

PENAL DESIGNS AND CORPORATE CONDUCT: TEST RESULTS FROM FAULT AND SANCTIONS IN AUSTRALIAN CARTEL LAW

I INTRODUCTION

Several papers in the *Adelaide Law Review* in the 1970s,¹ and much of my other research work in Adelaide and elsewhere, reflect the basic postulate that corporate criminal law and corporate civil penalties are unlikely to be effective unless they reflect the nature of *corporate* conduct.² The present law in Australia, as in other jurisdictions,³ has yet to come fully to grips with that postulate. Many gaps remain to be surveyed, filled and built upon. The scope for further exploration, design, and construction is very large.

The present law has been much influenced by methodological individualism and anthropomorphism. Methodological individualism has it that all social action, including that of corporations, is to be explained in terms of the actions of individual persons. Thus, it has often been said that corporations don't commit offences;

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¹ Brent Fisse, 'Consumer Protection and Corporate Criminal Responsibility: A Critique of *Tesco Supermarkets Ltd v Nattrass*' (1971) 4(1) *Adelaide Law Review* 113; Brent Fisse, 'The Social Policy of Corporate Criminal Responsibility' (1978) 6(3) *Adelaide Law Review* 361.

² On the basic postulate, see Christopher D Stone, *Where the Law Ends: The Social Control of Corporate Behavior* (Harper & Rowe, 1975); Nicola Lacey, 'Philosophical Foundations of the Common Law: Social Not Metaphysical' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (Oxford University Press, 2000) 17. Later work by the author animated by this postulate includes: Brent Fisse, *Howard's Criminal Law* (Lawbook, 5th ed, 1990) ch 7; Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation* (Cambridge University Press, 2011) chs 6, 7, 11, 12.

³ For the United States, see William Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (University of Chicago Press, 2006). For the United Kingdom, see Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan Publishers, 2007). For Europe, see Dominik Brodowski et al (eds), *Regulating Corporate Criminal Liability* (Springer, 2014).

people do.⁴ Anthropomorphism treats corporations as if they are akin to human persons (they are juristic persons), so that a ‘corporation is merely a legal fiction’.⁵ However, such slogans, and the methodological individualism and anthropomorphism on which they are based, misrepresent key features of corporate action and corporate responsibility. One key feature is corporate blameworthiness, which is not reducible simply to the blameworthiness of individual persons:

The fact is that organisations are blamed in their capacity as organisations for causing harm or taking risks in circumstances where they are expected to have acted otherwise. We often react to corporate offenders not merely as impersonal harm-producing forces but as responsible, blameworthy entities. When people blame corporations, they are not merely channelling aggression against the ox that gored. Nor are they pointing the finger only at individuals behind the corporate mantle. They are condemning the fact that the organisation either implemented a policy of non-compliance or failed to exercise its collective capacity to avoid the offence for which blame attaches.⁶

The mistakes of methodological individualism and anthropomorphism need to be corrected by taking due account of the corporate features of corporate action and corporate responsibility.

Cartel conduct is a prime example of unlawful conduct committed on behalf of corporations, and has received considerable attention legislatively and in case law.⁷ However, Australian cartel law under the *Competition and Consumer Act 2010* (Cth) (‘CCA’) neglects the corporate condition in several fundamental respects. The first is that the fault element for corporate liability for a cartel offence is defined partly on the basis of attribution of a human representative’s state of mind, which is not the same as *corporate* fault. The second is that the criminal and civil sanctions used against corporate defendants are governed by an incentive theory of deterrence, not a theory that focusses on the *corporate* impacts that sanctions are supposed to have on corporate defendants. The discussion in Parts II and III below traces these failures and sketches what may be done to rectify them.

⁴ See, eg, Lee Sarokin, ‘Corporations Don’t Commit Crimes — People Commit Crimes’, *Huffington Post* (online, 25 September 2013) <https://www.huffingtonpost.com/judge-h-lee-sarokin/corporations-dont-commit_b_3661127.html>; Comment, ‘Comments on the Seminar on Criminalising Cartel Conduct’ (2008) 36(3) *Australian Business Law Review* 241, 242; *Anonymous Case 935* (1701) 12 Mod 559; 88 ER 1518, 1518 (Holt CJ).

⁵ *Universal Music Australia Pty Ltd v ACCC* (2003) 131 FCR 529, 587 [251] (Wilcox, French and Gyles JJ).

⁶ Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993) 25; Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford University Press, 2011); Philip Pettit, ‘Responsibility Incorporated’ (2007) 117(2) *Ethics* 171; Peter French, *Collective and Corporate Responsibility* (Columbia University Press, 1984); Peter French, ‘The Corporation as a Moral Person’ (1979) 16(3) *American Philosophical Quarterly* 207.

⁷ Beaton-Wells and Fisse (n 2).

II CORPORATIONS AND FAULT IN AUSTRALIAN CARTEL LAW

Cartel offences were introduced in 2009 with much fanfare but scant attention to corporate fault. The rules under s 84 of the *CCA*, which attribute the conduct and states of mind of human representatives to a corporation, were extended to the cartel offences as well as to the civil cartel prohibitions.⁸ The principles of corporate liability under the *Criminal Code Act 1995* (Cth) ('*Criminal Code*'), which include several provisions geared to corporate fault,⁹ were excluded.¹⁰ No defence of corporate reasonable precautions was provided. The relevance or otherwise of corporate fault to prosecutorial discretion or determination of sentence was not addressed.

A Vicarious Responsibility under CCA s 84

The attribution rules under s 84 impose vicarious responsibility for cartel offences.¹¹ Vicarious responsibility is questionable:

- The orthodox view is that criminal liability for serious offences requires blameworthiness.¹² Vicarious responsibility is a species of strict responsibility; it is not contingent on organisational blameworthiness.
- Criminal liability based on blameworthiness is more likely to induce respect for the law and willingness to comply.
- If criminal liability can be imposed without fault, legislators may be reluctant to provide additional punitive sentencing options against corporate offenders.
- Unless criminal liability is fault-based, courts may be constrained from imposing sanctions of sufficient severity and deterrent capability.

Little weight was given to these considerations when the cartel offences were first enacted. Today, however, corporate criminal liability is exposed to keener scrutiny. Major corporations, including banks, have been prosecuted for cartel offences

⁸ Ibid 209–10 [7.1.1].

⁹ *Criminal Code Act 1995* (Cth) ss 12.3(2)(c)–(d), (3).

¹⁰ *Competition and Consumer Act 2010* (Cth) s 6AA(2); Russell Miller, *Miller's Annotated Competition and Consumer Act* (Lawbook, 41st ed, 2019) 136. Miller misleadingly omits the effect of s 6AA(2).

¹¹ Technically, ss 84(1)–(2) of the *CCA* make the state of mind and conduct of a director, employee, or agent the state of mind and conduct of the corporation: see *Trade Practices Commission v Tubemakers Australia Ltd* (1983) 47 ALR 719, 740 (Toohey J). However, the effect is to impose vicarious responsibility in the sense of strict responsibility for the state of mind or conduct of another. The term 'vicarious responsibility' is used here in the latter commonplace sense.

¹² Jeremy Horder, *Ashworth's Principles of Criminal Law* (Oxford University Press, 9th ed, 2019) ch 5.

and may be expected to agitate against questionable liability rules.¹³ The recent *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* has spurred widespread public debate about corporate misconduct and the standard of conduct expected of banks and other financial institutions.¹⁴ The Australian Competition and Consumer Commission (‘ACCC’) campaign for more severe penalties under the *CCA* has sparked inquiry into whether hard-hitting sanctions for cartel offences should require corporate fault instead of merely vicarious responsibility.¹⁵

B *Vicarious Responsibility and Corporate Fault under the Commonwealth Criminal Code*

The *Criminal Code* provisions on corporate fault in Part 2.5¹⁶ avoid the extremes of the *CCA* vicarious responsibility model under s 84 and the narrow *Tesco Supermarkets Ltd v Natrass* common law principle of corporate responsibility for the fault of a directing mind.¹⁷ Vicarious responsibility is limited to the physical elements of an offence.¹⁸ It is sufficient that the conduct is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of her or his employment, or within her or his actual or apparent authority. By contrast, s 84 of the *CCA* imposes vicarious responsibility in relation to the fault elements as well as the physical elements of an offence. By way of further contrast, the *Tesco* directing mind

¹³ Australian Competition and Consumer Commission, ‘Criminal Cartel Charges Laid Against ANZ, Citigroup and Deutsche Bank’ (Media Release 103/18, 5 June 2018) <<https://www.accc.gov.au/media-release/criminal-cartel-charges-laid-against-anz-citigroup-and-deutsche-bank>>.

¹⁴ *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) (‘*Royal Commission*’).

¹⁵ OECD, *Pecuniary Penalties for Competition Law Infringements in Australia* (Report, 2018) <<http://www.oecd.org/competition/pecuniary-penalties-competition-law-infringements-australia-2018.htm>>; James Thomson, ‘ACCC Warns “Arrogant” Business Sector of Huge Fines’, *Australian Financial Review* (online, 6 January 2019) <<https://www.afr.com/news/policy/accc-warns-arrogant-business-sector-of-huge-fines-20181221-h19e27>>.

¹⁶ See generally Stephen Odgers, *Principles of Federal Criminal Law* (Thomson Reuters, 4th ed, 2019) ch 4; Attorney-General’s Department, *The Commonwealth Criminal Code: A Guide for Practitioners* (Guidelines, 2002) 295–335; Matthew Goode, ‘Corporate Criminal Liability’ (Conference Paper, Environmental Crime Conference, 1 September 1993).

¹⁷ [1972] AC 153 (‘*Tesco*’). Under the *Tesco* identification doctrine, the conduct and the state of mind of a director or other ‘directing mind’ of a corporation acting on behalf of the corporation are attributable to the corporation for the purpose of imposing corporate liability.

¹⁸ *Criminal Code Act 1995* (Cth) s 12.2.

principle applies in relation to the physical elements as well as the fault elements of an offence.¹⁹

The fault element of an offence is attributable to a corporation on the basis that fault existed on the part of a ‘high managerial agent’.²⁰ The concept of a ‘high managerial agent’ is broadly defined and is wider than the concept of a directing mind under the *Tesco* principle. The managerial agent provision is a variant of the discredited *Tesco* directing mind principle and suffers from much the same defects, especially undue narrowness and a failure to reflect the concept of *corporate* fault.²¹ However, where s 12.3(2)(b) applies, a defence of due diligence is available under s 12.3(3). This defence requires corporate due diligence and is based on the concept of corporate fault.

The fault element of an offence is also attributable to a corporation on the basis that the corporation had a culture that led to non-compliance or failed to create and maintain a corporate culture that required compliance with the relevant provision.²² The element of corporate culture roughly reflects the concept of corporate blameworthiness.

Why were the *Criminal Code* provisions on corporate criminal liability excluded under the *CCA*? No official explanation has been given, but the main concern appears to be underreach of cartel and other criminal prohibitions under the *CCA*. The attribution of fault of the board of directors or a ‘managerial agent’ to a corporation under the *Criminal Code* would not apply where the fault required for a cartel offence existed at a lower level within a corporation:

Cartel offences are often committed by sales managers and others who may not be ‘high managerial agents’. The classic heavy electrical price-fixing conspiracies in the US in the late 1950s and early 1960s are a prime test case. Would the prosecutions against General Electric, Westinghouse and the other larger transformer

¹⁹ The *Tesco* principle has been widely discredited: see Brent Fisse, ‘Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions’ (1983) 56 *Southern California Law Review* 1145, 1186–8; Fisse, ‘Consumer Protection and Corporate Criminal Responsibility’ (n 1); James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Cambridge University Press, 2003) 62–9. The relaxation of the *Tesco* directing mind principle by the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 is ill-defined and ill-related to the concept of corporate fault: see CMV Clarkson, ‘Kicking Corporate Bodies and Damning their Souls’ (1996) 59(4) *Modern Law Review* 557, 565–9; Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) 99–104.

²⁰ *Criminal Code Act 1995* (Cth) s 12.3(2)(b).

²¹ Fisse, ‘Reconstructing Corporate Criminal Law’ (n 19) 1186–8.

²² *Criminal Code Act 1995* (Cth) ss 12.3(2)(c)–(d). The term ‘corporate culture’ is defined in s 12.3(6) to mean ‘an attitude, policy, rule, course of conduct, or practice existing within the body corporate generally or on the part of the body corporate in which the relevant activities takes place.’

companies have succeeded if the DOJ [Department of Justice] had been required to establish liability under the Criminal Code provisions for corporate criminal responsibility? Considerable difficulty would have been encountered given that the companies assiduously blamed middle management for breaching the antitrust compliance policy that each company had in place. In particular, the companies would have answered that no high managerial agent was implicated in the price fixing.²³

Another reason for excluding the *Criminal Code* provisions appears to be that the concept of ‘corporate culture’ in ss 12.3(2)(c) and (d) is unworkable:

The concept of a ‘corporate culture’ has yet to be tested and appears to require proof of conditions and attitudes within an organisation that go considerably beyond merely proving that the managers immediately involved in the cartel conduct acted with the requisite state of mind. Moreover, expert sociological evidence would seem relevant to prove or disprove the existence of a corporate culture. Given that usually there are many diverse cultures within a corporation, the concept of some homogenous corporate culture seems unworkable as a fault element. There is also the concern that ‘official’ corporate cultures typically are exhortatory and bear little resemblance to actual views, attitudes, habits and proclivities within organisations.²⁴

C Better Approaches?

Given this experience in the testing ground of Australian cartel law, the *Criminal Code* principles relating to corporate fault invite revision. There is a case for a fundamental revision that redefines corporate criminal liability in terms of: failure to take reasonable proactive steps to prevent the commission of an offence by officers, employees, or agents;²⁵ and failure to take reasonable reactive steps to remedy the harm caused by the unlawful conduct and to guard against future unlawful conduct of that type.²⁶

²³ Beaton-Wells and Fisse (n 2) 232.

²⁴ Ibid. See also John Colvin and James Argent, ‘Corporate and Personal Liability for “Culture” in Corporations?’ (2016) 34(1) *Companies and Securities Law Journal* 30. For one overview see Jennifer Hill, ‘Legal Personhood and Liability for Flawed Corporate Cultures’ (Research Paper No 19/03, Faculty of Law, The University of Sydney, February 2019) <https://ecgi.global/sites/default/files/working_papers/documents/finalhill3.pdf>.

²⁵ See Liz Campbell, ‘Corporate Liability and the Criminalisation of Failure’ (2018) 12(2) *Law and Financial Markets Review* 57; Celia Wells, ‘Corporate Failure to Prevent Economic Crime — A Proposal’ [2017] *Criminal Law Review* 426; Jeremy Horder, *Ashworth’s Principles of Criminal Law* (Oxford University Press, 9th ed, 2019) 172–173.

²⁶ On the principle of ‘reactive corporate fault’, see Fisse, ‘Reconstructing Corporate Criminal Law’ (n 19), 1183–213; Fisse and Braithwaite, *Corporations, Crime and Accountability* (n 6) 210–3.

A more modest proposal may be advanced for improving the law in the interim. The first step would be to repeal the concept of a ‘managerial agent’ in s 12.3(2)(b) and to redefine ss 12.3(2)(b)–(d) in terms of fault on the part of an officer, employee or agent acting within the scope of their actual or apparent authority. This attribution rule would be subject to the defence of corporate due diligence under s 12.3(3) or, better still, a defence of corporate reasonable precautions and due diligence.

Secondly, the concept of corporate culture in s 12.3(2)(c) and (d) should be replaced by the concept of a corporate failure to take reasonable corporate precautions and exercise due diligence to prevent the conduct charged. That concept is plainly a concept of corporate fault: the standard of care required is not that of any given individual but that expected of a corporation in the position of the defendant corporation. One model is s 65 of the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (Cth).²⁷ Section 65, in relevant part, provides as follows:

- (1) Where, in proceedings for an offence against this Act, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is sufficient to show:
 - (a) that the conduct was engaged in by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority; and
 - (b) that the director, servant or agent had the state of mind.
- (2) Any conduct engaged in on behalf of the body corporate by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority shall be taken, for the purposes of a prosecution for an offence against this Act, to have been engaged in also by the body corporate unless the body corporate establishes that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct.

If s 12.3 of the *Criminal Code* provisions were revised in the way proposed above, it is difficult to see why s 12.3 should not apply to cartel offences under the *CCA*. Alternatively, s 84 of the *CCA* could be amended by making the application of s 84 to the cartel offences subject to a defence of reasonable corporate precautions and due diligence.

The potential application of a defence of reasonable corporate precautions and due diligence to the cartel offences is discussed in detail elsewhere.²⁸ It may be contended that a defence of reasonable corporate precautions and due diligence

²⁷ There are numerous similar examples in Commonwealth legislation including s 152EO of the *CCA*.

²⁸ Beaton-Wells and Fisse (n 2) 234–5 [7.4.5].

would be too difficult or too time-consuming for juries to assess in the context of the cartel offences. Two responses may be given.

First, the *Royal Commission* has aroused awareness. The day to day revelations about rank misconduct by pillars of business, and the relentless media attention devoted to them, have opened up the internal workings of corporations to public scrutiny. The focus of the *Royal Commission* on what the institutions under the spotlight proposed to do to prevent misconduct and to remedy the harm caused, coupled with the extensive media exposure, has done much to remind the community about bad organisation behaviour and the importance of internal organisational controls.

Second, criminal liability is a special form of social control that is subject to various constraints designed to reinforce that it is special and not merely civil penal liability.²⁹ One is that liability be proven beyond a reasonable doubt. Another is that liability for serious offences requires fault. Some regulators and politicians want to deploy the criminal law regardless of these and other constraints. They need to be called out for being unprincipled and cavalier. The cartel offences were introduced in 2009 without adequately discriminating between criminal liability and liability for civil penalties. The fault element required for the cartel offences verged on token³⁰ and no effort was made to create a distinctive regime of criminal sanctions.³¹

III CORPORATIONS AND SANCTIONS IN AUSTRALIAN CARTEL LAW

Criminal and civil sanctions against corporate defendants in Australian cartel law are governed by an incentive theory of deterrence that glosses over and dodges the limitations of fines and monetary penalties against corporations.³² The discussion below sets out a different approach that focuses on achieving corporate deterrent impacts that are desired, and avoiding or reducing corporate impacts that are not.

²⁹ See Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook, 4th ed, 2017) ch 1.

³⁰ Beaton-Wells and Fisse (n 2) 28.

³¹ *Ibid* ch 11.

³² See *ibid*, which sets out the sentence and penalty options and the serious flaws in the principles governing their use against corporate defendants in Australian law.

A *Limitations of Monetary Sanctions against Corporations*

The limitations of fines and monetary penalties against corporations are generally known. They have been recognised by the Australian Law Reform Commission ('ALRC') in several reports.³³ Three major limitations are:³⁴

- (1) Monetary sanctions are an indirect method of achieving sanctioning impacts on managers and other personnel in a position to control corporate behaviour. However, they may have little impact on those in a position of control.³⁵ Instead, they may inflict substantial loss on shareholders.³⁶ Alternatively or additionally, they may have adverse spillover effects on employees, consumers, and other innocent bystanders.³⁷ The worst case scenario for spillover effects on consumers is where all members of an oligopoly are fined for their participation in a cartel, have sufficient market power to be able to pass the fines on to their customers and are able to rely on

³³ Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974* (Report No 68, 1994) ch 10; Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, (Report No 95, 2002) ch 28; Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report No 103, 2006) ch 30.

³⁴ For these and other limitations: see Brent Fisse, 'Cartel Offences and Non-Monetary Punishment: The Punitive Injunction as a Sanction against Corporations' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) ch 14; Christopher Hodges and Ruth Steinholtz, *Ethical Business Practice and Regulation: A Behavioural and Values-Based Approach to Compliance and Enforcement* (Bloomsbury, 2017) ch 3.

³⁵ Fisse, 'Reconstructing Corporate Criminal Law' (n 19) 1216–7.

³⁶ See Jean Adams, 'Trustbusting and the "Innocent" Shareholder: "Compensation" If Stock Prices Fall?' (1978) 10(1) *Antitrust Law & Economics Review* 51; Fisse and Braithwaite, *Corporations, Crime and Accountability* (n 6) 49–50. For the view that shareholders should bear the cost of fines, see Christopher Kennedy, 'Criminal Sentences for Corporations: Alternative Fining Mechanisms' (1985) 73(2) *California Law Review* 443.

³⁷ Fisse, 'Reconstructing Corporate Criminal Law' (n 19) 1219–20. Whether or not such spillover effects will occur in any given case is an empirical question. See Comment, 'Increasing Community Control over Corporate Crime — A Problem in the Law of Sanctions' (1961) 71(2) *Yale Law Journal* 280, 286 n 17. For the view that fines are unlikely to be passed on to consumers as higher prices: see Massimo Motta, 'On Cartel Deterrence and Fines in the European Union' (2008) 29(4) *European Competition Law Review* 209, 217–9. The passing on of a fine is a factor to be considered in sentencing under US federal criminal law: 18 USC §3572(a)(7) (2005). However it is not a factor listed in the *Crimes Act 1901* (Cth) s 16A(2). For criticism of the neglect of this factor, see Brent Fisse, 'The First Cartel Offence Prosecution in Australia: Implications and Non-Implications' (2017) 45(6) *Australian Business Law Review* 482, 486.

some form of tacit collusion to coordinate future prices.³⁸ In theory, a fine is a sunk cost and will not be passed on to consumers: rational economic actors look to what they should do in future and do not try to recover sunk costs. However, whether or not or when corporations treat fines as sunk costs is an empirical question.³⁹ Moreover, if fines are treated as sunk costs, they emerge as a relatively weak form of deterrent punishment.

- (2) Monetary sanctions, no matter how large, do not ensure that corporate offenders will respond by taking internal disciplinary action against those implicated in the offending conduct.⁴⁰ The cheapest and least embarrassing response may be simply to write a cheque in payment of the fine and continue with business as usual. Corporations have incentives not to undertake extensive disciplinary action. A disciplinary program may be disruptive, embarrassing for those exercising managerial control, encouraging for whistle-blowers, or hazardous in civil litigation against the company or its officers.
- (3) Monetary sanctions, no matter how large, do not ensure that corporate offenders will respond by revising their internal operating procedures in such a way as adequately to guard against re-offending.⁴¹ The response may be to treat the offence as an isolated incident and simply to write a cheque in payment of the fine, hoping or expecting that the incident will not be repeated.

B *Incentive Theory of Deterrence*

The limitations of monetary sanctions do not seem to be recognised by the incentive theory of deterrence. For example, they are not discussed in the OECD Report, *Pecuniary Penalties for Competition Law Infringements in Australia* that was commissioned by the ACCC in an apparent lobbying exercise.⁴² The discussion in that report accentuates the positives of monetary penalties but does not articulate their

³⁸ However, there are many reasons why corporations may not pass on fines, including the risk of losing market share and the ‘stickiness’ of prices. On the latter, see generally Alan Blinder et al, *Asking About Prices: A New Approach to Understanding Price Stickiness* (Russell Sage Foundation, 1998).

³⁹ How sunk costs are treated in the real world as distinct from neoclassical economic theory is one of many items on the agenda of behavioural economists: see Christine Jolls et al, ‘A Behavioral Approach to Law and Economics’ (1998) 50(5) *Stanford Law Review* 1471, 1482–3.

⁴⁰ Fisse and Braithwaite, *Corporations, Crime and Accountability* (n 6) 8–12; John Coffee, ‘Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions’ (1980) 17(3) *American Criminal Law Review* 419, 458–9.

⁴¹ See Stone (n 2) ch 6.

⁴² OECD (n 15). For one critique see Caron Beaton-Wells and Julie Clarke, ‘Corporate Financial Penalties for Cartel Conduct in Australia: A Critique’ (Web Page, 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3149143>.

shortcomings. The OECD Report makes no mention of the ALRC Reports on the topic. Unless and until the limitations of monetary sanctions against corporations are recognised, attempts to improve the design and application of monetary penalties are unlikely to be made or will suffer from lack of direction.

The OECD Report does not explore all of the deterrent impacts that monetary penalties against corporations have or could impel. The Report assumes that imposing a large enough monetary penalty on a corporation will achieve deterrence, by giving the corporation a sufficient incentive to refrain from similar contravening conduct in the future. This incentive theory is consistent with optimal (or suboptimal) economic theories of deterrence.⁴³ The incentive theory has much to commend it. Financial profit and loss are an essential means of propulsion in commerce, and monetary sanctions are geared to that engine. And monetary incentives can be deployed without intervention in the internal affairs of corporations. However, the incentive theory is not the only theory of monetary sanctions against corporations that is relevant and significant. I will now outline the deterrent impacts theory.⁴⁴

C Deterrent Impacts Theory

The deterrent impacts theory first specifies the main intended deterrent impacts of monetary penalties:

- (1) a monetary penalty on a corporation is to be felt by management with limited pass-through to shareholders or consumers;
- (2) to the extent possible, those implicated in a contravention are to be held accountable; and
- (3) internal operating procedures (including compliance programs)⁴⁵ are to be reviewed and revised to guard against similar contravention in future.

Secondly, the deterrent impacts theory requires that

- (1) monetary penalties be used in ways calculated to reinforce and achieve the intended impacts specified above; and

⁴³ See, eg, Kenneth Elzinga and William Breit, *The Antitrust Penalties: A Study in Law and Economics* (Yale University Press, 1976) ch 7; Gary Becker, 'Crime and Punishment: An Economic Approach' (1968) 76(2) *Journal of Political Economy* 169.

⁴⁴ Brent Fisse, 'Taking the Deterrent Impacts of Fines and Monetary Penalties against Corporations: Seriously: A Functional Reconstruction' (forthcoming).

⁴⁵ Compliance programs are important but may not necessarily work. See, eg, William Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (University of Chicago Press, 2006) chs 4–5; Christine Parker and Vibeke Nielsen, 'Corporate Compliance Systems: Could They Make Any Difference?' (2009) 41(4) *Administration & Society* 3.

- (2) intervention in the internal affairs of corporations be avoided except to the extent of enforced self-regulation.⁴⁶

The deterrent impacts theory is not based on neoclassical economic theory,⁴⁷ nor on principal-agent theory.⁴⁸ It does not assume a rational human actor or rational unitary actor model of corporate behaviour.⁴⁹ Consistent with theories of organisational behaviour, the deterrent impacts theory recognises that threats or incentives directed to corporations do not operate in the same way as threats or incentives directed to individuals.⁵⁰ Deterrent signals or incentives are received and processed by a corporate system for receiving and managing external information. Managers and employees participate in that management process but the output is not merely self-restraint or self-activation — the input of deterrent signals or incentives is fed into the internal controls of the organisation. Those internal controls include policies, procedures and processes. If the external threat or incentive is to be heeded, those policies, procedures or processes need to be applied and, if necessary, revised.

A full account of the implications of the deterrent impacts theory for the design and application of monetary sanctions against corporations is provided elsewhere.⁵¹ These are some basic points:

- The deterrent impacts theory complements the incentive theory — pluralism is called for, not one-eyed preoccupation with economic incentive.⁵²
- Enforced self-regulation could be used to induce a corporate defendant to come up with ways of making management feel the impact of a monetary penalty and limiting the pass-through of monetary penalties to shareholders or consumers.

⁴⁶ John Braithwaite, 'Enforced Self-Regulation: A New Strategy for Corporate Crime Control' (1982) 80(7) *Michigan Law Review* 1466. Enforced self-regulation is the strategy of allowing corporations to regulate their own conduct but insisting that self-regulation does in fact occur. Compliance is more likely to ensue if nurtured in a spirit of cooperation (enforcement policies should avert organised business cultures of resistance). Efficiency considerations are also important and require that intervention in the internal affairs of corporations be kept to a minimum. Another precept of enforced self-regulation is the utilitarian principle of least drastic means; more drastic means are available but are used primarily as a contingent threat.

⁴⁷ See also Beaton-Wells and Fisse (n 2) 425 n 14.

⁴⁸ See Jean-Jacques Laffont and David Martimort, *The Theory of Incentives: The Principal-Agent Model* (Princeton University Press, 2002).

⁴⁹ Fisse and Braithwaite, *Corporations, Crime and Accountability* (n 6) 73–4; Timothy Malloy, 'Regulating by Incentives: Myths, Models, and Micromarkets' (2002) 80(3) *Texas Law Review* 531.

⁵⁰ Fisse, 'Reconstructing Corporate Criminal Law' (n 19) 1159–66.

⁵¹ Fisse, 'Taking the Deterrent Impacts of Fines and Monetary Penalties Against Corporations Seriously' (n 44).

⁵² See also John Braithwaite, 'The Limits of Economism in Controlling Harmful Corporate Conduct' (1982) 16(3) *Law and Society Review* 481.

The extent and quality of the corporation's proposal would be taken into account when determining the amount of the penalty. A null or anaemic response should be treated as an aggravating factor. There is no need to go to the extent of imposing legislative requirements that corporations recover a minimum specified percentage of a monetary penalty from management by means of levy or denial of bonus, or that they absorb a penalty and not pass it on to consumers.⁵³

- Enforced self-regulation could be used in much the same way to induce a corporate defendant to prepare a self-investigative report detailing the internal disciplinary steps that have been taken to impose individual accountability on those who were concerned in the contravention or who were in a position to have done more to prevent it. This approach is set out in detail elsewhere, with safeguards against scapegoating and corporate cheating.⁵⁴
- The same applies in relation to other internal controls including compliance programs, whistleblowing procedures, and incident reporting procedures.⁵⁵

D *Deterrent Impacts Theory and Non-Monetary Sanctions Against Corporations*

Another dimension of the deterrent impacts theory is that deterrent impacts on corporations depend not only on financial incentives but also non-monetary inducements.

Non-monetary sanctions against corporations are available under the *CCA*.⁵⁶ Punitive adverse publicity orders may be made under s 86D. Non-punitive and non-monetary orders may be made under s 86C including:

- information disclosure orders;
- advertisement publication orders;
- community service orders; and
- probation orders.

⁵³ Cf John McAdams, 'The Appropriate Sanctions for Corporate Criminal Liability: An Eclectic Alternative' (1977) 46(4) *University of Cincinnati Law Review* 989, 992 n 28.

⁵⁴ Fisse and Braithwaite, *Corporations, Crime and Accountability* (n 6) chs 5–6.

⁵⁵ See also Beaton-Wells and Fisse (n 2) ch 12.

⁵⁶ See Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974* (n 33) ch 10; Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (n 33) ch 28; Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (n 33) ch 30; New South Wales Law Reform Commission, *Sentencing Corporate Offenders* (Report No 102, 2003) chs 7–12; Beaton-Wells and Fisse (n 2) 453–4 [11.3.5], 515 [11.4.6.6]; Richard Gruner, *Corporate Criminal Liability and Prevention* (Law Journal Press, 2008) ch 12.

Section 86C is the leading example in Australia of an attempt to provide for non-monetary sanctions against corporations. However, it is a flawed model. Section 86C has a number of limitations, which I will now discuss.⁵⁷

First, the orders that may be made under s 86C(2) are explicitly non-punitive and hence cannot be used as a punitive sanction. That limit is highly questionable given the limitations of monetary sanctions and the deterrent value of non-monetary sanctions.⁵⁸ It is also difficult to reconcile with the introduction of cartel offences in 2009.⁵⁹ For example, a punitive community service order would be an appropriate and superior alternative to imposing a monetary penalty or a fine for cartel conduct in some situations.⁶⁰

Secondly, the court is unlikely to impose a punitive community service order unless given the power expressly to do so. Section 86C should be amended accordingly, with additional examples. A further weakness of s 86C is that the power to make an order under the section depends on application by the ACCC or, in the context of cartel offences, the Commonwealth Director of Public Prosecutions. There is no good reason why the discretion of the courts when sentencing corporations or making orders in relation to civil contraventions should be fettered in such a way.

Thirdly, the examples of probation orders in s 86C do not include an order requiring a corporate defendant to prepare and provide an internal discipline report detailing who was implicated in the corporate contravening conduct and what internal disciplinary measures have been taken against them in order to prevent similar conduct in future.⁶¹ Individual accountability is a fundamental pillar of social control but is imposed in enforcement actions by the ACCC to a limited and selective extent. Internal discipline orders are a means of making individual accountability count in cases where, as is common, few of the individuals implicated in contravening conduct can be proceeded against and held liable under ss 76 or 79 of the *CCA*. Section 86C should provide expressly for internal discipline orders.

⁵⁷ Beaton-Wells and Fisse (n 2) 453–4 [11.3.5].

⁵⁸ See Fisse ‘Cartel Offences and Non-Monetary Punishment’ (n 34) 315-17. See also Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974* (n 33) [10.14], [10.17] (recommending that community service orders be introduced as a penalty, not merely as a remedy).

⁵⁹ The question does not appear to have been on the drawing board of the architects of the cartel offences: see Explanatory Memorandum, Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth) 82–83 [6.14]–[6.15].

⁶⁰ Beaton-Wells and Fisse (n 2) 458–9. See further Brent Fisse, ‘Community Service as a Sanction Against Corporations’ [1981] *Wisconsin Law Review* 970.

⁶¹ See Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (n 33) 747; Beaton-Wells and Fisse (n 2) 195–9 [6.6.3]–[6.6.4]; Fisse and Braithwaite, *Corporations, Crime and Accountability* (n 6) ch 5; John Coffee, “‘No Soul to Damn: No Body to Kick’: An Unscandalized Inquiry into the Problem of Corporate Punishment” (1981) 79(3) *Michigan Law Review* 386.

The concept of redress facilitation is also reflected obliquely and inadequately by s 86C in its current form. Information disclosure orders and advertisement publication orders may be used to facilitate redress but these represent only two such forms of redress facilitation. The potential of redress facilitation as a sanction is unachievable unless a wider range of orders are covered and authorised by the section. This includes orders to

- (a) disclose information about the circumstances of the contravention, the nature of the loss likely to have been caused and the persons or classes of persons likely to have incurred the loss;
- (b) give notice to persons who may have suffered or may suffer loss as a result of corporate wrongdoing;
- (c) cooperate with someone acting on behalf of victims by making employees available for interview, waiving confidentiality obligations, and providing documents and data and explanations of them; and
- (d) establish a collective redress scheme.

Further, it has been held in several cases that there is no power under s 86C to require that a compliance program be independently audited.⁶² This is cramped and unsatisfactory. Independent auditing is often required in undertakings under s 87B as a safeguard against corporate cheating or laxity. Section 86C should be amended to include the power to require independent auditing as part of an order or consequential order under the section.

Section 86C also leaves courts in the dark about the factual basis of sentencing, assessment of penalty or design of remedy. Courts should have the power to require a corporate defendant to provide a detailed report setting out what steps have been taken by the corporation since the contravention:

- (1) to improve its internal controls and to discipline the persons implicated in the contravention; and
- (2) to compensate victims or to facilitate the compensation of victims.

Proposed amendments to s 86C to overcome the limitations indicated above are detailed in another paper.⁶³

⁶² *BMW Australia Ltd v ACCC* (2004) 207 ALR 452; *ACCC v Visy Paper Pty Ltd [No 2]* (2004) 212 ALR 564; *ACCC v Midland Brick Co Pty Ltd* (2004) 207 ALR 329.

⁶³ Brent Fisse, 'Redress Facilitation Orders as a Sanction Against Corporations' (2018) 37(1) *University of Queensland Law Journal* 85.

Punitive injunctions have been proposed by the author elsewhere.⁶⁴ The punitive injunction is a punitive variant of the mandatory civil injunction or a corporate probationary order. It is intended to serve as a sanction against corporations for serious offences and serious civil contraventions without going to the extremes of disqualification from conducting business, or dissolution. The punitive element is to require a corporate offender to act in a demanding way that may go beyond the limits of remedial action. The demanding response required is non-financial in terms of its direct impact within a corporation. The punitive effect sought to be achieved is to produce a positive regulatory outcome. The main kinds of positive regulatory outcome sought to be achieved in the context of cartel conduct are

- (1) the imposition of internal accountability for the cartel offence or contravention;
- (2) the revision of organisational precautions against future possible cartel offences or contraventions; and
- (3) the facilitation of civil redress to the victims of a cartel offence or contravention.

IV CONCLUSION

Corporate criminal and civil penalty liability have developed much under the influence of methodological individualism and anthropomorphism. This is evident in Australian cartel law, perhaps the main arena where corporate issues of penal liability have been tested in Australia. Methodological individualism and anthropomorphism have obscured the implications of the *corporateness* of corporate conduct. As a result, the present law continues to have no coherent and workable concept of corporate fault. Nor does it have a clear and cogent sense of the deterrent impacts that need to be achieved by sanctions against corporations. Better approaches are entirely possible and long overdue.⁶⁵ Doubtless the *Adelaide Law Review* will be receptive, as ever, to explorations of constructive solutions.

⁶⁴ See Fisse, 'Cartel Offences and Non-Monetary Punishment' (n 34).

⁶⁵ A review by the ALRC into Australia's corporate criminal responsibility regime was announced on 10 April 2019; see ALRC, 'Review into Australia's Corporate Criminal Responsibility Regime (Webpage, 10 April 2019) <<https://www.alrc.gov.au/inquiries/review-australia%E2%80%99s-corporate-criminal-responsibility-regime>>. The report is due on 30 April 2020.