each defendant, apportioned it between them: \$15,000 for the corporation and \$5,000 for the director.

1. *Gosford City Council v Build Max Developments Pty Ltd* [2000] NSWLEC 224.

2. *Gosford City Council v Build Max Developments Pty Ltd* at [23].

15.5 In the United States, the Federal Guidelines on Sentencing of Organisations provides that the court may offset the fine imposed upon a closely held organisation when one or more individuals, each of whom owns at least 5 percent interest in the organisation, has been fined in a federal criminal proceeding for the same offence for which the organisation is being sentenced. An organisation is “closely held” under the Guidelines when relatively few individuals own it. The Guidelines provide a limit on the amount that can be offset, stipulating that it should “not exceed the amount resulting from multiplying the total fines imposed on those individuals by those individuals’ percentage interest in the organisation”.³

DETERMINING THE PENALTIES FOR CLOSELY RELATED CORPORATIONS

15.6 Where two related corporations are prosecuted, that is, where the first defendant is a wholly owned subsidiary of the second, an issue arises as to whether the penalty imposed on one should be relevant to the determination of the penalty for the other.

15.7 Some occupational safety cases have considered this issue. In *Haynes v CI & D Manufacturing*,⁴ a work-related accident occurred on the premises owned by CI & D Industries Pty Ltd (Industries) and leased to the associated and wholly-owned company CI & D Manufacturing Pty Ltd (Manufacturing). As a result of the accident, an employee of the latter company, the subsidiary, was killed. Both companies were prosecuted and convicted under sections 15 and 16 of the *Occupational Health and Safety Act 1983* (NSW). At sentencing, the Full Court of the Industrial Court of NSW said:

Should the prosecution of closely related companies attract one penalty or two penalties assessed against each company? The evidence available showed that Manufacturing at the time of the accident employed at the Somersby plant about nine workers and that for purposes related to company structure was a company wholly-owned by Industries. The personnel on whom the ultimate responsibility for ensuring the supervision of the employees rested at the time the accident were the same.

We have come to the view on the evidence that the connection between the two companies was so intimate that it is permissible to view the

3. United States Sentencing Commission, *Guidelines manual* (2002) § 8C3.4. The Guidelines give this example: an organisation is owned by five individuals, each of whom has a twenty percent interest; three of the individuals are convicted; and the combined fines imposed on those three is \$100,000. In this example, the fine imposed on the organisation may be offset up to 60 percent of their combined fine amounts, ie, by \$60,000.

4. *Haynes v CI & D Manufacturing* (1995) 60 IR 149; (*No 2*) (1995) 60 IR 455.

offence in a global way. We are of the view that an appropriate penalty in all the circumstances would be a total fine of \$30,000.

...In determining the way in which the totality of the fine should be apportioned, we have decided that Manufacturing and Industries are so clearly linked that each should bear the fine equally – \$15,000 by Manufacturing and \$15,000 by Industries.⁵

15.8 In contrast however, Justice Walton in later case did not seem to agree with what was held in *CI & D*. He observed that the case relied on previous cases that had applied the sentencing principle of totality. This principle requires a judge who is sentencing an offender for a number of offences to ensure that the aggregation of the sentences appropriate for each offence is a just and appropriate measure of the total criminality involved. Justice Walton clarified that this principle operates only in circumstances where a single defendant is convicted of a number of offences: it does not apply where two defendants face different charges. He was of the view that “the approach adopted by the court in *CI & D* does not sit comfortably with the principle of totality ...” because “[w]hilst the charges against the corporations in *CI & D* (and the assessment of penalty) were heard concurrently ... the matter essentially concerned prosecutions for different offences under the Act”. He held further that “the decision in *CI & D* is based upon the unusual circumstances applying in that matter where both defendants had supervisory responsibility for the employees concerned”.⁶

15.9 The two companies in *CI & D* were charged and convicted under separate sections of the *Occupational Health and Safety Act 1983* (NSW) because only one of them was the employer of the victim and as such was liable under one section of the Act (s 15). The other company was liable under another provision of the Act (s 16), for failing to ensure the health and safety of non-employees while they are at the company’s place of work. Hence, even though the two companies were convicted under different provisions of the pertinent Act, their negligence, which gave rise to their criminal prosecution, was closely related. Considering this and the relationship between the two corporations, it may have been legitimate for the court in that case to apportion the fine between the two defendants and avoid the imposition of a “double penalty”.

15.10 The same result was had in a case which involved charges brought against Nicholson Air Services Pty Ltd under s 16 of the *Occupational Health and Safety Act 1983* (NSW) and Agair Development Pty Ltd under s 15 of the Act. Justice Fisher found that the companies belonged to common owners, and further, that the directors and management were the

5. *Haynes v CI & D Manufacturing* (1995) 60 IR 149; (*No. 2*) (1995) 60 IR 455 at 458.

6. *WorkCover Authority of NSW (Inspector Ankucic) v McDonald’s Australia Ltd* (2000) 95 IR 383 at 459.

same. His Honour accepted the agreed position of the prosecutor and the defendant that only one penalty should be fixed in relation to the charges.⁷

THE COMMISSION'S CONCLUSION

15.11 It would appear then, that when setting the penalty for corporate offenders, courts take into account the penalty imposed on the corporation's owners, or a related corporation. The courts' decisions ultimately turn on the facts of the case, with particular attention paid to any existing close relationship between the defendant corporation and its directors, or between two related corporate defendants. In each case, courts weigh the respective culpabilities of the defendants to ensure a proper apportioning of responsibility.

15.12 However, there is uncertainty regarding the ultimate basis of the rule governing this practice. Most judges have relied on the principle of totality.⁸ However, the Commission agrees with Justice Walton that the totality principle is irrelevant in this context. Regardless of their correct bases, however, the rules at common law that allow courts to offset the penalties to be imposed on a corporation and its owners, or between two related corporate defendants, are useful in ensuring the proper apportioning of responsibility and avoiding the imposition of an excessive penalty. The Commission does not think it necessary to make any recommendations for legislation on the matter. The common law is best suited to the further development of these rules and in settling any issues that may arise from them.

7. *WorkCover Authority of NSW v Nicholson Air Services Pty Ltd* (NSW, Industrial Court, No CT1008 and 1009, Fisher P, 8 April 1998, unreported).

8. *Gosford City Council v Build Max Developments Pty Ltd* [2000] NSWLEC 224; *Haynes v CI & D Manufacturing* (1995) 60 IR 149; (*No. 2*) (1995) 60 IR 455.

Appendices

- Appendix A: Selected NSW statutes containing offences that carry specific penalties for corporations
- Appendix B: Submissions
- Appendix C: Consultations and seminar

APPENDIX A

SELECTED NSW STATUTES CONTAINING OFFENCES THAT CARRY SPECIFIC PENALTIES FOR CORPORATIONS

LEGEND

* – penalty is expressed in the statute in penalty units but has been converted to a monetary value for the sake of comparison with penalties that are expressed only in terms of monetary value. One penalty unit is currently equivalent to \$110.

P/D – per day. Where the offence is continuing, some statutes provide additional fine for each day the offence continues.

SECTION	OFFENCE	PENALTY APPLICABLE TO CORPORATION
ANIMAL RESEARCH ACT 1985		
48(1)	Supplying animals for use in connection with animal research without animal supplier's licence.	\$17,600*
48(2)	As licensee, supplying animals for use in connection with animal research otherwise than as authorised by the licence.	\$17,600*
ANTI-DISCRIMINATION ACT 1977		
20D	Serious racial vilification.	\$11,000*
38T	Serious transgender vilification.	\$11,000*
49ZTA	Serious homosexual vilification.	\$11,000*
49ZXC	Serious HIV/AIDS vilification.	\$11,000*
51	Publishing or causing to be published an advertisement that indicated an intention to do an act unlawful under the Act.	\$5,500*
89	Failing to comply with notice issued by President requiring person to produce copy of broadcast which is the subject of vilification complaint.	\$5,500*
92	Failing to comply with notice issued by President requiring complainant and respondent, or either, to appear before President for purpose of endeavouring to resolve complaint by conciliation.	\$5,500*
116	Refusing, neglecting or failing to obey or comply with order of Tribunal under s 113, or interim order of Tribunal.	\$5,500*
BIOLOGICAL CONTROL ACT 1985		
49	As employer, dismissing etc any employee, or threaten to dismiss etc an employee, because the employee has appeared as a witness at an inquiry by a Commission.	\$11,000*
CLASSIFICATION (PUBLICATIONS, FILMS AND COMPUTER GAMES) ENFORCEMENT ACT 1995		
6	Selling or publicly exhibiting an unclassified film – if film is subsequently rated G.	\$550*

SECTION	OFFENCE	PENALTY APPLICABLE TO CORPORATION
6	Selling or publicly exhibiting an unclassified film – if film is subsequently rated PG.	\$1,100*
6	Selling or publicly exhibiting an unclassified film – if film is subsequently rated M.	\$2,200*
6	Selling or publicly exhibiting an unclassified film – if film is subsequently rated MA or R.	\$11,000*
6	Selling or publicly exhibiting a film classified RC or X, or an unclassified film – if film is subsequently rated RC or X.	\$27,500*
7	Selling or exhibiting a classified film under a different title or in an altered form.	\$22,000*
8	Selling or publicly exhibiting a classified film without keeping a notice in the approved form about film classifications on public display in a prominent place where the film is sold or exhibited.	\$1,100*
9(1)	Selling or delivering to a minor a film classified RC or X or an unclassified film which, if classified, would be classified RC or X.	\$33,000*
9(2)	Selling or delivering to a minor a film classified R, or an unclassified film which, if classified, would be classified R, unless the person is a parent or guardian of the minor.	\$22,000*
9(4)	Selling or delivering to a minor under 15 a film classified MA unless the person is a parent or guardian of the minor.	\$11,000*
12	Publicly exhibiting a film classified R where a minor is present during any part of exhibition.	\$11,000*
13	Publicly exhibiting a film classified MA where an unaccompanied minor under 15 is present during any part of the exhibition.	\$2,200*
15	Selling a film without classification markings and applicable consumer advice on the container, wrapping or casing of film; selling an unclassified film where the container, wrapping or casing displays a marking that indicated the film has been classified; selling a classified film where the container, wrapping or marking displays a marking that indicates the film is unclassified or classified differently.	\$11,000*
16	Keeping or possessing an unclassified film or an RC- or X-rated film on any premises where classified films are sold.	\$27,500*
17	Leaving in a public place, or without the occupier's permission, on private premises, an RC- or X-rated film, or an unclassified film which would be RC- or X-rated.	\$27,500*
18	Possessing an RC- or X-rated film, or an unclassified film which would be RC- or X-rated, with the intention of selling or exhibiting the film; copying RC- or X-rated film, or an unclassified film which would be RC- or X-rated, with the intention of selling or exhibiting the copy.	\$27,500*

CONTAMINATED LAND MANAGEMENT ACT 1997		
17	Failing, without reasonable excuse, to comply with an investigation order.	\$137,500* + \$66,000* p/d
23	Failing, without reasonable excuse, to comply with a remediation order.	\$137,500* + \$66,000* p/d
28	Failing to comply with a notice requiring the person to maintain remedial action in relation to the land.	\$66,000*
45	Wilfully delaying or obstructing a person who is carrying out action in compliance with an order under Part 3 of the Act.	\$137,500* + \$66,000* p/d
46	As a person who in a report required under Part 3 and lodged with EPA, knowingly making a statement that is false or misleading in a material particular.	\$137,500*
60(1)	Having become aware that one's activities in, on or under land have contaminated the land so as to present a significant risk of harm, failing to notify the EPA in writing that the land has been so contaminated.	\$137,500*
60(2)	As owner of land who becomes aware that land has been contaminated so as to present significant risk of harm, failing to notify EPA in writing that the land has been so contaminated.	\$137,500*
89(1)	Neglecting or failing, without reasonable excuse, to comply with a requirement made under Part 9.	\$137,500* + \$66,000* p/d
89(2)	Furnishing information or doing anything in purported compliance with requirement made under Part 9, knowing that it is false or misleading in a material respect.	\$137,500* + \$66,000* p/d
89(3)	Wilfully delaying or obstructing authorised officer in exercise of authorised officer's powers under Part 9.	\$137,500* + \$66,000* p/d
89(4)	Impersonating an authorised officer.	\$137,500* + \$66,000* p/d
CRIMES ACT 1900		
562NB	Publishing or broadcasting the name of, or identifying information about, a child under 16 involved in AVO proceedings or appearing before a court under Part 15A of the Crimes Act, before the matter is disposed of.	\$220,000*
562NC	Publishing the name of, or identifying information about, persons involved in proceedings in or before a court under Part 15A of the Crimes Act or relating to an ADVO, where the court has directed such information must not be published.	\$220,000*
578A(2)	Publishing any matter which identifies, or is likely to lead to the identification of, the complainant in prescribed sexual offence proceedings.	\$55,000*
578C(2)	Publishing an indecent article (other than an indecent article that is child pornography).	\$22,000*
578C(2A)	Publishing an indecent article that is child pornography.	\$220,000*
578E	Where a person is engaged in the business of selling or disposing of products associated with sexual behaviour, advertising or displaying those products to persons who have not requested or consented to the display or to members of the public.	\$22,000*

DANGEROUS GOODS ACT 1975		
9	Keeping dangerous goods on premises not licensed under s 8 or s 19, or prescribed quantities, manner and conditions.	\$55,000*
11	Carrying dangerous goods in any container that is in, on or forms a part of a vehicle or vessel unless authorised under s 10(3).	\$55,000*
12(1)	Failing to take such precautions as a necessary to prevent access by unauthorised persons to the goods.	\$55,000*
12(2)	Conveying dangerous goods using container or vehicle or vessel, which fails to prevent the escape of the goods during normal incidents of conveyance.	\$55,000*
13	Selling dangerous goods in a public place.	\$55,000*
18	Importing an explosive into NSW unless authorised under s 17(4).	\$5,500*
20	Manufacturing any explosive without authorisation under s 19(3).	\$55,000* + \$27,500* p/d
23	Selling any explosive without authorisation under s 22.	\$5,500*
26	Having explosives in one's possession, control or custody (subject to s 26(2) and s 25(3)).	\$55,000*
ELECTRICITY SAFETY ACT 1945		
21D	Making a false statement or giving a false description in relation to guarantee in relation to an electrical article.	\$5,500*
ELECTRICITY SUPPLY ACT 1995		
13	Operating a distribution system for purpose of conveying electricity, for or on behalf of retail suppliers, otherwise than under the authority of a distribution network service provider's licence.	\$55,000*
ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979		
109ZO	As building practitioner, carrying out building work or subdivision work, or holding him- or herself out as being covered by required insurance, without being covered by required insurance.	\$55,000*
ENVIRONMENTALLY HAZARDOUS CHEMICALS ACT 1985		
26	Contravening a chemical control order under the Act by carrying on a prescribed activity in relation to chemical waste.	\$137,500*
27	Failing to supply the Authority with new information about chemical waste in relation to an assessment of a prescribed activity under s 13.	\$137,500*
32	As a licensee, contravening a condition in force in respect of the licence.	\$137,500*
44	Unauthorised disclosure of information relating to the manufacturing or industrial or commercial secrets obtained in connection with administration of the Act.	\$137,500*
55	Where convicted of an offence under the Act, neglecting or failing, without reasonable excuse, to undertake remedial action ordered by the court.	\$137,500*
FISHERIES ACT 1935		
42(5)	Neglecting or failing to furnish a return (as to catches, sales, output and gear) required by the Minister under s 42.	\$2,750*

FISHERIES MANAGEMENT ACT 1994		
14(1)	Taking fish in contravention of a fishing closure.	\$110,000*
14(2)	Being in possession of fish taken in contravention of a fishing closure.	\$55,000*
16	Being in possession of prohibited size fish; selling prohibited size fish.	\$55,000*
17	Taking on any one day more fish than the daily limit of those fish.	\$55,000*
18	Having in one's possession more than the possession limit of those fish.	\$55,000*
19	Taking protected fish; being in possession of protected fish.	\$220,000
20	Taking declared fish for sale; selling declared fish.	\$55,000*
22	If a class of fishing gear is registrable, using unregistered gear of that class to take fish.	\$5,500*
24	Unlawful use of a net or trap for taking fish.	\$110,000*
25	Being in possession of fishing gear if the use by that person of that fishing gear is prohibited, or if the taking of fish from those waters is prohibited.	\$110,000*
35	Being in possession of fish which were illegally taken.	\$55,000*
39	Failing to remove an obstruction on a recognised fishing ground after being directed by a fisheries officer to do so.	\$11,000*
65	As shareholder in a share management fishery, contravening a provision of the management plan.	\$110,000*
117	Receiving fish for resale or other commercial use, from commercial fisher, without being registered under Division.	\$55,000*
119	As registered fish receiver, refusing or failing to give information or keep required records.	\$55,000*
144	Undertaking aquaculture without aquaculture permit.	\$22,000*
152	As holder of aquaculture permit, contravening a condition of the permit without lawful excuse.	\$11,000*
179	Removing, injuring or interfering with any fish or marine vegetation cultivated within leased area without consent of lessee; depositing anything on leased area or dredging or digging within leased area, except in accordance with Div 3 of Part 7 or by direction of lessee or Minister.	\$11,000*
183	Contravening an order declaring a quarantine area, without reasonable excuse.	\$110,000*
184	Intentionally or recklessly communicating a declared disease to live fish or marine vegetation.	\$55,000*
185	Selling any fish or marine vegetation if person knows or has reason to suspect that it is infected with a declared disease.	\$55,000*
186	Depositing diseased fish or marine vegetation in any waters if person knows or has reason to suspect it is infected with a declared disease.	\$55,000*
197K(1)	Contravening an aquatic reserve notification.	\$110,000*
197K(2)	Being in possession of any animal, plant, rock, sand or other thing taken in contravention of an aquatic reserve notification.	\$55,000*
201	Carrying out dredging or reclamation work without a permit issued by Minister.	\$220,000*
204A	Harming protected marine vegetation in a protected area.	\$220,000*

204B	Gathering or collecting for commercial purposes protected marine vegetation in a protected area.	\$220,000*
205	Harming mangroves, seagrasses, or other marine vegetation declared by regulations to be marine vegetation to which this section applies but not protected under s 204A, in a protected area with out authority of permit issued by Minister under Part.	\$220,000*
210	Selling live noxious fish or noxious marine vegetation otherwise than under the authority of a permit issued by Minister.	\$11,000*
211	Being in possession of live noxious fish or noxious marine vegetation otherwise than under the authority of a permit issued by the Minister.	\$11,000*
216	Releasing into any waters any live fish except under authority of permit issued by Minister or an aquaculture permit.	\$11,000*
217(1)	Bringing into NSW live fish of a species not taken from NSW waters except under authority of a permit issued by Minister.	\$11,000*
217(2)	Selling or buying or being in possession of fish, knowing that the fish has been brought into NSW in contravention of s 217.	\$11,000*
218	Failing to comply with order requiring person who constructs, alters or modifies a dam, weir or reservoir on a waterway to carry out works to enable fish to pass through or over the dam, weir or reservoir.	\$220,000*
219	Setting a net etc, or constructing or altering a dam etc, or otherwise creating an obstruction across or within a bay, inlet, river or creek, so that fish could be blocked or left stranded, or immature fish could be destroyed, or the free passage of fish could be obstructed.	\$220,000*
221O	Not complying with an order made by the Director to cease action.	\$220,000* + \$110,000* p/d
275G(1)	Providing false or misleading information to auditor.	\$220,000*
275G(2)	Failing to provide information to auditor.	\$220,000*
275G(3)	As compliance auditor, including information in audit report, knowing the information to be false or misleading in a material respect.	\$220,000*
275G(4)	As compliance auditor, failing to provide information in audit report, knowing the information to be materially relevant to audit.	\$220,000*
275G(5)	As holder of fishing authority, failing to retain written documentation required in connection with compliance audit for at least 5 years after audit report was produced to Minister; failing to produce during that period any such documentation to a fisheries officer on request.	\$220,000*
GAS SUPPLY ACT 1996		
5	Operating a distribution pipeline for purpose of conveying natural gas to another person, or supplying natural gas to another person by means of a distribution pipeline, without authorisation.	\$55,000*
33O	As gas marketer, contravening requirement of Marketing Code of Conduct in relation to a small retail customer.	\$22,000*
34	Operating a distribution system for purpose of conveying to another person liquefied petroleum gas or any other gas, without authorisation.	\$55,000*

65	Abstracting, causing to be wasted or diverted, consuming or using any gas from a distribution pipeline or system without being authorised.	\$22,000*
66	Interfering with network operator's gas works without authorisation.	\$22,000*
67	Altering or interfering with gas meter without authorisation.	\$22,000*
68	Altering or interfering with any seal that has been attached to gas installation by a network operator, without authorisation.	\$22,000*
69	Connecting a gas installation to a network operator's distribution pipeline or system without authorisation.	\$22,000*
70	Increasing capacity of an existing connection to a network operator's distribution pipeline or system without authorisation.	\$22,000*
71	Altering or adding to a gas installation that is connected to a network operator's distribution pipeline or system so as to cause the unauthorised supply of gas to the installation.	\$22,000*
72	Preventing an inspector from exercising any function conferred under Act; hindering or obstructing inspector; impersonating inspector.	\$22,000*
HEALTH CARE LIABILITY ACT 2001		
24(4)	Providing approved professional indemnity insurance in contravention of Minister's order prohibiting that person from providing such insurance.	\$44,000* + \$11,000* p/d
24(5)	Providing approved professional indemnity insurance in contravention of Minister's order prohibiting that person from providing such insurance, in case of second or subsequent offence.	\$88,000* + \$11,000* p/d
INDUSTRIAL RELATIONS ACT 1996		
180	Contempt of Commission.	\$55,000*
LIE DETECTORS ACT 1983		
5(1)	Using an instrument or apparatus to measure or monitor physiological reactions of the body of another person, or elements of stress, tonal variation or vibration in the voice of another person, for a prohibited purpose; using output from an instrument or apparatus so used; using an analysis of, or opinion as to the effect of, any such output. (s 7(1)(a)).	\$5,500*
5(1)	Using an instrument or apparatus to measure or monitor physiological reactions of the body of another person, or elements of stress, tonal variation or vibration in the voice of another person, for a prohibited purpose; using output from an instrument or apparatus so used; using an analysis of, or opinion as to the effect of, any such output – where offence is second or subsequent offence. (s 7(1)(a)).	\$11,000*
5(2)	Requesting or requiring another person to undergo an examination based on the use of an instrument or apparatus to measure or monitor physiological reactions of the body of that other person, or elements of stress, tonal variation or vibration in the voice of the other person, for improper purpose. (s 7(1)(a)).	\$5,500*

5(2)	Requesting or requiring another person to undergo an examination based on the use of an instrument or apparatus to measure or monitor physiological reactions of the body of that other person, or elements of stress, tonal variation or vibration in the voice of the other person, for improper purpose – where offence is second or subsequent offence. (s 7(1)(a)).	\$11,000*
MARINE PARKS ACT 1997		
17A	Committing a serious contravention of a provision of the regulations referred to in Division.	\$110,000*
20G(1)	Carrying out an activity in contravention of a marine park closure.	\$110,000*
20G(2)	Being in possession of any animal, plant, rock, sand or other thing that has been taken in contravention of a marine park closure.	\$55,000*
20H	Failing, without reasonable excuse, to comply with order to remove unused property from marine park.	\$55,000*
MARINE POLLUTION ACT 1987		
8	Ship that discharges oil into State waters.	\$10,000,000
9	Failure to retain on board oil residues while in State waters.	\$10,000,000
10	Failure to notify Minister of incident involving oil or an oily mixture.	\$2,750,000
11	Failure to carry oil record book.	\$110,000*
13	Failure to retain oil record book.	\$110,000*
18	Discharge of noxious liquid substance from ship.	\$10,000,000
20	Failure to notify Minister of prescribed incident in circumstances of ship's abandonment.	\$2,750,000
21	Ship does not carry cargo book.	\$110,000*
23	Cargo book not retained.	\$110,000*
29	Failing to keep records relating to transfer etc.	\$110,000*
37	Alteration of ship's construction without giving notice.	\$5,500*
38	Failure to have ship surveyed periodically.	\$11,000*
42	Alteration of ship's construction without giving notice.	\$5,500*
43	Failure to have ship periodically surveyed.	\$11,000*
44	Beginning a cargo voyage without a chemical tanker certificate.	\$55,000*
52C	Ship that departs State waters before being released from detention.	\$110,000*
MEDICAL PRACTICE ACT 1992		
112A	Accepting from a registered practitioner, or his or her employer, a benefit as inducement, consideration or reward for the person referring another person to the practitioner etc.	\$22,000*
112A	Accepting from a registered practitioner, or his or her employer, a benefit as inducement, consideration or reward for the person referring another person to the practitioner etc, where second or subsequent offence.	\$44,000*
112B	Giving a registered medical practitioner or employer thereof a benefit as inducement, consideration or reward for the practitioner referring another person to the offeror etc.	\$22,000*

112B	Giving a registered medical practitioner or employer thereof a benefit as inducement, consideration or reward for the practitioner referring another person to the offeror etc, where second or subsequent offence.	\$44,000*
114	As a corporation, advertising medical services without having appointed a person to be responsible for medical services advertising by the corporation.	\$27,500*
116A	As employer of medical practitioner, directing or inciting the practitioner to engaged in overservicing or in conduct that would constitute unsatisfactory professional conduct.	\$44,000*
116A	As employer of medical practitioner, directing or inciting the practitioner to engaged in overservicing or in conduct that would constitute unsatisfactory professional conduct, where second or subsequent offence.	\$88,000*
116E	Operating a business that provides medical services in contravention of a prohibition order.	\$44,000* + \$11,000* p/d
116E	Operating a business that provides medical services in contravention of a prohibition order, where second or subsequent offence.	\$88,000* + \$11,000* p/d
116H(5)	Failing, without reasonable excuse, to comply with requirement to provide information as to convicted person.	\$44,000*
116H(5)	Failing, without reasonable excuse, to comply with requirement to provide information as to convicted person, where second or subsequent offence.	\$88,000*
116H(6)	When purportedly acting in compliance with s 116H, knowingly providing information that is false or misleading in a material particular.	\$44,000*
116H(6)	When purportedly acting in compliance with s 116H, knowingly providing information that is false or misleading in a material particular, where second or subsequent offence.	\$88,000*
Sch 2 cl 6	Contravening a direction concerning release of information.	\$16,500*
Sch 3A cl 15	Contravening a direction concerning release of information.	\$16,500*
MINES INSPECTION ACT 1901		
36C(a)	Wilfully failing to comply with any requirement imposed by an inspector or mine safety officer.	\$11,000*
36C(b)	Wilfully preventing any other person from appearing before an inspector or mine safety officer etc.	\$11,000*
36C(c)	Without inspector's permission, wilfully removing from a mine, or concealing or tampering with, any machinery, apparatus or other article of which possession has been taken by an inspector.	\$11,000*
36C(d)	Wilfully failing to comply with a requirement made under s 36A(1)(a).	\$11,000*
36C(e)	In giving answer required by inspector under s 36A(1)(a), knowingly making a false statement.	\$11,000*
36C(f)	Wilfully obstructing an inspector or mine safety officer in exercise of their functions.	\$11,000*
NATIONAL PARKS AND WILDLIFE ACT 1974		
90	Destruction etc of relics or Aboriginal places.	\$22,000*

OCCUPATIONAL HEALTH AND SAFETY ACT 2000		
12	Contravening a provision of the general duties set out in Part 2, Division 1 (not previous offender).	\$550,000*
12	Contravening a provision of the general duties set out in Part 2, Division 1 (previous offender).	\$825,000*
13	Failure by employer to consult with employees to enable contribution to making decisions affecting OHS (not previous offender).	\$55,000*
13	Failure by employer to consult with employees to enable contribution to making decisions affecting OHS (previous offender).	\$82,500*
22	Employer who imposes charge upon employee for anything done in pursuance of a specific requirement of Act (not previous offender).	\$275,000*
22	Employer who imposes charge upon employee for anything done in pursuance of a specific requirement of Act (previous offender).	\$412,500*
23	Dismissing employee, or injuring employee in his/her employment, because employee makes complaint about OHS matter, is a member of an OHS committee, or exercises any functions conferred on employee under Div 2 (not previous offender).	\$27,500*
23	Dismissing employee, or injuring employee in his/her employment, because employee makes complaint about OHS matter, is a member of an OHS committee, or exercises any functions conferred on employee under Div 2 (previous offender).	\$41,250*
24	By intimidation or any act or omission, intentionally hindering or obstructing without reasonable excuse the giving or receiving of aid to an injured worker or an action to prevent a serious risk to OHS (not previous offender).	\$550,000*
24	By intimidation or any act or omission, intentionally hindering or obstructing without reasonable excuse the giving or receiving of aid to an injured worker or an action to prevent a serious risk to OHS (corporation, previous offender).	\$825,000*
86	Failure to notify WorkCover of a non-disturbance occurrence at workplace or accident or other matter (not previous offender).	\$55,000*
86	Failure to notify WorkCover of a non-disturbance occurrence at workplace or accident or other matter (previous offender).	\$82,500*
87	Failing to ensure that plant and surrounding area is not used, moved or interfered with after involved in non-disturbance occurrence (not previous offender).	\$55,000*
87	Failing to ensure that plant and surrounding area is not used, moved or interfered with after involved in non-disturbance occurrence (previous offender).	\$82,500*
90	Failure to comply with investigation notice (not previous offender).	\$55,000*
90	Failure to comply with investigation notice (previous offender).	\$82,500*
92	Failure to comply with improvement notice, without reasonable excuse (not previous offender).	\$55,000*
92	Failure to comply with improvement notice, without reasonable excuse (previous offender).	\$82,500*

94	Failure to comply with prohibition notice, without reasonable excuse (not previous offender).	\$110,000*
94	Failure to comply with prohibition notice, without reasonable excuse (previous offender).	\$165,000*
102	Destroying, damaging or removing notice under Part, without approval of WorkCover or an inspector.	\$11,000*
117	Failure to comply with order, without reasonable excuse (not previous offender).	\$110,000*
117	Failure to comply with order, without reasonable excuse (previous offender).	\$165,000*
136	Obstructing or intimidating inspectors and others exercising functions under Act (not previous offender).	\$55,000*
136	Obstructing or intimidating inspectors and others exercising functions under Act (previous offender).	\$82,500*
OZONE PROTECTION ACT 1989		
14	Failing to comply with notice given by Authority to furnish specified information as to business activities carried on relating to controlled substances etc.	\$5,500*
PESTICIDES ACT 1999		
7	Wilfully or negligently using a pesticide in a manner that injures or is likely to injure another person, or damages or is likely to damage the property of another person.	\$250,000
8	Wilfully or negligently using a pesticide in a manner that harms a non-target animal or non-target plant, or (if there is no approved label or permit for the pesticide) harms any animal or plant.	\$250,000
9	Wilfully or negligently using pesticide in a manner that harms any animal that is a threatened species within meaning of Threatened Species Conservation Act 1995, or any protected fauna within meaning of National Parks and Wildlife Act 1974.	\$250,000
10	Using a pesticide in a manner that injures or is likely to injure another person, or damages or is likely to damage another person.	\$120,000
11	Using a pesticide in a manner that harms any non-target animal or non-target plant, or (if there is no approved label or permit for the pesticide) harms any animal or plant.	\$120,000
12	Being in possession of an unregistered pesticide without authorisation.	\$120,000
14(1)	Before using a registered pesticide, failing to either read the label or have it explained to user.	\$120,000
14(2)	Where permit is in force in respect of a pesticide, failing to read the permit or have it explained before using the pesticide.	\$120,000
16	Keeping, without reasonable excuse, a registered pesticide in a container that does not have an approved label attached to it.	\$20,000
17	Being in possession of, or using, a restricted pesticide unless authorised to do so by a certificate of competency or a pesticide control order.	\$120,000
19	Failing, without reasonable excuse, to comply with a clean-up notice issued by EPA.	\$120,000 + \$60,000 p/d

25	Failing to comply with a prevention notice issued in respect of “environmentally unsatisfactory” use of pesticide.	\$120,000 + \$60,000 p/d
36	Wilfully delaying or obstructing a person who is carrying out any action in compliance with notice under Part, or a public authority that is taking clean-up action under Division 2.	\$120,000 + \$60,000 p/d
37	Knowingly making false or misleading statement in report required under Part and lodged with EPA.	\$120,000
39	Contravening a pesticide control order made under s 39.	\$120,000
41	Failing to comply with direction given by authorised officer under s 41 for the destruction etc of any pesticide.	\$120,000
42	Using equipment in contravention of defect notice issued by authorised officer under s 42.	\$120,000
43	Attaching any aerial spraying equipment to aircraft where aircraft has not been approved by Civil Aviation Authority for agricultural operations.	\$120,000
45	Employing or engaging another person to pilot an aircraft that is being used in the application of a pesticide if the employer does not hold an aircraft (pesticide applicator) licence, or the pilot does not hold a pilot (pesticide rating) licence.	\$120,000
54(3)	Failing to keep record made under s 54 for three years after the date of the occasion to which the record relates.	\$120,000
54(1)	As the holder of an aircraft (pesticide applicator) licence, failing to cause a record to be made in accordance with s 54 in respect of each occasion on which the licensee causes an aircraft to be used in the application of a pesticide.	\$120,000
59	As a holder of a licence or certificate of competency, contravening any condition to which the licence or certificate is subject.	\$120,000
64	Failing to comply with prohibited residue notice issued by authorised officer under s 64.	\$120,000
65	Failing to comply with prohibited residue order made by Minister under s 65.	\$120,000
101	Failing to comply with court order under Part 10 Division 1.	\$120,000 p/d
PIPELINES ACT 1967		
60A	Where a person has been served with a notice under s 60A prohibiting the person from activities damaging any pipeline etc, carrying out any activity in contravention of the terms of the notice.	\$4,400*
PREVENTION OF CRUELTY TO ANIMALS ACT 1979		
5	Committing an act of cruelty upon an animal.	\$27,500*
6	Committing an act of aggravated cruelty upon an animal.	\$55,000*
7(1)	Carrying or conveying an animal in a manner which unreasonably, unnecessarily or unjustifiably inflicts pain upon the animal.	\$27,500*
7(2)	Carrying or conveying a horse on a multi-deck vehicle.	\$27,500*
8	Failing to provide the animal with food, drink or shelter which is sufficient and proper and reasonably practicable.	\$27,500*

9(1)	Failing to provide confined animal with adequate exercise.	\$27,500*
9(3)	Confining an animal (other than a stock animal) in a cage of which the height, length or breadth is insufficient to allow the animal a reasonable opportunity for adequate exercise.	\$27,500*
10(1)	Tethering an animal for an unreasonable length of time or by means unreasonably heavy, or unreasonably short rope chain or cord.	\$27,500*
10(2)	Tethering a sow in a piggery.	\$27,500*
11	Abandoning an animal.	\$27,500*
12	Performing prohibited operations on an animal.	\$27,500*
13	Riding, driving, using, carrying or conveying an animal if the animal is unfit for such purpose.	\$27,500*
16	Using a prescribed electrical device on an animal, or selling or possessing such device.	\$27,500*
17	Possessing any spur or similar appliance, or any article to be used for attachment to an animal for the purpose of training it to fight another animal, or increasing the ability of the animal to inflict injury on another animal during a fight.	\$27,500*
18(1)	Using any place etc for the purpose of conducting a bull-fight, baiting an animal or causing an animal to fight.	\$27,500*
18(2)	Causing, procuring, permitting, encouraging or inciting a fight in which one or more animals are pitted against another animal, or advertise the intention to conduct such a fight, or promote, organise or attend such a fight.	\$27,500*
18A	Advertising, promoting or taking part in a bull-fight.	\$27,500*
19	Advertising, promoting or taking part in a match or competition in which an animal is released from confinement for the purpose of that person, or any other person, shooting at it.	\$27,500*
19A(2)	Using any premises etc for the purposes of a game park.	\$27,500*
19A(3)	Taking or killing any animal in a game park.	\$27,500*
20	Advertising, promoting or taking part in an activity in which an animal is released from confinement for the purpose of chasing, catching or confining it.	\$27,500*
21	Causing, procuring, permitting or encouraging an activity in which an animal is used for the purpose of its being chased, caught or confined by a dog; promoting or attending such activity; using an animal as lure or kill for the purpose of bleeding greyhounds on in connection with the trialing, training or racing of any dog; keeping an animal for such purpose.	\$55,000*
21A	Applying a thermal stimulus to leg of an animal with intention of causing tissue damage and the development of a scar around tendons and ligaments.	\$27,500*
21B	Cuts tail of horse with intention of causing horse to carry tail high.	\$27,500*
21C	Organising or participating in a steeplechase or hurdle.	\$27,500*
21D	Confining a bird by means of a ring around its leg and a chain attached to the ring.	\$27,500*
22(1)	Purchasing, acquiring, keeping or selling, an animal which is so severely injured, so diseased or in such condition that it is cruel to keep it alive.	\$27,500*

22(3)	Where person purchases/acquires animal for purpose of causing animal to be promptly destroyed, the person shall cause it to be destroyed in a manner that causes it to die quickly.	\$27,500*
23(1)	Setting a prescribed trap in a prescribed area of NSW.	\$27,500*
23(2)	Setting or possess a steel-jaw trap with the intention of using it on an animal.	\$27,500*
PRICES REGULATION ACT 1948		
30	Selling at price higher than maximum price fixed under Act. (s 59)	\$11,000*
31	Charging for services at rate higher than that fixed under Act. (s 59)	\$11,000*
PROTECTION OF THE ENVIRONMENT OPERATIONS ACT 1997		
47	As occupier of premises, scheduling development work without holding a permit.	\$250,000 + \$120,000 p/d
49	Carrying on scheduled activity without holding a licence.	\$250,000 + \$120,000 p/d
64	Contravening any condition of a licence (other than an offence relating exclusively to noise).	\$250,000 + \$120,000 p/d
64	Contravening any condition of a licence (where offence relates exclusively to noise).	\$60,000 + \$6,000 p/d
66(2)	As a licensee, supplying to appropriate authority information that is false or misleading in a material respect.	\$250,000
66(4)	Giving a certificate relating to licences where any statement certified is false or misleading in a material respect.	\$250,000
86	Contravening notice requirements following contravention of Part 3.2.	\$250,000 + \$120,000 p/d
80	As the occupier of a waste facility, failing to pay prescribed contribution to EPA.	\$250,000 + \$120,000 p/d
91	Failing, without reasonable excuse, to comply with clean-up notice.	\$250,000 + \$120,000 p/d
97	Failing to comply with a prevention notice.	\$250,000 + \$120,000 p/d
102	Failing, without reasonable excuse, to comply with a prohibition notice.	\$250,000 + \$120,000 p/d
112	Wilfully delaying or obstructing a person who is carrying out action in compliance with an environment protection notice, a public authority taking clean-up action, or a regulatory authority that is taking action under s 98 or s 103.	\$250,000 + \$120,000
113	Making a statement that is false or misleading in a material particular in a report required under Chapter 5.	\$250,000
119	Offence under Part 15.2 (Tier 1 offences): wilful or negligent disposal of waste in a manner that harms or is likely to harm environment; wilfully or negligently causing any substance to leak, spill or otherwise escape in manner harmful to environment; wilfully or negligently causing any controlled substance (within meaning of Ozone Protection Act 1989) to be emitted into atmosphere in contravention of regulations and in manner harmful to environment.	\$1,000,000

123	Water pollution offences under Part 5.3.	\$250,000 + \$120,000 p/d
132	Air pollution offences under Part 5.4.	\$250,000 + \$120,000 p/d
141	Noise offences under Part 5.5.	\$60,000 + \$6,000 p/d
143	Unlawful transporting of waste.	\$250,000
144	Permitting land to be used unlawfully as waste facility.	\$250,000 + \$120,000 p/d
152	Offence under Part 5.7 – Duty to notify pollution incidents.	\$250,000 + \$120,000 p/d
155	Selling motor vehicle that emits excessive air impurities.	\$250,000
156	Selling motor vehicles without anti-pollution devices.	\$250,000
157	Removing, disconnecting or impairing, or adjusting or modifying, an anti-pollution device fitted into motor vehicle.	\$250,000
158	Servicing or repairing motor vehicle in manner prohibited by regulations.	\$250,000
159	Selling a motor vehicle that has not been serviced, maintained or adjusted in accordance with the regulations.	\$250,000
162	Contravening Minister's order prohibiting use of motor vehicles in certain circumstances.	\$250,000
164	Selling a motor vehicle that does not meet the prescribed road octane requirement when tested.	\$250,000
167	As an occupier, not maintaining or operating control equipment as required.	\$250,000 + \$120,000 p/d
177(1)	Knowingly providing false or misleading information to environmental auditor in connection with mandatory audit.	\$250,000 + \$120,000 p/d
177(2)	As licensee, failing to provide information to environmental auditor, knowing information to be materially relevant.	\$250,000 + \$120,000 p/d
177(3)	As environmental auditor, including information in audit report, knowing information to be false or misleading.	\$250,000 + \$120,000 p/d
177(4)	As environmental auditor, failing to provide information in audit report, knowing the information to be materially relevant.	\$250,000 + \$120,000 p/d
177(5)	As licensee, failing to retain any written documentation required to be prepared by licensee in connection with mandatory environmental audit for period of 5 years; or failing to produce during that period any such documentation to appropriate regulatory authority on request.	\$250,000 + \$120,000 p/d
PUBLIC HEALTH ACT 1991		
10C	As supplier of drinking water, contravening direction by Chief Health Officer to retract or correct any information or advice issue by supplier to public in relation to safety of supplier's drinking water.	\$1,100,000*
10G	As supplier, failing to comply with Director-General's direction that tests be carried out on water available for supply.	\$275,000*

10H	Failure by supplier to comply with Director-General's direction to produce information.	\$275,000*
10I	Contravention of minister's order to restrict or prevent use of water that is not fit for human consumption or a risk to public health, or to bring water to safe standards.	\$1,100,000*
35	Contravening court order restricting publication of information.	\$11,000*
RADIATION CONTROL ACT 1990		
6(2)	Using, selling or giving away radioactive substances, ionising radiation substances or prescribed non-ionising radiation apparatus without a licence.	\$165,000*
6(3)	Selling or giving away radioactive substances, ionising radiation substances or prescribed non-ionising radiation apparatus to a person who does not hold a licence.	\$165,000*
7(2)	Owning radioactive source or prescribed radiation apparatus without registering item in owner's name and complying with conditions of registration.	\$165,000*
7(3)	As owner of radioactive source or prescribed apparatus, allowing unauthorised person to use item.	\$165,000*
8(1)	Owning premises on which an unsealed radioactive source is kept if premises are unregistered or conditions of registration not complied with. NB Section uncommenced.	\$165,000*
8(2)	As owner of registered premises, allowing unauthorised person to use unsealed radioactive source kept on premises. NB Section uncommenced.	\$165,000*
RIVERS AND FORESHORES IMPROVEMENT ACT 1948		
22B	Making an excavation on, in or under protected land etc, without permit or in contravention of conditions of permit.	\$137,500* + \$66,000* p/d
22D	Failing to comply with stop order given by Constructing Authority.	\$137,500* + \$66,000* p/d
ROADS AND RAIL TRANSPORT (DANGEROUS GOODS) ACT 1997		
22	Without reasonable excuse, failing to comply with direction made by authorised officer, or obstructing authorised officer, or giving authorised officer false or misleading information.	\$50,000
28	Contravening notice to remedy contravention, or removing such notice from vehicle before matters causing contravention have been remedied.	\$50,000
29	Contravening notice to eliminate or minimise danger, or removing such notice from vehicle before measures have been taken to avert, minimise or eliminate danger.	\$50,000
32	Failing to comply with conditions of exemption from compliance with provision of regulations given by Competent Authority.	\$50,000
35(1)	Using a vehicle (other than as driver) to transport dangerous goods by road or rail where the vehicle is not licensed as required by regulations.	\$250,000
35(2)	Employing, engaging or permitting another person to drive a vehicle transporting dangerous goods by road or rail if the other person is required by the regulations to be licensed to drive the vehicle and is not so licensed.	\$250,000

35(4)	As a person required by regulations to be accredited to be involved in the transport of dangerous goods by road or rail, being so involved without being accredited.	\$250,000
36	Transporting by road or rail goods that the regulations identify as being too dangerous to be transported.	\$250,000
37	As person involved in transport of dangerous goods by road or rail, failing to ensure as far as is practicable that the goods are transported in a safe manner, or failing to comply with a provision of Act in circumstances where person knew or ought to have known that failure would be likely to endanger safety of persons, property or environment – in any other case.	\$250,000
37	As person involved in transport of dangerous goods by road or rail, failing to ensure as far as is practicable that the goods are transported in a safe manner, or failing to comply with a provision of Act in circumstances where person knew or ought to have known that failure would be likely to endanger safety of persons, property or environment – where failure results in death or serious injury to a person.	\$500,000
45	Contravening order prohibiting person from involvement in the dangerous goods transport industry.	\$250,000
ROAD TRANSPORT (HEAVY VEHICLES REGISTRATION CHARGES) ACT 1995		
12	As person in whose name an application for registration or renewal is made, failing to pay full amount required.	\$11,000*
13	As owner of unregistered vehicle, using or driving vehicle on road, or causing or permitting it to be driven on road.	\$11,000*
15	Failing to pay charges for heavy vehicle permit.	\$11,000*
16	As owner of heavy vehicle without permit, or as any other person, using or driving vehicle on road, or causing or permitting vehicle to be driven on road.	\$11,000*
18(2)	Failing to comply with requirement of Authority under s 18.	\$11,000*
18(3)	Knowingly providing false or misleading information to Authority determining appropriate charges.	\$11,000*
19	Failing to comply with requirement of Authority to pay fees under s 19.	\$11,000*
20(2)	Failing to pay appropriate amount of charges associated with change in the construction, equipment, configuration, use or ownership of the vehicle.	\$11,000*
36	Failing to comply with condition in force under s 36.	\$11,000*
ROAD TRANSPORT (SAFETY AND TRAFFIC MANAGEMENT) ACT 1999		
58(1)	Knowing or having ought to have known that a motor vehicle or trailer is loaded unsafely, and driving it onto the road and causing death or injury.	\$11,000*
58(2)	Being the person responsible for an unsafely loaded motor vehicle or trailer which causes death or injury, having known or ought to have known that it was unsafely loaded.	\$11,000*
SECURITY INDUSTRY ACT 1997		
7	Unlicensed carrying on of security activity.	\$11,000*
32(1)	Advertising that person carries on or is willing to carry on a security activity unless person holds licence.	\$4,400*

32(2)	As licensee, failing to ensure that any advertisements relating to security activity carried on by licensee contain number of licensee.	\$4,400*
SMOKE-FREE ENVIRONMENT ACT 2000		
8	As occupier, allowing a person to smoke in a smoke-free area.	\$5,500*
9	As occupier, failing to display within smoke-free area signs prescribed by regulations in the manner prescribed by regulations.	\$2,750*
10(1)	Where smoke-free area forms a part of premises in which smoking is elsewhere allowed, occupier of smoke-free area failing to take reasonable steps to prevent smoke from smoking area penetrating smoke-free area.	\$5,500*
10(2)	Where smoke-free area forms part of premises in which smoking is elsewhere allowed, occupier of smoking area failing to take reasonable steps to prevent smoke from penetrating smoke-free area.	\$5,500*
STOCK FOODS ACT 1940		
6	In the course of carrying on any business, supplying stock food or supplement for any stock in package without secure and conspicuous label bearing particulars required by regulations.	\$11,000*
6A	In the course of carrying on any business, supplying any stock food in bulk without providing a written statement about the stock food that complies with the regulations.	\$11,000*
7	In the course of carrying on any business, supplying a stock food that contains more than the maximum allowable proportion of a foreign ingredient.	\$11,000*
8	In the course of carrying on any business, supplying a medicated stock food that incorporates a veterinary chemical product in contravention of the regulations.	\$11,000*
11A	While subject to order to withdraw stock food from supply, supplying stock food to which the order relates.	\$11,000*
23	Tampering with sample taken under Act.	\$44,000*
28	Preventing, delaying, obstructing or hindering inspector in execution of inspector's powers etc, or failing to comply with requirement of inspector.	\$11,000*
30	Retaking or attempting to retake any article seized under Act.	\$44,000*
STOCK MEDICINES ACT 1989		
37(1)	Being in possession of unregistered stock medicine unless stock medicine was prescribed or supplied by vet to deal with particular condition of animal, or the person in possession is a pharmacist or vet etc.	\$44,000*
37(2)	Being in possession or custody of a stock medicine containing a restricted substance that has been supplied in contravention of Poisons and Therapeutic Goods Act 1966.	\$44,000*
38(1)	Using an unregistered stock medicine on stock that is a member of a food producing species unless authorised under Act.	\$44,000*
38(2)	Using an unregistered stock medicine on stock that is not a member of a food producing species unless person is a vet etc or the stock medicine complies with s 38(2)(b).	\$44,000*
40A(1)	As owner of stock of food producing species, failing to inform buyer of relevant withholding period.	\$44,000*

40A(2)	Selling any stock of a food producing species that has been treated with a stock medicine for which there is a relevant withholding period that has not expired without informing buyer that the stock has been so treated and when the period will expire.	\$44,000*
43(1)	Contravening a prohibition or requirement made by regulations in relation to advertising etc of stock medicine.	\$44,000*
43(2)	Making etc claim or statement as to efficacy of registered stock medicine for a use other than that for which it is registered, or making any false or misleading claim with relation to stock medicine.	\$44,000*
46	Contravening a supply and use ban or recall order issued under 46.	\$44,000*
53	Improperly tampering with sample taken under Act; removing, erasing altering, breaking or opening any mark, label or seal placed by inspector on any package containing a substance seized under Act.	\$44,000*
UNLAWFUL GAMBLING ACT 1998		
15	Being in possession of a prohibited gaming device, or permitting the use of a prohibited gaming device.	\$55,000*
VALUERS REGISTRATION ACT 1975		
24A	Offences relating to practice as a real estate valuer.	\$1,100*
WATER ACT 1912		
17B	Offences in respect of licences.	\$22,000* + \$2,200* p/d
20AC(1)	Taking water from a water source which is part of an authorised work, unless connected to an approved water meter etc.	\$22,000*
20AC(2)	Intentionally, fraudulently or negligently damaging a water meter etc, preventing meter from recording quantity of water taken, or interfering with meter without authorisation.	\$22,000*
20SA	Offences in respect of group licences.	\$22,000* + \$2,200* p/d
21B	Constructing, erecting or using a work other than pursuant to right conferred under Act or by licence; failing to comply with direction given by Minister to remove work; or failing to comply with direction by Minister to carry out work.	\$22,000* + \$2,200* p/d
22B(8)	Taking water in contravention of restriction imposed by Minister; taking water in contravention of Minister's direction suspending a right.	\$22,000*
23	Obstructing or hindering any person performing duty under Act.	\$22,000*
112	Sinking, enlarging, deepening or altering bore without licence, or being the owner of a bore being so altered.	\$22,000* + \$2,200* p/d
117D	Intentionally, fraudulently or negligently damaging a meter etc fitted to bore, preventing meter etc from recording quantity of water taken from bore, or interfering with such meter without Minister's consent; or, as holder of licence in respect of bore, suffering, permitting or directing another person to do such acts.	\$22,000*
117E	Taking or using water from bore to which suspension or restriction order relates otherwise than according to terms of order.	\$22,000*

117I	Altering a licensed bore; taking or using water from an unlicensed bore; taking or using water from a licensed bore while licence is suspended; taking or using water from a licensed bore otherwise than in accordance with licence.	\$22,000*
121A	Interfering with sub-surface water or restricting its flow, otherwise than in accordance with Act or permission of Ministerial Corporation.	\$22,000* + \$2,200* p/d
180	Constructing a controlled work otherwise than in accordance with approval.	\$275,000*
180A	As occupier of land on which an approved controlled work is situated, failing to comply with the conditions of approval.	\$275,000* + \$132,000* p/d
180B	Failing to comply with stop work order.	\$275,000* + \$132,000* p/d
180D	Failing to comply with Ministerial direction for remedial work.	\$275,000* + \$132,000* p/d
180E	Hindering or obstructing Ministerial Corporation etc in exercise of function under s 180D.	\$22,000*
180F	Removing, damaging or modifying any work carried out by or on behalf of Ministerial Corporation under s 180D.	\$275,000*
121A(2)	Failing to comply with order by Ministerial Corporation to remove unlawful artificial obstruction to flow of sub-surface water, carry out such work as Ministerial Corporation considers necessary to permit flow of sub-surface water, or render ineffective an unlicensed bore.	\$22,000* + \$2,200* p/d
WATER MANAGEMENT ACT 2000		
256	Constructing any building, fence or structure in, on, or adjacent to, a levee bank, or constructing a flood work on a floodplain, without the consent of the Minister.	\$275,000*
341	Unlawful taking of water. (s 348).	\$275,000* + \$132,000* p/d
342	Using water without a water use approval. (s 348).	\$275,000* + \$132,000* p/d
343	Constructing or using water management work without a water management approval. (s 348).	\$275,000* + \$132,000* p/d
344	Carrying out a controlled activity in, on or under waterfront land otherwise than in accordance with a controlled activity approval, or carrying out an aquifer interference activity otherwise than in accordance with an aquifer interference approval. (s 348).	\$275,000* + \$132,000* p/d
345	Failing to comply with a direction served under Part 1. (s 348).	\$275,000* + \$132,000* p/d
346	Destroying, damaging or interfering with certain works. (s 348).	\$275,000* + \$132,000* p/d
347	Taking water from public or private works without authorisation. (s 348).	\$275,000* + \$132,000* p/d

APPENDIX B

SUBMISSIONS

Australian Stock Exchange (13 August 2002)

Australian Taxation Office (27 August 2002)

Braithwaite, Professor John (16 June 2002)

NSW Department of Fair Trading (12 July 2002)

NSW Land and Environment Court (9 August 2002)

APPENDIX C

CONSULTATIONS AND SEMINAR

CONSULTATION	DATE	PARTICIPANTS
Regulatory and prosecution agencies consultation	24 July 2002	Mr Nicholas Cowdery, QC, NSW Director of Public Prosecutions; Mr Chris Hanlon, Acting Assistant Director-General (Operations), NSW Department of Fair Trading; Mr David Catt, Director of Legal Services, NSW Department of Fair Trading ; Mr Anthony Lean, Manager, Legislation and Advising Branch, NSW WorkCover; Mr Jonathan Adam, Policy Officer, Legislation and Advising Branch, NSW WorkCover; Mr Les Blake, Service Delivery Group, NSW WorkCover; Mr Julian O'Connell, Solicitor, Legal Services Branch, NSW WorkCover; Ms Janet Austin, corporate specialist, Office of the Commonwealth Director of Public Prosecutions
NSW Environment Protection Authority consultation	6 August 2002	Ms Kerry Palmer, Principal Legal Officer (Legal Services Branch)
NSW Industrial Relations Commission consultation	9 August 2002	The Honourable Justice F L Wright, President; The Honourable Justice M J Walton, Vice President; The Honourable Justice L C Glynn; The Honourable Mr Justice R J Peterson; The Honourable Justice F Marks; The Honourable Justice M Schmidt; The Honourable Justice T M Kavanagh; Mr Deputy President P J Sams; The Honourable Justice R P Boland; The Honourable Justice W R Haylen; Mr T McGrath (Industrial Registrar); Mr A Musgrave (Deputy Industrial Registrar); Ms Maria Anastasi (Assistant Industrial Registrar)
Commercial Law Association consultation	22 August 2002	Dr John Keogh, Chairman, Commercial Law Association, and barrister; Mr Max Wislon, Chief Executive Officer, Commercial Law Association; Mr Daren Armstrong, Secretary of the Commercial Law Association's Legislative Task Force, and partner at Kemp Strang Solicitors; Mr Warren Andrews, barrister; Mr Edmund Finnane, barrister; Mr Glebe Stcherbina, Milmont Holding Pty Ltd; Mr Stephen Lamy, Commonwealth Bank; Ms Vanessa Hall, Thompson Hall Pty Ltd
Seminar	4 March 2003	Professor Harry Glasbeek, Emeritus Professor of Law at Osgoode Hall Law School, York University, Canada

Tables

- Table of legislation
- Table of cases

TABLE OF LEGISLATION

COMMONWEALTH

Australian Broadcasting Corporation Act 1983	1.5
Black Marketing Act 1942	11.17
Corporations Act 2001	
Part 2D.4	14.34
Part 2D.6	8.29
s 5E(1)	8.28
s 5G	8.28
s 9	1.4, 14.34
s 57A	1.4
s 82A(1)	14.34
s 119	1.5
s 120	14.34
s 124	1.4
s 127	14.34
s 129(2)	14.34
s 1317M	2.49
s 1317N	2.48
s 1317P	2.48
s 188	14.34
s 206E(1)(a)(i)	8.29
s 206E(1)(b)	8.29
s 461(1)(k)	8.24
s 462(2)	8.24
s 601AD	7.24
Corporations Law	
s 461(k)	8.24
Crimes Act 1914	
s 4B	5.14
s 21B	3.26
s 21B(1)	12.2
Criminal Code Act 1995	2.19
Part 2.5 Div 12	2.31, R1
s 12.2	12.31
s 12.3(1)	2.24
s 12.3(2)(a)-(d)	2.24, 2.31
s 12.4(2)	2.31
s 12.3(6)	2.25
s 13.3	2.6
Federal Court of Australia Act 1976	
Part 4A	12.7
Federal Court Rules 1979	
Order 73	12.7
Income Tax Assessment Act 1936	
s 51(4)	2.58
s 221F(5J)(a)	1.24

Proceeds of Crime Act 1987	8.36
Proceeds of Crime Act 2002	8.36
Therapeutic Goods Act 1989	
s 41(1)	8.11
Trade Practices Act 1974	
Part 4	9.16, 9.41
Part 4A	9.16, 9.41
Part 4B	9.16, 9.41
Part 5C	9.41
s 45DC	1.5
s 75AU	9.16, 9.41
s 75AYA	9.16, 9.41
s 76	4.2, 4.3
s 76(1)	4.15
s 80	9.41
s 84	2.6
s 86C	5.3
s 86C(2)(a)	5.15
s 86C(2)(b)	3.21, 5.15, 9.16, 13.8
s 86C(4)	5.15, 9.16
s 86C(4)(b)	9.34
s 86C(4)(c)	9.34
s 86D	5.15, 11.18, 11.22
Trade Practices Amendment Act (No 1) 2001	9.16
Taxation Administration Act 1953	
s 8C(1)(a)	1.24, 6.15
s 8H(1)	1.24

NEW SOUTH WALES

Animal Research Act 1985	
s 44	2.33
Anti-Discrimination Act 1977	
s 113(1)(b)(iia)	2.33
Civil Liability Act 2002	
s 18	2.33
Clean Air Act 1961	1.26, 1.31
s 21B(a)	1.24
Clean Waters Act 1970	1.26, 1.31, 2.12
s 16(1)	1.24
Community Service Orders Act 1979	
s 23(1)	13.23
Confiscation of Proceeds of Crime Act 1989	8.36
s 20	8.35

Crimes (Sentencing Procedure) Act 1999

Part 3 Div 2	14.14
Part 8	5.22
s 3(1)	3.28
s 3A	3.2, 3.28
s 3A(g)	14.10
s 8	10.2
s 9	5.9, 5.22, 9.4
s 9(2)	5.9, 13.8
s 10	5.9, 5.22, 9.4
s 10(1)(a)	1.26, 9.4
s 10(1)(b)	1.26, 13.8
s 12	5.9, 9.4
s 12(1)	13.8
s 13	9.4
s 16	5.5
s 16(a)	13.2
s 16(b)	13.2
s 17	1.33, 5.5
s 21A	4.1, 4.4, 4.51
s 21A(1)	4.4
s 21A(2)(d)	14.9
s 21A(3)(i)	4.53
s 21A(3)(e)	14.9
s 21A(3)(k)	4.53
s 21A(3)(m)	4.53
s 25	14.27
s 26	14.14
s 26-30	3.24, 14.10
s 66	14.3
s 68	14.3
s 69	14.3
s 78(1)(c)	8.35
s 80	14.3
s 81	14.3
s 86	14.3
s 88	14.3
s 89	14.3
s 95	5.11
s 96	5.11

Crimes (Sentencing Procedure)

Amendment (Standard Minimum Sentencing) Act 2002	3.2
---	-----

Crimes Act 1900

s 35A(1)	14.17
s 58	14.17
s 61	14.17
s 61O(2)	14.17
s 562AB(1)	14.17
s 580E	14.27

Crimes Legislation Amendment

(Sentencing) Act 1999	13.23
-----------------------------	-------

Criminal Assets Recovery Act 1990.....8.36**Criminal Procedure Act 1986**

s 59	5.5
s 126	12.2, 12.5

District Court Act 1973

s 64	14.28
------------	-------

Dog Act 1966

s 6(1)	14.17
--------------	-------

**Environmental Offences and
Penalties Act 1989**

s 6(1)	1.30, 1.31
s 8B(1)(a)	6.54

Environmental Planning and

Assessment Act 1979.....	1.26, 1.31
--------------------------	------------

Evidence Act 1995

s 102	2.36
s 110	2.36
s 128	2.36
s 184	2.43

Exotic Diseases of Animals Act 1991

s 72(2)	5.6
---------------	-----

Fair Trading Act 1987

s 64A.....	3.22, 8.10
s 67	11.18
s 70	2.12

Fines Act 1996

Part 4.....	6.12, 13.27
s 6	4.27
s 98	6.12, 13.27

Food Act 1989

s 9(3)	1.24
--------------	------

Gaming Machines Act 2001.....

2.57

Industrial Relations Act 1996

s 179(1)	1.28
----------------	------

Interpretation Act 1987

s 21	3.28, 5.5
------------	-----------

Land and Environment Court

Act 1979	1.28
----------------	------

Liquor Act 1982.....

2.57

Local Courts (Civil Claims) Act 1970... 9.39

s 12	13.3
------------	------

Local Government Act 1993

1.31

Marine Parks Act 1997

s 38	2.33
------------	------

Marine Pollution Act 1987.....

s 8	6.22
s 18	6.22

Medical Practices Act 1992

s 127	2.57
-------------	------

Motor Dealers Act 1974	2.57
Occupational Health and Safety Act 1983.....	1.32
s 15	1.33, 15.7, 15.9, 15.10
s 16	15.7, 15.9, 15.10
Occupational Health and Safety Act 2000	1.32, 4.23, 9.4
s 12	5.7, 6.22
s 24	5.7
s 113	5.3, 5.13
s 113(1)	9.39
s 115	11.18, 11.22, 11.28
s 115(1)(a).....	5.13
s 116	5.3, 5.13, 10.11, 10.16
s 116(1)	9.39
s 116(3)	9.39, 13.3
s 117	13.16
Pesticides Act 1999	
s 109	4.2
Pollution Control Act 1970	1.31
Property, Stock and Business Agents Act 2002.....	2.57
Protection of the Environment Operations Act 1997.....	1.26, 1.31
s 119	6.22
s 120	1.24
s 123	6.54
s 215	6.54
s 241	4.2
s 241(1)(a).....	4.14, 14.21
s 241(2)	4.2
s 241(c)	4.24
s 245	5.3, 5.13, 9.38, 12.12
s 246	12.12
s 250	5.3, 5.13, 11.14, 11.22, 11.28
s 250(1)	9.17
s 250(1)(c).....	3.24, 9.50, 10.11, 10.16, 12.12
s 250(1)(d).....	9.34
s 250(2)	9.17, 13.5
s 251	9.38, 13.16
Public Health Act 1991	
s 10C.....	6.22
Registered Clubs Act 1976	
s 27B.....	2.57
Supreme Court Rules 1970	
Part 8 r 13	12.7
Part 37.....	14.28
Part 42 r 6	8.15, 8.16
Part 54 r 5	14.28
Taxation Administration Act 1996.....	5.6
s 48	2.57

Trade Measurement Act 1989	
s 69.....	5.6
Traffic Act 1909	
s 4A(1).....	1.24
s 6(1)(c)(v)	1.24
Victims Rights Act 1996.....	3.24, 14.10
Victims Support and Rehabilitation Act 1996	
Part 4	3.24, 12.5, 14.10
s 71.....	12.5
s 77B	12.5
Waste Minimisation and Management Act 1995.....	1.31
s 64(1).....	1.30
Water Act 1912.....	1.26
Workers Compensation Act 1987	
s 174.....	2.57
Young Offenders Act 1997	
s 52(6)(a)	13.3

QUEENSLAND

Penalties and Sentences Act 1992	
s 35(2).....	12.2

SOUTH AUSTRALIA

Criminal Law (Sentencing) Act 1988	
s 7(1)	14.20
s 7A	14.20
Environment Protection Act 1993	
s 133.....	5.15
s 133(b).....	3.24, 10.11, 10.16
s 133(c).....	11.18, 11.22

VICTORIA

Crimes (Workplace Deaths and Serious Injuries) Bill 2001	2.30
Environment Protection Act 1970	
s 67AC.....	5.15
s 67AC(2)(a)	11.18, 11.22
s 67AC(2)(b)	11.18
s 67AC(2)(c)	3.24, 10.11, 10.16
s 67AC(5)	13.17, 13.26
s 67AC(8)	13.17
Sentencing Act 1991	
s 95B	14.18
s 109(3A)	5.14

WESTERN AUSTRALIA

Companies Code	2.6
Sentencing Act 1995	
s 40(5).....	5.14
s 110(1).....	12.2

AUSTRALIAN CAPITAL TERRITORY

Crimes Act 1900	
s 429AB(4)	14.18

NORTHERN TERRITORY

Sentencing Act	
s 106A	14.19
s 106B(2)	14.19
s 118.....	5.14

NEW ZEALAND

Food and Drug Act 1969.....	11.15
Food and Drugs Act 1947 (NZ)	
s 28.....	11.15

UNITED KINGDOM

Adulteration Act 1872	
(35&36 Vict c 74)	
s 2.....	11.14
Adulteration of Seeds Act 1869	
(32&33 Vict c 112)	
s 3.....	11.14
Bread Act 1836 (6&7 Will 4 c 37)	
s 8.....	11.14
Health and Safety at Work etc	
Act 1974	
s 42(1).....	9.40
Licensing Act 1874 (35&36 Vict c 94)	
s 19.....	11.14
London Bread Act 1822 (3 Geo 4 c 106)	
s 10.....	11.14
Public Health (London) Act 1891	
(54&55 Vict c 76)	
s 47(4).....	11.14
Weights and Measures Act 1889	
(52&53 Vict c 21)	
s 14.....	11.14

UNITED STATES

Federal Acquisition Regulations	
§9.406-2	8.13
Texas Business Corporation Act	
Art 7.01 s F	8.25
Texas Limited Liability Company Act	
Art 7.11 s F	8.25
Texas Non-Profit Corporation Act	
Art 7.01 s F	8.25
United States Code	
15 USC §780(b)(4)	8.11
18 USC §1509.....	13.28
18 USC §3552(b)	9.30
18 USC §3553(a)(7)	3.25
18 USC §3563(a)(2)	10.9
18 USC §3563(b)(5)	8.6
18 USC §3563(b)(13)	10.9
18 USC §3663(a)(1)	12.3
42 USC §1320a-7	3.22
United States Sentencing Commission,	
<i>Guidelines manual</i> (2002)	
§1B1.7.....	14.29
§5E1.1.....	12.5
§5E1.1(d)	12.6
Chapter 8 Part B.....	9.45
§ 8A1.2.....	4.46, 6.42
§8B1.1.....	12.3, 12.8
§8B1.2.....	12.9
§8B1.3.....	10.9, 10.15, 12.10
§8C1.1.....	3.22, 8.21, 8.36
§8C1.3(a)	9.32
§8C2.4.....	6.41
§8C2.5(b)	6.46
§8C2.5(f)	4.36, 4.37, 4.44, 6.46, 14.5
§8C2.5(g)	14.29
§8C2.8.....	6.45
§8C2.8(a)(6)	14.5
§8C2.9.....	6.45
§8C3.1(b)	6.45
§8C3.1(g)	6.46
§8C3.4.....	15.5
§8C4.7.....	4.49
§8D1.1(a)(1)	12.3
§8D1.1(a)(3)	9.19
§8D1.1(a)(6)	9.19
§8D1.1(a)(8)	9.19
§8D1.2(a)	9.21, 13.8
§8D1.3(a)	9.21
§8D1.4	11.16
§8D1.4(c).....	9.20, 9.33
§8D1.4(c)(4)	13.14
§8D1.5	13.21, 13.22

TABLE OF CASES

Alcatel Australia Ltd v WorkCover Authority of NSW (1996)	4.58, 4.39, 4.40
ASIC v Barrack Mortgage Managers Pty Limited [1999]	8.24
Attorney General (NSW) v Macquarie Publications Pty Ltd (1988)	4.46
Attorney General (NSW) v Radio 2UE Sydney Pty Ltd (1998)	4.32
Attorney General (NSW) v TCN Channel Nine Pty Ltd (1990)	4.28, 4.39
Attorney General (NSW) v Time Inc Magazine Co Pty Ltd (1994)	4.46
Attorney General v Mayas Pty Ltd (1984)	4.29
Attorney General's Reference No 2/1999 under Section 36 of the Criminal Justice Act 1972 (2000)	2.29
Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (1997)	3.17, 4.8, 4.34, 4.35, 4.48
Australian Competition and Consumer Commission v J McPhee & Son (Australia) Pty Ltd (1998)	3.17
Australian Competition and Consumer Commission v Mayo International Pty Ltd (No 3) (1998)	4.27
Australian Competition and Consumer Commission v Nissan Motor Company (Australia) Pty Ltd (1998)	4.34
Australian Competition and Consumer Commission v Rural Press Ltd (2001)	4.27
Australian Consolidated Press Ltd v Morgan (1965)	8.16
Australian Industrial Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Australia (2001)	13.25
Australian Securities Commission v AS Nominees Ltd (1995)	8.24
Bushell v Environment Secretary [1981]	2.16
Bugmy v The Queen (1990)	6.27
Cabonne Shire Council v Environment Protection Authority (2001)	4.12, 4.19
Cameron v The Queen (2002)	4.1
Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority (1993)	4.8, 4.12, 4.24, 4.42, 4.47, 6.53
Capral Aluminium Ltd v WorkCover Authority of NSW (2000)	3.6, 3.7, 4.12, 4.16, 4.21, 4.22, 4.39, 4.42
Carnie v Esanda Finance Corp Ltd (1995)	12.7
Cheatle v The Queen (1972)	8.32
Commissioner for Consumer Affairs v Reject Shop (Australia) Pty Ltd [1999]	4.39
Coppen v Moore (No 2) [1898]	2.14
Department of Mineral Resources (Chief Inspector McKensy) v Berrima Coal Pty Ltd (2001)	4.12
Department of Mineral Resources of NSW (McKensy) v Kembla Coal and Coke Pty Ltd (1999)	4.21
Director of Public Prosecutions (Cth) v Australian Broadcasting Corporation (1987)	4.46
Director of Public Prosecutions (Cth) v El Karahni (1990)	3.6
Director of Public Prosecutions (Cth) v United Telecasters Sydney Ltd (in liquidation) (1992)	4.32
Director of Public Prosecutions (Cth) v United Telecasters Sydney Ltd (1990)	4.39
Dorszynski v United States (1974)	6.50
Drake Personnel Ltd v WorkCover Authority of NSW (Inspector Ch'ng) (1999)	4.23
EPA v BHP Steel (AIS) Pty Ltd [2001]	6.54
EPA v Byron Shire Council [2001]	6.54
EPA v Camberwell Coal Pty Ltd [1999]	4.47
EPA v CSR Ltd [2001]	4.30, 4.14

EPA v Devro-Teepak Pty Ltd [2000]	4.47, 6.54
EPA v Duke Eastern Gas Pipeline Pty Ltd [2002]	4.25
EPA v Energy Services International Pty Ltd [2001]	4.19
EPA v Ferrcom Pty Ltd [1999]	4.13
EPA v Heggies Bulkhaul Limited [2003]	4.14, 4.24, 4.39, 4.40, 4.42
EPA v J K Williams Contracting Pty Ltd [2001]	4.13, 4.39, 4.42, 4.40
EPA v Johnson & Johnson Pacific Pty Ltd (2001)	4.39
EPA v Middle Harbour Constructions Pty Ltd (2002)	4.12, 4.19, 4.28
EPA v Nestle Australia Ltd (2002)	10.11, 10.16, 10.24
EPA v Pivot Ltd (2001)	10.16
EPA v Rosedale Leather Pty Ltd (2002)	10.11
EPA v Simplot Australia Pty Ltd [2001]	4.13, 13.12
EPA v Simplot Australia Pty Ltd [2001]	4.25, 4.42, 10.11
EPA v Sorcevski [2002]	1.30
EPA v Supreme Poultry & Chickens Pty Ltd [2001]	4.13, 4.32, 4.40
EPA v Sydney Water Corporation [2000]	4.14, 4.25, 6.54
EPA v The Shell Company of Australia Ltd [2000]	4.14, 4.46, 4.47
EPA v Timber Industries Ltd [2001]	4.19, 4.25
EPA v Virotec International Ltd [2002]	4.46, 4.47, 5.11, 9.4
Filipowski v Fratelli D'Amato (2000)	1.30
Fisher v Samaras Industries Pty Ltd (1996)	3.6
Fletcher Construction Australia Ltd v WorkCover Authority of NSW (Inspector Fisher) (1999)	4.8
Genner Constructions Pty Ltd v WorkCover Authority of NSW (Inspector Guillarte) (2001)	4.16
Gosford City Council v Build Max Developments Pty Ltd [2000]	15.3, 15.12
Hamilton v Whitehead (1988)	2.6
Hannah v Ricegrowers Co-operative Ltd (1990)	4.23
Harkianakis v Skalkos (1997)	4.32
Haynes v CI & D Manufacturing (1995)	4.23, 15.7, 15.12
Haynes v CI & D Manufacturing (No. 2) (1995)	15.7, 15.12
Hinch v Attorney General (Vic) [1987]	4.46
Holroyd City Council v Skyton Developments Pty Ltd [2002]	4.39
ICI Australia Operations Pty Ltd v Trade Practices Commission (1992)	9.41
Ibbs v The Queen (1987)	6.27
Krakowski v Eurolynx Properties Ltd (1995)	2.18
Lawrenson Diecasting Pty Ltd v WorkCover Authority of NSW (Inspector Ch'ng) (1999)	4.8, 4.16
Lowe v The Queen (1984)	6.27
Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [1998]	2.18
Magna Alloys and Research Pty Ltd v Federal Commissioner of Taxation (1980)	2.58
Manpac Industries Pty Ltd v WorkCover Authority of NSW (Inspector Glass) (2001) ..	4.29
Melbourne v The Queen (1999)	4.47
Minister of Aboriginal Affairs v Peko-Wallsend (1986)	2.16
Morgan v Babcock & Wilcox Ltd (1929)	2.12
Mosman Municipal Council v Menai Excavations Pty Ltd (2002)	4.27
Moussell Bros Ltd v London and North-Western Railway Co [1917]	2.12
Newcastle City Council v Pace Farm Egg Products Pty Ltd [2002]	4.14, 4.42, 4.40
NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission (1996)	4.32
P & O European Ferries (Dover) Ltd (1991)	2.29
Patton v Fletcher Construction Australia Limited (No 2) [2003]	3.7, 4.8, 4.33, 4.46

R v A C Hatrick Chemicals Pty Ltd (1995)	2.18
R v Adomako [1995].....	2.29
R v Australasian Films Ltd (1921)	2.12, 2.18
R v Boskovitz [1999]	3.6
R v Corner (19 December 1997)	3.6
R v Cornwell [1972]	14.27
R v Cory Brothers and Company Ltd [1927].....	2.29
R v Craven (1995)	4.49
R v David Syme & Co Ltd [1982].....	4.32
R v Finn [2002]	3.6
R v H (1980)	6.53
R v Hallocoglu (1992).....	14.27
R v Hawker [2001].....	3.6
R v HM Coroner for East Kent (1989)	2.18
R v Howland (1999)	4.12, 6.53
R v ICR Haulage [1944].....	2.3
R v Majors (1991).....	14.3
R v Mato [1999].....	3.6
R v Oliver (1980)	4.11, 6.23, 6.27
R v Pont (2000)	3.6
R v Radich [1954].....	3.6, 4.9
R v Rushby [1977].....	3.6, 4.9
R v Slattery (1996).....	4.12
R v Szeto [1999]	3.6
R v Wattle Gully Gold Mines NL [1980]	6.11
R v Woodman [2002].....	3.6
Re Director of Public Prosecutions; Ex Parte Lawler (1994)	8.32, 8.33
Registrar of the Court of Appeal v John Fairfax Group Pty Ltd (1993)	4.27, 5.4
Smith v Cnizonom (1982)	4.29
State Rail Authority of NSW v WorkCover Authority of NSW (Inspector Dubois) (2000)	1.33, 4.32
Tesco Supermarkets Ltd v Natrass [1972]	2.6, 2.7, 2.8, 2.11
Tiger Nominees Pty Ltd v State Pollution Control Commission (1992)	2.12, 2.14
Trade Practices Commission v Annand and Thompson Pty Ltd (1987)	4.32
Trade Practices Commission v Carlton United Breweries Ltd (1990)	4.28
Trade Practices Commission v CC (NSW) Pty Ltd (No 2) (1995)	4.34
Trade Practices Commission v CSR Ltd (1991)	4.3, 4.15, 4.18, 4.28, 4.32, 4.34, 4.43
Trade Practices Commission v Dunlop Australia (1980)	4.43
Trade Practices Commission v ICI Australia Operations Pty Ltd (1991)	4.48
Trade Practices Commission v Malleys Ltd (1979)	4.34, 4.41, 4.46
Trade Practices Commission v Stihl Chain Saws (Aust) Pty Ltd (1978).....	4.9, 4.18
Trade Practices Commission v TNT Australia Pty Ltd (1995)	3.17, 4.18, 4.27, 4.28, 4.34, 4.38, 4.39, 4.43
United States v Allied Chemical Corporation (1976)	10.10
United States v Bank of New England (1987)	2.16
United States v Danilow Pastry Co (1983)	7.3, 10.5, 10.9
United States v Missouri Valley Construction Co (1984).....	10.10
United States v Prescon Corp (1982).....	7.10
United States v William Anderson Co Inc (1982)	9.25
United States v Wise (1962).....	6.2, 7.11
United States v Wright Contracting Co (1983).....	7.10
Veen v The Queen (No 2) (1988)	4.8

Watson v Southern Asphalters Pty Ltd (1996).....	4.16
Wong v The Queen (2001).....	4.1
WorkCover Authority of NSW v Genner Constructions Pty Ltd [2000].....	5.12, 9.4
WorkCover Authority of NSW v Nicholson Air Services Pty Ltd (1998).....	15.10
WorkCover Authority of NSW v Profab Industries Pty Ltd (2000).....	4.8
WorkCover Authority of NSW (Inspector Ankucic) v McDonald's Australia Ltd (2000).....	3.7, 4.21, 4.23, 4.46, 4.47, 6.2, 15.8
WorkCover Authority of NSW (Inspector Blume) v TMP Worldwide eResourcing [2003].....	3.7, 4.39
WorkCover Authority of NSW (Inspector Bourne) v Delta Pty Ltd [2000].....	4.8
WorkCover Authority of NSW (Inspector Buggy) v P&O Ports Ltd [2000]	4.39, 4.42
WorkCover Authority of NSW (Inspector Byer) v Cleary Bros (Bombo) Pty Ltd (2001).....	4.16
WorkCover Authority of NSW (Inspector Donnelly) v Riverina Wool Combing Pty Ltd [2000]	4.12, 5.12
WorkCover Authority of NSW (Inspector Dubois) v Galicia Constructions Pty Ltd [2000].....	4.31, 9.4
WorkCover Authority of NSW (Inspector Dubois) v Transfield Pty Ltd [2000]	4.23, 4.42
WorkCover Authority of NSW (Inspector Farrell) v Forgacs Shipyard Pty Ltd [2001]	4.8
WorkCover Authority of NSW (Inspector Gilbert) v Kayuu Pty Ltd [2000]	3.7
WorkCover Authority of NSW (Inspector Glass) v Kellogg (Aust) Pty Ltd (No 1) (2000).....	4.16, 4.23
WorkCover Authority of NSW (Inspector Glass) v Kellogg (Aust) Pty Ltd (No 2) (2000).....	4.30
WorkCover Authority of NSW (Inspector Howard) v General Beton Co Pty Ltd (2001)	4.47
WorkCover Authority of NSW (Inspector Lancaster) v BHP Steel (AIS) Pty Ltd (2001).....	4.16, 4.25
WorkCover Authority of NSW (Inspector Lancaster) v Burnshaw Constructions Pty Ltd [2001]	4.30
WorkCover Authority of NSW (Inspector Mansell) v Anytime Industrial Services Pty Ltd (2001).....	4.47
WorkCover Authority of NSW (Inspector Mansell) v Hayman Industries Pty Ltd [2003]	3.7, 4.27, 4.40
WorkCover Authority of NSW (Inspector McMartin) v Milltech Pty Limited [2001]	7.3
WorkCover Authority of NSW (Inspector Olive) v Transfield Pty Ltd [2001]	4.46
WorkCover Authority of NSW (Inspector Page) v Walco Hoist Rentals Pty Ltd (No 2) (2000).....	4.8, 4.27
WorkCover Authority of NSW (Inspector Patton) v P & M Denton Building Constructions Pty Ltd [2003]	3.7, 4.27
WorkCover Authority of NSW (Inspector Reynolds) v NorthPower [2001]	4.12
WorkCover Authority of NSW (Inspector Reynolds) v PF Thearle & Co Pty Ltd [2001].....	4.29, 7.3
WorkCover Authority of NSW (Inspector Richey) v State Rail Authority of NSW [2000]	4.23
WorkCover Authority of NSW (Inspector Robinson) v Milltech Pty Ltd [2001]	4.29, 4.30, 7.3
WorkCover Authority of NSW (Inspector Stewart) v Siemans Dematic Pty Ltd (No 2) [2003].....	3.7, 4.39, 4.40
WorkCover Authority of NSW (Inspector Suliman) v Favelle Favco Cranes Pty Ltd [2003].....	3.7
WorkCover Authority of NSW (Inspector Vassel) v Duff Bros Pty Limited [2000]	4.47
WorkCover Authority of NSW (Inspector Vierow) v J Gardner (NSW) Contractors Pty Ltd [2003]	3.7, 4.40, 4.46, 4.47

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INDEX

- Accountants**
 role in assessing corporations pre-sentence 14.8
 supervision of sentences by 9.14, 13.12
- Aggravating factors**
 augmenting penalty 4.8
 to be contained in legislative statement 4.50-4.52, **R3**
- Aggregation model** 2.15-2.20, 2.31
- Aims of sentencing** *see* **Objectives of sentencing**
- Associations** *see also* **Unincorporated associations**
- Audit orders**
 under Protection of the Environment Operations Act 1997 (NSW) 5.13
- Auditors**
 role in assessing corporations pre-sentence 14.8
 supervision of sentences by 9.14, 13.12
- Bonds** *see also* **Probation orders; Conditional discharges; Good behaviour bonds;**
 Suspended sentences
 for individuals – operation of 9.3
 use of, to impose conditions 5.22
- Chief executive officer** *see also* **Executive officer**
 in Australia – use of term 14.34-14.36
 in United States – presence of at sentencing 14.29-14.32
- Circumstances relevant to sentencing** *see under* **Corporate offenders**
- Civil injunctions**
 compared with punitive injunctions 9.41-9.42
- Civil liability**
 compared with corporate criminal liability 2.33-2.48
- Closely held corporations**
 sentencing in context of 15.5
- Collective knowledge** 2.16
 see also **Aggregation model**
- Community service orders** 10.1-10.27, **R10, R11**
 achieving restitution or compensation 7.27, 12.3, 12.7, 12.8, 12.10, 12.11, 12.13
 application to corporations 5.2, 5.17-5.19, **R4**, 10.4-10.8
 application to corporations in Australia 10.11, 10.16
 application to corporations in US 10.9, 10.10
 application to individuals 5.2, 10.2-10.3
 as civil sanction 2.33
 common provisions 13.1
 compared with equity fines 7.27
 compared with fines 6.18

Community service orders (continued)

cost of carrying out.....	13.4
enforcement of.....	10.27
funding of community projects.....	10.12-10.17, R10
in other Australian jurisdictions.....	5.15
involving corporation's personnel and resources	10.18-10.22
maximum cost of complying.....	10.26
natural justice and.....	10.21, 10.22, R11
to enforce payment of fines.....	6.12, 13.27, R20
under Protection of the Environment Operations Act 1997 (NSW).....	12.12
under Protection of the Environment Operations Act 1997 (NSW).....	5.13
under Trade Practices Act 1974 (Cth)	5.15
use in combination with other penalties	10.23-10.25
where more appropriate than punitive injunctions.....	9.50

Compensation *see also* Reparation

achieved by community service orders	7.27
achieved by equity fines.....	7.8-7.10
definition	12.1
for victims of corporate crime.....	5.17
in New South Wales.....	12.5
order for, as civil sanction	2.33

Compliance systems

relevance to sentence	4.32-4.37, 4.52, 4.53, R3
-----------------------------	----------------------------------

Conditional discharges *see also* Bonds; Probation orders

applicable to corporations.....	5.10, 5.11, 9.4
general availability	5.9, 9.4
two year limit	13.8

Confiscation of proceeds of crime

means of dissolving corporation.....	8.36
natural justice and.....	8.35

Consistency in fines..... 6.25-6.30

operation of principle.....	6.51-6.52
unknown in US	6.50

Consumers

as targets of publicity orders.....	11.10-11.12, 11.26
compared to shareholders.....	7.18
effect of community service orders on.....	10.5, 10.9
effect of disqualification orders on	8.4, 8.8
effect of dissolution on	8.20-8.23, 8.26
effect of fine on	7.6
effect of freezing profits on	8.15, 8.18
effect of probation orders on.....	9.27

Contempt of court

enforcement of orders	13.17-13.19
remedy of sequestration	8.16

Contracts

disqualifying corporations from	3.22, 8.2, 8.13, 8.14, R6
---------------------------------------	----------------------------------

Contrition

evidence of in corporation.....4.38-4.42

Corporate crime.....1.6-1.19

conventional crimes1.7-1.10

definition1.6

impact on society1.11-1.14

incidence of corporate offending1.21-1.34

perceptions of1.9, 1.10, 1.15-1.19

prosecution of1.8, 1.9, 2.1

regulatory offences1.7-1.10

sentencing in the context of1.20

Corporate criminal liability

aggregation model2.15-2.20, 2.31

appropriateness of2.33-2.34

bases for2.1-2.60, **R1**

compared with civil liability.....2.33-2.48

corporate fault.....2.21-2.25, 2.31

current legal regime2.3-2.14

current legal regime – criticisms of2.27-2.28

identification doctrine2.6-2.11, 2.31

imposition by statute2.4, 2.12, 2.18

justification of2.32-2.60

LRC's conclusion2.31

vicarious liability2.12-2.14, 2.31

Corporate fault

model of corporate criminal liability.....2.21-2.25, 2.31

Corporate offenders *see also* Directors; Shareholders; Employeesapplying sentencing objectives to3.27, 3.28, **R2**

circumstances relevant to sentencing.....4.26-4.49

compliance systems.....4.32-4.37, 4.52, 4.53, **R3**, 6.46

cooperation with authorities4.40

corporate character.....4.47-4.48

effect on provision of services to the public4.49, 4.53, **R3**financial circumstances4.27, 4.30, 4.31, 4.53, **R3**management attitude to criminal activity.....4.43-4.45, 4.52, **R3**, 6.46

plea of guilty.....4.38-4.39

prior criminal record.....4.46

reparation4.42

size of the corporation.....4.28-4.29

stopping offending conduct4.41, 4.53, **R3**

definition1.3

factors relevant to sentencing.....4.1-4.53

owners as related offenders.....15.1-15.5, 15.11, 15.12

scope of Report1.1

separate provisions proposed for5.21, **R4****Corporate probation *see* Probation orders****Corporate quarantine**.....8.8*see also* **Disqualification**

Corporations *see also* Corporate offenders

compelling presence of representative at sentencing	14.25-14.39, R23
nature of	1.4-1.5
Parent corporations – sentencing of	15.6-15.12
public perceptions of	3.15, 3.16
Subsidiary corporations – sentencing of	15.6-15.12

Corporations law

dissolution of corporation under	8.24
dissolution, potential constitutional inconsistency	8.28, R7

Correction orders *see also* Injunctive orders; Probation orders; Punitive injunctions,

Remedial orders

common provisions	13.1
cost of carrying out	13.4
definition	9.1
means of achieving restitution	12.7
proposed for corporations	5.17, 5.18, R4 , 9.1-9.50, R9
to enforce payment of fines	13.27, R20

Cost of compliance

in relation to orders	13.2-13.4
not to exceed maximum amount	9.39, 10.26
publicity orders, met by offenders	11.14, 11.22, R12

Cost of preparing pre-sentence reports

to be met by corporations	14.8, R22
---------------------------------	------------------

Cost of supervision

to be met by corporations	9.28, 9.34, 13.14, R17
---------------------------------	-------------------------------

Creditors

as targets of publicity orders	11.32
effect of community service orders on	10.5
effect of fine on	6.8

Criminal liability *see also* Corporate criminal liability

Customers

as targets of publicity orders	11.32
--------------------------------------	-------

Denunciation..... 3.13-3.17

***see also* Objectives of sentencing**

achieved by presence of corporate representative at sentencing	14.26
achieved by publicity orders	10.24, 11.2, 11.32
definition	3.13
fine ineffective for achieving	6.7
not achieved by optimal penalties model	6.35
not achieved effectively by civil liability	2.45
objective of sentencing	3.1, 3.2, 3.4

Department of Fair Trading (NSW)

enforceable undertakings and civil orders	9.23
regulatory role	9.24
suspension of licences by	8.10

Deterrence *see also* Objectives of sentencing

achieved by community service orders	10.6
achieved by conviction alone	6.13
achieved by corporate probation	9.25, 9.29
achieved by criminal liability	2.46
achieved by equity fines	7.4, 7.11-7.15
achieved by incapacitation orders	8.1
achieved by presence of corporate representative at sentencing	14.26
achieved by probation order	5.12
achieved by publicity orders	11.4, 11.6
achieved by punitive injunctions	9.45
better achieved by other than disqualification	8.8
definition	3.5
emphasised for corporate offenders	3.3
empirical studies	3.9-3.10
importance of	4.9
incapacitation order a last resort	3.11
justification for vicarious liability of corporations	2.13
LRC's view	3.12
main aim of sentencing corporate offenders	3.11, 3.17
more important than retribution	3.11
not achieved by equity fines	7.20-7.22, 7.27
not achieved by optimal penalties model	6.35
not achieved effectively by civil liability	2.45
not achieved effectively by fine	6.2-6.5
not emphasised by organisational reform orders	9.15
objective of sentencing	3.1, 3.2, 3.4, 3.5-3.12
primary focus of disqualification order	8.4
relationship to incapacitation and rehabilitation	3.18
under Trade Practices Act 1974 (Cth) s 80	9.41
under US Sentencing Commission's guidelines on fines	6.46

Deterrence trap	6.4
avoided by community service orders	10.5

Directors

and corporate criminal liability	2.8-2.10
as related offenders	15.1-15.5, 15.11, 15.12
compelling presence of at sentencing	14.25-14.39, R23
consideration of criminal records	14.9, R22
effect of freezing profits	8.17
preventing from reincorporating	8.29-8.35, R8

Discretion *see* Judicial discretion**Disparity**

NSW response to	6.52
US response to	6.50

Disqualification *see also* Corporate quarantine; Incapacitation orders

analogy to imprisonment	8.3
common provisions	13.1
compared with dissolution	8.2, 8.5, 8.19
compared with fine	8.8

Disqualification (continued)

compared with publicity orders.....	8.8
compared with punitive injunctions	5.20, 9.36
proposed for corporations	5.17, 8.1-8.18, R6
to enforce payment of fines.....	13.27, R20

Dissolution 2.48, 3.22*see also Incapacitation orders; Nationalisation; Liquidation*

as a civil remedy	8.24-8.25
by confiscation of proceeds of crime	8.36
by means of a fine	8.19, 8.36, 8.37
compared with disqualification	8.2, 8.5, 8.19
compared with probation order	9.25
potential inconsistency with corporations law	8.28, R7
proposed for corporations	5.17, 8.1, 8.19-8.37
reincorporation after	8.20, 8.29-8.35
to enforce payment of fines.....	13.27, R20
under corporations law	8.24

District Court (NSW)

convictions for corporate crime	1.27
---------------------------------------	------

Duration of orders 13.5-13.10

LRC's conclusion	13.9, 13.10, R16
under Protection of the Environment Operations Act 1997 (NSW).....	13.5
under Trade Practices Act 1974 (Cth)	13.8

Education and training

programs established under probation order	9.16, 9.34
--	------------

Employees *see also Managers*

and corporate criminal liability.....	2.13, 2.14, 2.16, 2.19, 2.27
compared to shareholders.....	7.18
compelling presence of at sentencing.....	14.25-14.39, R23
consideration of criminal records.....	14.9, R22
effect of community service orders on.....	10.5, 10.9
effect of disqualification orders on	8.4, 8.8
effect of dissolution on	8.20-8.23, 8.26
effect of fine on	6.8, 6.9, 7.6
effect of freezing profits on	8.15, 8.18
effect of probation orders on	9.27
effect of publicity orders on	11.9, 11.19, 11.20
involvement in community service orders	10.6, 10.18-10.22
low level, inability of to pay fines.....	2.58
prosecution of	2.49

Enforceable undertakings

under trade practices law	9.23
---------------------------------	------

Enforcement

by contempt of court	13.17-13.19
by offence attracting further penalty.....	13.15, 13.16
by punishing individuals	13.28, 13.29, R21
by resentencing	13.20-13.26, R18
difficulty of enforcing fines	6.12

Enforcement (continued)

further options for enforcing fines	13.27, R20
of community service orders	10.27
of disqualification orders – problems.....	8.8
of sentencing orders.....	13.15-13.29

Entrapment

danger of with internal discipline orders	9.11
---	------

Environmental offences

and corporate criminal liability	2.51
application of factors relevant to sentencing	4.7
convictions for	1.24
extent of harm caused as factor in determining objective seriousness.....	4.14
failure to comply with orders	13.16
foreseeability of the offence or its consequences	4.24-4.25
impact of.....	12.6, 14.12, 14.22
in Land and Environment Court	1.29-1.31
in Local Courts.....	1.26
New South Wales legislation – additional orders under	9.17
orders to remedy harm caused by.....	3.24, 5.13
public view of	1.18
restitution for.....	12.12
South Australian legislation	5.15
systematic or deliberate defiance of the law	4.18
use of community service orders for	10.4, 10.11, 10.14, 10.16
use of publicity orders	11.18
use of punitive injunctions for	9.38, 9.45, 9.50
Victorian legislation	5.15

Equity fines	7.1-7.27, R5
administrative difficulties.....	7.24-7.25
also “stock dilution”	5.17, 7.7
avoidance of “wealth ceiling”.....	7.3-7.5
compared with community service orders.....	7.27
compensating victims	7.8-7.10
definition	7.1
do not reflect gravity of offence.....	7.23
limited application.....	7.26
LRC’s view	7.27, R5
overspill.....	7.6, 7.7
proposals for	5.17
unfair burden on shareholders	7.16-7.20
whether achieve deterrence	7.11-7.15, 7.21, 7.22
whether achieve rehabilitation.....	7.21, 7.22

Executive officer

presence of at sentencing	14.34, R23
---------------------------------	-------------------

Extent of harm caused

indicative of objective seriousness	4.13-4.16
---	-----------

Factors relevant to sentencing	4.1-4.53
<i>see also</i> Mitigating factors, Aggravating factors	
statutory list in NSW	4.4, 4.5

Fair trading offences *see* **Trade practices offences**

Fault *see also* **Corporate fault**

Financial circumstances

relevance to sentence 4.27, 4.30, 4.31, 4.53, **R3**

Fines 6.1-6.54

see also **Equity fines**

adverse effects on third parties 6.8-6.11
 compared with disqualification 8.8
 compared with funding community projects 10.13
 compared with probation orders 9.25, 9.28, 9.29
 compared with punitive injunctions 9.46, 9.47
 consistency in fines 6.25-6.30
 difficulty of enforcing 6.12
 do not alleviate harm to victims 7.8
 enforcement of payment 13.27, **R20**
 for corporations – at common law 5.4
 for corporations – under statutes 5.5-5.7
 frequency in Local Courts 1.25
 frequency in US District Court 1.25
 in other Australian jurisdictions 5.14
 ineffective against corporations 2.39
 ineffective for denunciation 6.7
 ineffective for deterrence 6.2-6.5, 7.11
 ineffective for rehabilitation 6.6
 ineffective in addressing all objectives of sentencing 5.16
 level of fines 6.22-6.25
 LRC's view 6.13-6.20
 maximum penalties 6.22-6.24, 6.27, 13.2
 maximum penalties, circumvention of 13.4
 most common penalty for corporations 2.33, 5.2
 optimal penalties model 6.31-6.39
 quantum in Land and Environment Court 1.30
 relevance of financial circumstances 4.27, 4.30, 4.31
 setting fines 6.21-6.54
 United States Sentencing Commission's guidelines 6.40-6.50
 use of to dissolve corporation 8.19, 8.36, 8.37
 usual result of resentencing for breach of an order 13.24

Foreseeability of offence

indicative of objective seriousness 4.20-4.25, 4.52, **R3**

Forfeiture

analogy to preventing reincorporation 8.32-8.33

Freezing profits

of corporations 8.2, 8.15-8.17, **R6**
 similarity to sequestration 8.15, 8.16

Gaol *see* **Imprisonment**

Good behaviour bonds *see also* **Bonds; Probation orders**

five year limit 13.8
 general availability 5.9, 9.4
 possible application to corporations 5.11

Gravity of an offence	
gravity with which community views offence	4.10-4.12
Home detention orders	
natural justice and	8.35
Homicide	
and corporate criminal liability	2.29, 2.30
incidence of death in the workplace	2.30
Law Commission proposals on corporate killing	2.29, 9.43
public view of corporate crime causing death	1.16
use of disqualification when corporation commits.....	8.5
Identification doctrine	2.6-2.11, 2.31
and corporate manslaughter	2.29
Imprisonment	
compared to disqualification	8.3
high social costs of	9.28
last resort for fine defaulters	6.12
not available for corporations	2.39, 5.2, 5.10
Incapacitation	3.18-3.22
<i>see also</i> Objectives of sentencing	
achieved by disqualification of directors	8.33
achieved by forfeiture orders	8.33
achieved by incapacitation orders.....	8.1
definition	3.18
objective of sentencing.....	3.1, 3.2, 3.4
sub-goal of deterrence.....	3.18
Incapacitation orders <i>see also</i> Disqualification; Dissolution	
last resort where deterrence fails	3.11
proposed for corporations	5.17, 5.18, R4 , 8.1-8.37
to enforce payment of fines	13.27, R20
Incarceration <i>see</i> Imprisonment	
Industrial relations	
special sentencing options for corporations.....	5.3
Industrial Relations Commission (NSW)	
corporate offences in.....	1.28, 1.32, 1.33
Injunctions <i>see also</i> Punitive injunctions, Civil injunctions, Correction orders	
as civil sanctions	2.33
Injunctive orders <i>see also</i> Correction orders	
in other Australian jurisdictions	5.15
Internal discipline orders	
effect of achieved by enforceable undertakings	9.23
proposals for	9.7-9.13, 9.33, R9
Judicial discretion	
attempts to constrain in US	6.30, 6.47
factors relevant to sentencing.....	4.1
fixing combination of penalties	5.23, 10.23-10.25

Judicial discretion (continued)

fixing fines.....	6.28, 6.29
in civil proceedings.....	2.43
wide scope for	5.18

Jurisdictional limits

in relation to orders	13.2-13.4, R15
under Occupational Health and Safety Act 2000 (NSW).....	13.3
under Young Offenders Act 1997 (NSW)	13.3

Land and Environment Court (NSW)

corporate offences in	1.28-1.31
-----------------------------	-----------

Law and economics

approach to probation orders	9.29
optimal penalties model	6.31-6.39

Lawyers

role in assessing corporations pre-sentence	14.8
supervision of sentence by	9.14, 13.12

Legal Practitioners *see* Lawyers**Leniency**

in sentences for corporate crime	1.20
NSW response	6.53
US concerns.....	6.50

Liability *see also* Criminal liability**Licences**

revoking or suspending.....	2.48, 3.22, 8.2, 8.9-8.12, R6
revoking or suspending – as administrative sanction	2.33

Liquidation *see also* Dissolution

compared with nationalisation.....	8.23
------------------------------------	------

Local Courts

Corporations found guilty in	1.23-1.25
duration of orders	13.7, R16
jurisdictional limits.....	13.3, R15
power to compel presence of persons at sentencing.....	14.27

Managers *see also* Employees

and corporate criminal liability.....	2.8-2.11
effect of equity fines on.....	7.14, 7.15
effect of publicity orders on	11.9
holding shareholders culpable for actions of	7.18
involvement in community service orders.....	10.6, 10.18-10.22
involvement in or tolerance of criminal activity	4.43-4.45, 4.52, R3
may be reimbursed for fines.....	2.58

Manslaughter *see* Homicide**Maximum penalties**

aimed at obviating leniency	6.53, 6.54
in relation to fines.....	6.22-6.24, 6.27
indicative of gravity of offence.....	4.11-4.12

Media	
use of, for adverse publicity	11.26-11.29
Mitigating factors	
reducing penalty	4.8
to be contained in legislative statement.....	4.50, 4.53, R3
Murder <i>see</i> Homicide	
Nationalisation <i>see also</i> Dissolution	
compared with liquidation	8.23
form of dissolution	8.19
ideologically repugnant	8.23
Natural justice <i>see also</i> Procedural safeguards	
concerns regarding disqualification of directors	8.35, R8
confiscation of proceeds of crime.....	8.35
home detention orders	8.35
individuals under corporate community service orders	10.21, 10.22
Objective seriousness	4.8-4.25
extent of harm caused	4.13-4.16, 6.46
foreseeability of the offence or its consequences.....	4.20-4.25, 4.52, R3
gravity with which community views offence	4.10-4.12, 10.26
systematic or deliberate defiance of the law	4.17-4.19
Objectives of sentencing	3.1-3.28
<i>see also</i> Rehabilitation, Deterrence, Retribution, Prevention, Incapacitation,	
Denunciation	
achieved by mix of penalties	6.19, 6.20
applying to corporate offenders	3.27, 3.28, R2
general – legislative statement in NSW.....	3.2
in relation to probation orders.....	9.24-9.26
Occupational health and safety offences	
and corporate criminal liability	2.51
application of factors relevant to sentencing	4.7
community service orders for	10.11, 10.14
convictions in Industrial Relations Commission	1.32-1.33
extent of harm caused as factor in determining objective seriousness.....	4.16
failure to comply with orders	13.16
foreseeability of the offence or its consequences.....	4.21-4.23
impact of.....	14.12
jurisdictional limits on remedial orders	13.3
orders relating to	5.13
public view of injuries resulting from.....	1.18
publicity orders for	11.18
punitive injunctions for	9.39, 9.40
special sentencing options for corporations.....	5.3
work-related fatalities	1.12
Optimal penalties model	6.31-6.39
Organisational reform orders	
compared with punitive injunctions.....	9.15
effect of achieved by enforceable undertakings	9.23
proposals for	9.14, 9.15, 9.34, R9

Parent corporations	
sentencing of.....	15.6-15.12
Parliament	
expresses community view of seriousness of an offence	4.12, 6.14
Partnerships	
distinguished from corporations	1.5
Personnel <i>see also</i> Directors; Employees	
Pre-sentence reports	14.1-14.9, R22
for corporations – information to be contained in	14.5-14.9
for individual offenders.....	14.1-14.3
Prevention	
achieved by civil liability	2.44
achieved by corporate probation	9.25
achieved by punitive injunctions.....	9.45
Preventive orders <i>see also</i> Punitive injunctions	
proposed in South Australia.....	9.37
Probation and Parole Service (NSW)	
preparation of pre-sentence reports.....	14.2-14.3
whether able to assess corporations	14.8
supervision by Probation Officers	13.11
Probation orders	
alternatives to	9.23
and objectives of sentencing	9.24-9.26
compared with punitive injunctions	9.49
current – applicability to corporations	5.10, 5.11, 5.12
current – conditional discharges	5.9
current – good behaviour bonds	5.9
current – suspended sentences	5.9
for corporations – <i>see also</i> Correction orders	
for individuals – not generally available for corporations	5.2, 5.10
for individuals – operation of	9.3
in other Australian jurisdictions.....	5.15
internal discipline orders.....	9.7-9.13
means of achieving restitution.....	12.3, 12.7
organisational reform orders.....	9.7, 9.14, 9.15
proposed for corporations	5.17, 9.2-9.34
specific advantages	9.27
specific disadvantages	9.28-9.30
under Protection of the Environment Operations Act 1997 (NSW).....	9.17
under Trade Practices Act 1974 (Cth)	5.15, 9.16
under Trade Practices Act 1974 (Cth) – rehabilitation	3.21
under Trade Practices Act 1974 (Cth) – three year limit	13.8
under United States Sentencing Commission’s guidelines	9.19-9.22
use of term.....	5.19
Procedural safeguards <i>see also</i> Natural justice	
and internal discipline orders	9.11
effect on convictions	2.41
importance of when determining criminal liability	2.36

Profits *see also* Freezing profits

Proportionality	13.4
and consistency in fines.....	6.26, 6.27
objective of sentencing.....	4.9

Prosecution

cooperation with prosecutors – relevance to sentence.....	4.40
easier against corporations than individuals.....	2.56, 2.57
of corporate crime	1.8, 1.9
of corporate crime – agencies responsible for.....	1.8
of corporate crime – incidence.....	1.9, 1.27-1.29
reasons for prosecuting corporations.....	2.49-2.60
relation to basis for corporate criminal liability	2.1
tendency to antagonise relations with regulators	2.40

Publicity

danger of favourable publicity from community service order	10.7
effect of adverse publicity on corporations	2.35, 2.38
of corporation's failure to comply with order	13.17, R19

Publicity orders	11.1-11.33, R12, R13, R14
as administrative sanctions	2.33
common provisions	13.1
cost of carrying out	13.4
counter-publicity.....	11.30, 11.31, R14
courts as propagandists.....	11.21-11.23
effectiveness compared with disqualification.....	8.8
impact on corporate reputation.....	11.6-11.9
impact on corporation's autonomy.....	11.13
impact on corporation's business	11.10-11.12
in other Australian jurisdictions	5.15
intended audience.....	11.24-11.29, R13
preferable to fines in some cases	6.18
proposed for corporations	5.17, 5.18, R4
rationale	11.2-11.13
selective imposition required	11.32, 11.33
uncertain effect of	11.19, 11.20
under Protection of the Environment Operations Act 1997 (NSW).....	5.13
under Trade Practices Act 1974 (Cth)	5.15
use in conjunction with community service orders.....	10.24
use of in Australia	11.17, 11.18
use of in New Zealand	11.15
use of in United Kingdom	11.14
use of in United States	11.16

Punishment

achieved by corporate probation	9.25, 9.29
and civil liability	2.44
not achieved by equity fines.....	7.20

Punitive injunctions *see also* Correction orders; Preventive orders

appropriateness of	9.44-9.48
availability of	9.49-9.50
compared with civil injunctions.....	9.41-9.42

Punitive injunctions (continued)

compared with community service orders	9.50
compared with disqualification	5.20, 9.36
compared with fines	9.46, 9.47
compared with organisational reform orders	9.15
compared with probation orders	9.49
criticisms of	9.48
Law Commission proposals on corporate killing	9.43
possibility of under Trade Practices Act 1974 (Cth)	9.41
proposed for corporations	5.17, 9.37-9.50, R9
South Australian proposals	9.37
under environmental protection laws	9.38
under occupational health and safety laws	9.39, 9.40
use of term	5.19

Regulation *see also* **Self regulation**

Rehabilitation 3.18-3.22

see also **Objectives of sentencing**

achieved by community service orders	10.6
achieved by conviction alone	6.13
achieved by corporate probation	9.2, 9.25-9.27, 9.29
achieved by organisational reform orders	9.15
achieved by publicity orders	11.32
achieved by punitive injunctions	9.45
definition	3.18
emphasised for corporate offenders	3.3
equity fines ineffective for	7.20-7.22, 7.27
fine ineffective for	6.6
funding community projects ineffective for	10.12
little scope for with disqualification order	8.4
objective of sentencing	3.1, 3.2, 3.4
restitution orders ineffective for	12.7
sub-goal of deterrence	3.18

Reincorporation

after dissolution	8.20, 8.29-8.35
-------------------------	-----------------

Remedial orders *see also* **Correction orders**

means of achieving restitution	12.3, 12.8, 12.9
--------------------------------------	------------------

Remorse

relevance to sentence	4.38
-----------------------------	------

Reparation 12.1-12.14

see also **Restitution**

achieved by community service orders	10.4, 10.17, 12.3, 12.7, 12.8, 12.10, 12.11, 12.13
achieved by correction orders	12.7
achieved by probation orders	12.3, 12.7
achieved by remedial orders	12.3, 12.8, 12.9
as adjunct to sentencing process	3.23, 3.25
definition	3.25
for groups of victims	12.6-12.12
for victims of corporate crime	5.17
in New South Wales	12.5, 12.12

<i>Reparation (continued)</i>	
in United States.....	12.8-12.11
indicative of corporate contrition.....	4.38, 4.42
LRC's conclusion.....	12.13-12.14
UN declaration.....	12.4, 12.12
Repentance	
relevance to sentence.....	4.38
Representative proceedings	
for groups of victims	12.7
Reprobation <i>see</i> Denunciation	
Resentencing	
ancillary orders on	13.26, R19
for breach of order	13.20-13.26, R18
Responsive regulation	
theory of	2.48
Restitution <i>see also</i> Reparation	
achieved by funding community projects	10.13
achieved by punitive injunctions	9.45
achieved under Protection of the Environment Operations Act 1997 (NSW) ..	12.12
definition	12.1
Restitution orders	
for groups of victims	12.6-12.12
for victims of corporate crime.....	5.17
frequency of orders in US District Court	1.25
in New South Wales	12.5
in the United States	12.3
Restraint of business <i>see</i> Disqualification	
Retribution	3.13-3.17
<i>see also</i> Objectives of sentencing	
achieved by incapacitation orders.....	8.1
better achieved by other than disqualification	8.8
definition	3.13
deterrence more important	3.11
not achieved by optimal penalties model	6.35
not emphasised by organisational reform orders	9.15
objective of sentencing.....	3.1, 3.2
Self regulation	
by internal discipline orders	9.9, 9.12
encouraged by criminal liability	2.54, 2.55
encouraged by USSC guidelines	9.22
Sequestration	
similarity to freezing profits	8.15, 8.16
Seriousness <i>see also</i> Objective seriousness	
Shaming	
achieved by publicity orders.....	11.2

Shareholders

ability to effect change in corporation	7.22
as related offenders.....	15.1-15.5, 15.11, 15.12
as targets of publicity orders.....	11.27, 11.32
effect of disqualification orders on	8.4, 8.8
effect of dissolution on	8.20, 8.21, 8.26
effect of equity fines on.....	7.5, 7.7, 7.16-7.20, 7.27
effect of fine on	6.8-6.10
effect of freezing profits on	8.17, 8.18
effect of probation orders on.....	9.27, 9.28
introduction of new shareholders by equity fines	7.12
preventing from reincorporating.....	8.29-8.35, R8

Solicitors *see also* Lawyers**Spillover *see also* Consumers; Employees; Shareholders**

in relation to community service orders	10.5
in relation to cost of supervision	13.14
in relation to disqualification orders.....	8.4, 8.8
in relation to dissolution.....	8.21
in relation to equity fines	7.6, 7.7
in relation to fines.....	6.8-6.11
in relation to probation orders	9.27
in relation to publicity orders.....	11.19-11.20
in relation to punitive injunctions	9.47

Stock dilution *see* Equity fines**Subsidiary corporations**

sentencing of.....	15.6-15.12
--------------------	------------

Supervision of orders13.11-13.14, **R17**

community service orders.....	10.27
-------------------------------	-------

Supreme Court (NSW)

convictions for corporate crime in	1.27
--	------

Suspended sentences *see also* Probation orders

general availability	5.9, 9.4
two year limit	13.8

Taxation laws

breach of	1.13
breach of, convictions for	1.24
breach of, public view	1.18

Therapeutic goods

suspension of manufacturer's licence	8.11
--	------

Time *see also* Duration of orders**Totality**

and consistency in fines.....	6.27
principle of.....	15.8, 15.12

Trade practices offences

application of factors relevant to sentencing	4.7
civil injunctions.....	9.41-9.42
convictions for	1.24
enforceable undertakings	9.23
extent of harm caused by	4.15
possibility of punitive injunctions under Trade Practices Offences Act 1974 (Cth).....	9.41
relevance of compliance systems	4.34
special sentencing options for corporations.....	5.3
systematic or deliberate defiance of the law	4.18
use of publicity orders	11.18

Training *see* Education and training**Undertakings *see* Enforceable undertakings****Unincorporated associations**

distinguished from corporations	1.5
---------------------------------------	-----

United Nations

Declaration on victims.....	14.11
-----------------------------	-------

United States

Federal Acquisition Regulations – disqualification from contracts.....	8.13
federal sentencing law – disqualification	8.6
Securities and Exchange Commission – power to suspend licences.....	8.11
Sentencing Commission guidelines	
closely held corporations.....	15.5
community service orders.....	10.9, 10.10, 10.15
dissolution	8.21
fines	6.40-6.50
presence of company representative at sentencing.....	14.29-14.32
probation orders.....	9.19-9.22
probation orders, resentencing for breach.....	13.21
publicity orders	11.16
requirement of effective compliance program	4.36, 4.37
restitution.....	3.25, 12.3, 12.8-12.11
Texas Business Corporation Act – dissolution.....	8.25

Vicarious liability

corporate criminal liability.....	2.12-2.14, 2.31
-----------------------------------	-----------------

Victim impact statements

admission of	3.24
definition	14.13
for victims of corporate crime.....	14.13-14.24

Victims *see also* Reparation; Restitution orders; Compensation

Community service orders meet needs of.....	10.14, 10.17
compensation fund and equity fines.....	5.17
compensation of, achieved by community service orders	7.27
compensation of, achieved by equity fines	7.8-7.10
definition	14.11
effect of corporate crime on society	1.11-1.14
effect of environmental damage on groups.....	12.6

Victims (continued)

moves to accommodate concerns of.....	14.10
of corporate crime	14.11-14.12
public view of effect of corporate crime on victims.....	1.16-1.18
recognition of harm to victims and community.....	3.3, 3.4, 3.23, 3.24
restitution for	5.17, 12.1-12.14
restitution for groups of victims.....	12.6-12.12
UN declaration on.....	12.4

Wealth ceiling

avoidance of, by equity fines.....	7.3-7.5
------------------------------------	---------

White collar crime

definition	1.6
------------------	-----

Winding up *see* Dissolution