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The Principles that apply to the Sentencing of Corporate Offenders

The \$17 million speeding offence?

National Judicial College of Australia Sentencing Conference 2010 February 2010

Introduction

- 1 Sentencing is one of the more difficult tasks which judges face. The sentencing of corporations falls into no different category. Corporations tend to come before courts in criminal proceedings which ultimately concern activities intended to advance the company's interests - to maximise profit and shareholder returns. That, after all, is the *raison d'être* of the corporation. Sentencing a corporation convicted of an offence requires a trial judge to impose a penalty which fits the gravity of the crime, by that 'instinctive synthesis' which the High Court has explained,¹ against the background of the maximum penalty fixed for the offence.

- 2 As far as I am aware, Australia has resisted adopting the approach of some European countries to traffic offences, where the penalty is fixed

¹ *Wong v R* [2001] HCA 64 at 611-12; *Markarín v The Queen* [2005] HCA 25.

to fit the offender's income.² In January it was reported here that a Swiss driver was fined \$300,000 for speeding, with the maximum penalty imposed so far in Germany being \$17 million!³ One wonders what challenges those systems pose for sentencing judges. The existence of such radically different sentencing systems does, however, again raise that ever present question – have we got the balance in our justice systems right, particularly when dealing with corporate crimes?

- 3 In Australia, corporations are prosecuted for crimes which breach regulatory laws, as well as those involving the breach of conventional laws of more general application.⁴ That is no surprise. The consequences of crimes which companies commit can certainly be just as damaging to other people and society as a whole as the consequences of the criminal actions of individuals.
- 4 It is relatively clear nowadays that companies are capable of committing most conventional crimes, even those which carry a penalty of imprisonment. By provisions such as s 4B of the *Crimes Act 1914* (Cth) and s 16 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), a company may be fined when convicted of such an offence. This has been the outcome of the development of concepts of attribution and vicarious liability.⁵ The *Criminal Code Act 1995* (Cth) adopts these concepts,⁶ as well as a more radical model of corporate fault, which has been described as 'arguably the most sophisticated model of corporate

² See for example, Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) [30.24], where the adoption of 'turnover fines' based on annual turnover, or market capitalisation was considered undesirable, linking financial penalties formulaically to financial circumstances, rather than reflecting a proportionate response to the gravity of the offence.

³ Matt Campbell and Daniel Dasey, 'A fine way to stop speeders', *Sydney Morning Herald*, 15 January 2010.

⁴ See *Presidential Security Services of Australia Pty Ltd v Clinton Joseph Brilley* [2008] NSWCA 204, where the crimes in question were *Crimes Act 1900* (NSW), s61 (common assault), s33A (discharging a firearm with intent to cause grievous bodily harm), s93G (causing danger with a firearm) and s93GA(1) (firing at a dwelling house or building with reckless disregard for the safety of any person).

⁵ For a recent discussion of these concepts see *Presidential Security Services of Australia Pty Ltd v Clinton Joseph Brilley* [2008] NSWCA 204 at [2] to [25] per Allsop P and in environmental law prosecutions, see *Director General Department of Environment and Climate Change v Jack & Bill Issa Pty Ltd (No 5)* [2009] NSWLEC 232 at [78]-[99].

⁶ See Part 2.5 of the Code.

criminal liability in the world' in how it addresses corporate blameworthiness.⁷

- 5 Corporations, while capable of committing conventional crimes, are more likely to commit and be prosecuted for regulatory offences, which legislatures have specifically created to deal with situations where a corporation's pursuit of its objectives is achieved at a price which society is not prepared to pay. Numerous statutes are directed at criminalising particular corporate misconduct in areas which include the workplace, the environment, the marketplace regulated by trade practices and fair trading legislation, taxation and of course, corporate regulation itself. Many of these are offences for which strict or even absolute liability is imposed, intended to make successful prosecution easier, reflective of the seriousness with which the misconduct in question is perceived.

- 6 The question of the sentencing of corporations for their crimes has been repeatedly revisited in Australia in the face of ongoing controversy as to whether on the one hand, the most common penalty, a fine, is an adequate punishment for such offences and on the other, whether corporations and their 'innocent shareholders', rather than the individuals involved in the commission of the offence, the 'true culprits', should be punished.⁸ At the same time, civil, as opposed to criminal penalty provisions have also been growing.

- 7 Despite all of this activity, on occasions corporate misconduct and the prosecution and sentencing of corporations and the individuals involved in that conduct, still raise real public disquiet. Whether our laws yet have the balance right, is the ongoing question.

⁷ See Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (2002) at 138.

⁸ See for example, James McConvill and Mirko Bagaric, *Criminal responsibility based on complicity among corporate officers* (2004) 16 Australian Journal of Corporate Law 1.

Who is prosecuted?

- 8 In 2009 we learnt a lot about the consequences of what was widely perceived to be unacceptable corporate excess, not merely poor business judgment, which resulted in what came to be called the global financial crisis and the worst recession since the Great Depression of the 1930's. Fortunately for us, more pain was suffered overseas than in Australia. In the US, Senator Bernie Sanders of Vermont described the situation in 2008:

‘The top 0.1 per cent now earn more money than the bottom 50 per cent of Americans and the top 1 per cent owns more wealth than the bottom 90 per cent. The wealthiest 400 people in our country saw their wealth increase by \$670 billion while Bush has been President’. The IRS in America says that the last time the top 1 per cent of income earners were this proportionately wealthy in the US was 1929.⁹

- 9 The way in which the US responded to the problems it then confronted, came resentfully to be known as ‘welfare for the wealthy’. Even despite that resentment and the extraordinary consequences of what resulted from its cause for societies the world over, how much of the corporate misconduct which lay at its heart will result in the companies and individuals involved being prosecuted and sentenced for any criminal conduct, is not too difficult to predict – not as much as the public might expect.
- 10 Undoubtedly it was this recession which led to the uncovering of Bernie Madoff's extraordinary Ponzi scheme in the US and his subsequent prosecution.¹⁰ The charges included security and other fraud, money laundering, theft, making false statements and perjury. He was sentenced to a total term of imprisonment of 150 years, with numerous individual sentences of 10 and 20 years to run consecutively. He also

⁹ See Anne Davies, 'The glum old USA', *Sydney Morning Herald*, 4-5 October 2008.

¹⁰ See *Sydney Morning Herald*, '150 years jail for \$62 billion fraudster Madoff', 30 June 2009.

consented to a forfeiture order of \$US 171 billion. Yet even this situation required Madoff's confession after illegal activities spanning over twenty years and involving thousands of victims. Madoff was not dealt with earlier, even though his activities had been reported to US regulators on more than one occasion. They seemed to show insufficient interest, or ability, to uncover what finally proved to have been a relatively unsophisticated criminal enterprise. The sentencing remarks make fascinating reading.¹¹

11 Clearly Australia is not alone in having difficulty in dealing with the consequences of corporate misconduct. And it is not just the western world which has found itself in that situation. The ongoing problems of deliberate contamination of milk supplies in China, which led to some deaths, as well as significant illness of over 300,000 children, is but another serious example of this type of problem.¹²

12 Here, prosecution of regulatory offences tends to lie in the hands of regulators armed with wide discretions as to prosecution, which those involved in the investigation of conventional crimes do not have, or perhaps do not exercise, in quite the same way. Nowadays such agencies may also have alternatives to criminal prosecutions which they can pursue. As explained by *Higgins J* in *R v Whitnall*,¹³ the conduct there in question, fraud on the revenue, could have been dealt with by administrative penalty, by prosecution under the *Taxation Administration Act 1953* (Cth), or under two separate provisions of the *Crimes Act 1914* (Cth), with various maximum penalties including fines and up to 10 years imprisonment. Nowadays civil penalty options are also often available, with civil penalties in some areas eclipsing criminal penalties imposed in others.

¹¹ They may be found at <http://www.justice.gov/usao/nys/madoff/20090629sentencingtranscriptcorrected.pdf>

¹² See Gillian Wong, 'Tainted milk probe 'kept secret'', *Sydney Morning Herald* (Sydney), 7 January 2010, where it was reported that investigation of tainted milk uncovered in December 2008 in the products of the Shanghai Panda Dairy Co Ltd was only revealed publicly after the arrest of three executives, a year later. This was despite legislation enacted to ensure prompt public disclosure and the execution of a farmer and a milk salesman involved in earlier contaminations.

¹³ (1993) 42 FCR 512 at 518.

- 13 As is made clear by the November 2008 'Prosecution Policy of the Commonwealth', charge negotiations between the prosecutor and defendants may also result in a 'defendant pleading guilty to fewer than all of the charges he or she is facing, or to a lesser charge or charges, with the remaining charges either not being proceeded with or taken into account without proceeding to conviction.'¹⁴ This is a policy of general application which does not deal separately with the position of corporations, other than in relation to 'Corporate Immunity/Derivative Immunity' in relation to prosecution of serious cartel offences.¹⁵ There are also operating agreements in existence in relation to the investigation and prosecution of certain crimes, for example between ASIC and the DPP.¹⁶
- 14 That the public understands these enforcement options, penalty negotiations and the difference which results when a court is sentencing a corporation in criminal, rather than civil penalty proceedings, seems unlikely. What is really understood about the difference between the successful criminal prosecutions which followed the HIH collapse and the punishments there imposed, as opposed to the proceedings which followed the demise of OneTel, which do not appear to have achieved the same levels of success?
- 15 There is no question that prosecution for regulatory offences is often traded off for co-operation in investigations and promises of altered behaviour and future compliance, or agreement to pleas in relation to civil, rather than criminal penalties. That, no doubt, reflects both the difficulties which regulators face in bringing successful prosecutions against companies, as well as reflecting different political imperatives operating from time to time and a perceived need to make punishment

¹⁴ At [6.14].

¹⁵ See Annexure B.

¹⁶ See Damian Bugg, 'Sentencing of Corporate Offenders' (Paper presented at the Sentencing: Principles, Perspectives and Possibilities Conference, Canberra, 10-12 February 2006).

of misconduct easier, or perhaps more certain – the ‘bird in the hand’ approach.¹⁷

- 16 All of this too raises the obvious question - have we yet got the balance in the prosecution and sentencing of corporations right, given public expectation that corporations and those involved in the commission of their crimes will be appropriately punished?
- 17 The balance is undoubtedly a difficult one to achieve. No matter how much we may personalise companies in our thoughts, in the media or even in our laws, they are, at the end of the day, only ideas. Powerful ideas of course, bringing with them obviously important economic benefits to the societies where they are permitted to operate, but, nevertheless, ideas only. Their aim is to permit groups of people to pool their resources in order to pursue economic advantage and to shelter them from the economic consequences of any failure of the ventures which the companies in which they invest pursue. The idea was not designed to allow people to benefit from crimes which a company may commit in pursuit of their economic advantage, or to shelter them from the consequences of the crimes which they themselves may commit.
- 18 Of necessity, the idea which is the corporation must be actualised by people – be they the directors, the ‘controlling minds’ of the company; the employees and agents who act to put the decisions made by those minds into effect; or the shareholders whose financial investments provide the means by which those decisions may be acted upon.¹⁸ These are typically changing groups of people, especially in larger corporations. Shareholders may themselves also be corporations. Individuals may fall into more than one of these categories and behaviour which breaches the criminal law may not only have the result

¹⁷ See Arie Freiberg, 'Sentencing White-Collar Criminals' (Paper presented at the Fraud Prevention and Control Conference, Surfers Paradise, 24-25 August 2000).

of maximising company profitability and shareholder returns, but also short term personal gain, especially for those whose remuneration depends on corporate success. Nowadays this is an ever growing group of people: including those who earn parts of their income through bonuses and shares and share option schemes, which depend on the achievement of profitability, market share and/or increased share prices.¹⁹

- 19 There has also been another change which no doubt has had an impact on public expectations in relation to corporate misconduct and how legislatures respond. Given the investment which most people now have, or will make in corporations through superannuation funds, the vast bulk of the Australian working population are, or will become shareholders, either directly or indirectly. Corporations are pervasive, affecting every aspect of people's daily lives, as well as their long term economic position, particularly in retirement.
- 20 This helps explain heightened public interest in the prosecution and sentencing of corporate crime and the individuals who may be involved in its commission, as well as increasing maximum penalties imposed by legislatures for such crimes. The days when it might be thought that there is any lack of concern about corporate crime amongst members of the public, seem to me to have gone, although there will undoubtedly always be controversy about what is appropriate in a particular case.
- 21 The idea that 'innocent' shareholders ought not alone bear the consequences of crimes perceived to be those of an individual, rather than of the company, is certainly one which seems to have gained

¹⁸ See the NSW Court of Appeal's consideration of this issue in *Presidential Security Services of Australia Pty Ltd v Clinton Joseph Brilley* [2008] NSWCA 204.

¹⁹ See Eric Dash, 'Bonuses are back and even bigger', *Sydney Morning Herald*, 28 January 2008, where it was reported that the five largest banks on Wall Street had earned a combined \$US 147.4 billion in 2009, before paying compensation and taxes; had ploughed back \$US 31.2 billion into their companies; paid \$US 114.1 billion to employees and only \$US 2.1 billion to shareholders. One bank, Citigroup paid \$1.45 for every dollar earned to employees.

traction in certain areas.²⁰ Rather like the idea that directors ought to be made personally liable for the consequences of their conduct, rather than leaving them to be borne by the company and its shareholders, which has led to ever expanding directors' obligations in corporations law, legislatures appear to have imposed ever increasing obligations on individuals involved in corporate misconduct and not only at managerial or executive levels. Prosecutions have not necessarily followed suit.

- 22 The *Occupational Health and Safety Act 2000* (NSW) for example, contains a deeming provision, which has the effect that if a corporation contravenes, whether by act or omission, any provision of the Act or the regulations, each director of the corporation, and each person concerned in the management of the corporation, is taken to have contravened the same provision (s 26(1)). There have been increasing numbers of prosecutions of directors under this provision in NSW. The Act also contains an aiding and abetting offence in s 27. This is not a much used provision. A workplace death offence was inserted by amendment in 2005 (s 32A). It imposes a maximum penalty of \$1,650,000 in the case of a corporation and \$165,000 or imprisonment for a maximum of 5 years, or both, in the case of an individual. Despite this legislative initiative however, and regrettably many workplace deaths, there have been no prosecutions brought under this section. Whether that will alter in future seems doubtful.

²⁰ In 2000, for example, the new *Occupational Health and Safety Act 2000* (NSW) imposed safety obligations upon employees while at work and created offences for breach of these obligations – see s 20 Duties of employees.

23 The High Court has just given judgment in *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)*.²¹ In relation to what a prosecution under the predecessor legislation to the current *Occupational Health and Safety Act 2000* (NSW) required, the High Court observed at [33] to [34]:

[33] The propositions listed by his Honour appear to assume that the employer's obligation, to guarantee against risks in the workplace, remains in existence at all times and that the question of an employer's liability is to be determined by reference to it. There is no discussion of how the defences under s 53 can co-exist with that obligation. The only reference to the defences in the authorities referred to by his Honour is to the terms of s 53 and an acknowledgement that measures which may have been taken may be relevant to them. Since it was considered unnecessary for the prosecutor to identify those measures, it would appear to follow that the employer would be required to establish that there were no reasonably practicable measures, of any kind, which could have been addressed to the type of risk. If there was something further that could be done, the causal connection with the risk would remain and the employer would be guilty of an offence. The provisions of the OH&S Act relating to offence and defence were not intended to operate in this way.

[34] Walton J referred to earlier case law that the duty imposed upon an employer "is to be construed as meaning to guarantee, secure or make certain" and that the duty is directed at obviating "risks" to safety at the workplace. References to guarantees, and emphasis upon general classes of risks which are to be eliminated, tend to distract attention from the requirements of an offence against ss 15 and 16. The approach taken by the Industrial Court fails to distinguish between the content of the employer's duty, which is generally stated, and the fact of a contravention in a particular case. It is that fact, the act or omission of the employer, which constitutes the offence. Of course it is necessary for an employer to

²¹ [2010] HCA 1; see also Neil Foster, 'Note on *Kirk v Industrial Relations Commission of New South Wales; Kirk Group Holdings v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1 (3 Feb 2010)' available at http://works.bepress.com/cgi/viewcontent.cgi?article=1027&context=neil_foster.

identify risks present in the workplace and to address them, in order to fulfil the obligations imposed by ss 15 and 16. It is also necessary for the prosecutor to identify the measures which should have been taken. If a risk was or is present, the question is – what action on the part of the employer was or is required to address it? The answer to that question is the matter properly the subject of the charge.

- 24 There has not been much time for reflection about this decision, but my immediate reaction in the context of this paper is that this approach to the prosecution of OHS offences in NSW will undoubtedly present real challenges for prosecutors in some cases and will make the defence of charges brought against individuals involved in corporate crimes under this legislation easier. The decision is likely to have an impact in other areas of the criminal law. Concerns that the individuals truly responsible for such corporate offences are not prosecuted, is unlikely to go away in this area. In any event, this area of state legislation is about to be overtaken.
- 25 In July 2008, the Council of Australian Governments signed an Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety. A National OHS Review Panel reported on an optimal model OHS Act and in July 2009 Safework Australia and the Safework Australia Council were established. In December 2009 the Workplace Relations Minister's Council endorsed model OHS legislation, due to be implemented by December 2011.
- 26 The model Act creates three categories of offences, each of which apply to corporations and individuals. Category one offences, where a corporation has a health and safety duty; engages in conduct that, without reasonable excuse, exposes an individual to whom that duty is owed to a risk of death or serious injury or illness; and is reckless as to the risk of death or serious injury or illness to that individual, attracts a maximum penalty of \$3 million (s 30). Category two offences, where a corporation has a health and safety duty; fails to comply with the duty;

and the failure exposes an individual to a risk of death or serious injury or illness, attracts a maximum penalty of \$1,500,000 (s 31). Category three offences, where a corporation has a health and safety duty; and fails to comply with the duty, attracts a maximum penalty of \$500,000 (s 32). There are in each case also offence provisions with lesser penalties fixed for individuals and a higher penalty for those individuals who commit an offence 'as a person conducting a business or undertaking or as an officer of a body'.

27 Unlike the present NSW legislation, the offences created are not absolute and oblige prosecutors to prove matters which presently fall on defendants to prove when raising defences. They do however impose wide ranging health and safety duties on individuals and corporations in a variety of situations, including in relation to:

- workers while at work (s 18 which imposes a 'primary duty of care');
- those who have management or control, in whole or in part, of a workplace (s 19);
- those who have the management or control of fixtures, fittings or plant, in whole or in part, at a workplace (s 20);
- those who conduct a business or undertaking that designs (s 21), or manufactures (s 22), or imports (s 23), or supplies (s 24), or installs, constructs or commissions (s 25) plant or a substance that is to be used or could reasonably be expected to be used at a workplace; or a structure that is to be used or could reasonably be expected to be used as, or at, a workplace.

28 Officers of bodies with duties and obligations under the Act also have a duty to exercise due diligence to ensure that the body complies with that duty or obligation (s 26). Workers (s 27) and others at a workplace (s 28) have duties to take reasonable care for their own health and safety; and to take reasonable care that their acts or omissions do not adversely affect the health and safety of other persons; and must comply with any reasonable instruction to comply with the Act, and in

the case of workers, with reasonable policy or procedures of the person conducting the business or undertaking relating to work health or safety that has been notified to them. Penalties for individuals are to range from \$2,000 to \$300,000.

- 29 This new legislative scheme appears to respond to a range of concerns. They include that corporations be punished for their crimes under a significantly increased penalty regime, that the proof to which some prosecutors are put be increased, and that the responsibility for corporate crimes be spread to a wider range of individuals, also to be subject to a higher penalty regime. The High Court's judgment in *Kirk* is likely to have an impact on prosecutions brought under this new regime.
- 30 Given legislative initiatives such as these, regulators will undoubtedly continue to face difficult decisions when pursuing corporate crime – whether to prosecute and who, the individuals directly involved or the company? Such investigators are often armed with statutory tools not available to police investigating conventional crimes. Corporations are also denied privileges which individuals enjoy, such as the privilege against self incrimination. Nevertheless, given the nature of corporations, identifying the actors directly responsible for an offence may be difficult and resource intensive.
- 31 A corporate offence may truly be the result of a complex series of interactions between different people and decisions which they have each made and actions which they have each implemented, without any one individual intending, or being directly responsible for the resulting offence. For a regulator, the easiest course may be to prosecute the company, yet that itself may give rise to disquiet. For a court, when sentencing such a corporation, what penalty is to be imposed, given that the 'true culprits' have not also been brought before the court, may also arise as an issue.

The purpose of prosecution

- 32 Criminal laws are directed at protection of the community, punishment, deterrence, retribution and rehabilitation. Reasonable minds will differ as to what is appropriate in a particular case. Whether there is any point in criminal prosecution of corporations has been a matter of controversy over the years and no doubt helps explain the growth of civil penalty provisions.
- 33 Criminal sanctions imposed on corporations are generally financial, they having no body which can be incarcerated. Their impact is typically borne by the shareholders who ultimately benefit from the behaviour, although any shareholder's exposure to a penalty will never be more than the extent of their investment in the company, unless themselves prosecuted and penalised if involved in the misconduct. Still, they may fund the payment of criminal fines - in post tax dollars - and the cost of other penalties which may be imposed, by the reduced returns achieved on their investments. A fair outcome some argue, given that it is typically to their ultimate economic advantage that regulatory crimes are directed. Shareholders may well disagree. Sometimes it is employees who bear the brunt, when a penalty results in staff being shed. Sometimes consumers bear the cost, when the company recoups its losses through higher charges imposed for its goods and services. Sometimes it is a company's creditors, when the result of the criminal proceedings is insolvency.
- 34 Still, like civil penalty provisions, that fines and other punishments can help deter criminal behaviour cannot seriously be questioned. While corporations do not possess many things, they do possess reputations and competitive positions in the marketplace, which they are usually keen to protect. An unwelcome social stigma tends to attach to a criminal conviction and the punishment which accompanies it, provided of course, that the conviction becomes known. That, and the financial

burden flowing from the penalty imposed, are likely to encourage a corporation and those involved in it, to alter its future course.²² In some cases, whether that necessarily punishes the real perpetrator of the crime, will be open to argument, but who is pursued is a prosecutorial decision, not always easy to understand and which sometimes leads to controversy.

- 35 A case which achieved a certain notoriety in Victoria in the 1990's and which ultimately led to legislative change was *R v Denbo Pty Ltd*.²³ That company pleaded guilty to one charge of manslaughter, and one of the company's two directors pleaded guilty to two charges brought under the *Occupational Health and Safety Act* 1985 (Vic). The prosecutions followed the death of an employee who was killed when the brakes of the truck he was driving failed, when he had to drive down a steep track on a construction site. The brakes were known to be defective. The director who was responsible for maintaining the truck and training employees instructed the driver to use the truck, despite being aware that the brakes were grossly defective. The company was fined \$120,000, in a context where the maximum penalty was then \$180,000. The director was fined a total of \$40,000 for his two offences. In sentencing the company, *Teague J* emphasised the need for deterrence. A matter taken into account in fixing the company's penalty was that it was in administration and there was no possibility of the fine being paid, given its financial position.
- 36 Dissatisfaction with the outcome in this case led to an initially unsuccessful attempt to introduce a manslaughter offence in Victoria in the case of workplace accidents.²⁴ There are now such workplace death provisions. See for example the *Occupational Health and Safety*

²² See NSW Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) at [11.10] - [11.13] for a discussion of adverse effects of publicity orders in the context of shaming.

²³ (1994) VIR 157.

²⁴ The *Crimes (Workplace deaths and Serious Injuries) Bill* 2001(Vic). See 'Crime, Health and Safety and Corporations: Meanings of the Failed *Crimes (Workplace deaths and Serious Injuries) Bill*' (Working Paper No 29, Centre for Employment and Labour Relations Law, The University of Melbourne, 2004, Harry Glasbeek).

Act 2000 (NSW)²⁵ and the *Crimes Act* 1900 (ACT),²⁶ which apply to corporations.²⁷ Still, despite plenty of workplace deaths, such prosecutions are relatively rare.

37 The problem which this case revealed, of penalties which will never be paid by corporations because they are failing or have failed, has developed to the point where the 'phoenix' company phenomena has become well recognised. That is a company which is wound up once criminal proceedings are concluded and the business then springs back into life under the guise of a new company, without the fine imposed on the old company ever being paid and the new business not carrying the baggage of the old company's criminal record. It is an ongoing phenomenon, still not adequately addressed by legislatures. Both the NSW and Australian Law Reform Commissions have recommended that courts be given the power to make orders requiring dissolution and preventing the same business being carried on by another corporation, but legislatures have not responded to those proposals in any systemic way.

38 An interesting comparison can be drawn between what has resulted in the case of legislative workplace death provisions and the proceedings brought against Visy Industries Holdings Pty Limited and a number of its senior officers for breaches of the cartel provisions of the *Trade Practices Act* 1974 (Cth), which also achieved real notoriety in more recent times.²⁸ The result was a \$36 million penalty imposed on the company for 37 contraventions of the *Trade Practices Act*; a \$1.5 million penalty for one executive; \$500,000 for a second and no penalty

²⁵ See Part 2A Workplace deaths and s 32A reckless conduct causing death at workplace by person with OHS duties. At the time of enactment the maximum penalty for this offence for a corporation was \$1,650,000 and \$165,000 or 5 years imprisonment for an individual. There has been no prosecution brought under the section.

²⁶ See ss 49C and 49D. Introduced by the *Crimes (Industrial Manslaughter) Amendment Act* 2003, which also introduced a separate senior officer offence.

²⁷ For a discussion of these developments in Australia, the UK and Canada, see Karen Wheelwright, 'Goodbye directing mind and will, hello management failure: A brief critique of some new models of corporate criminal liability' (2006) 19 *Australian Journal of Corporate Law* 287.

²⁸ See *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Limited* (No 3) [2007] FCA 1617.

for a third, because as owner of the company he would bear the burden of the corporate penalty. This outcome followed all defendants admitting liability, after the other side of the cartel, received immunity after disclosure of the cartel to the regulator.

- 39 The two cases provide an interesting contrast between the criminal sanctions imposed upon those who by their conduct put the safety of those who work for them at risk – to the point of death – and the sanctions imposed for unlawfully fixing what consumers paid in the marketplace for cardboard boxes. That, too, raises the question of whether we have the balance right in the way in which the misconduct of corporations and those who work for them are dealt with in various legislation by way of civil or criminal penalties, but that is a topic for another day.

Law Reform

- 40 A useful discussion of the prosecution of corporations and the need for law reform in relation to the sentencing of corporate offenders can be found in *The Prosecution of Corporations*.²⁹ There Clough and Mulhern discuss how corporate misconduct is dealt with in Australia and suggest a need for sentencing legislation directed specifically at corporate offenders. They also suggest that existing legislative models and that to be found in US Sentencing Guidelines could easily be adopted, to provide clearer guidance to prosecutors as to when civil or criminal sanctions are appropriate; to simplify the enforcement of criminal sanctions on corporations by the establishment of a single agency devoted to corporate enforcement and to arm sentencing judges with a range of sentencing options, as alternatives to a fine.³⁰ Although there is much which is attractive about these proposals, they do not appear to have found as much favour with legislatures as one might expect.

²⁹ Jonathan Clough & Carmel Mulhern, *The Prosecution of Corporations* (2002).

³⁰ Jonathan Clough & Carmel Mulhern, 'The way forward' in *The Prosecution of Corporations* (2002) 218-221.

- 41 The Commonwealth *Criminal Code* deals with corporate criminal responsibility in Part 2.5, but alternative sentencing options, if available, are still generally to be found in particular statutes. There doesn't seem to have been much legislative interest in simplifying the enforcement of sanctions or in giving greater guidance to prosecutors.
- 42 In 2003, the NSW Law Reform Commission made a number of recommendations for the amendment of the *Crimes (Sentencing Procedure) Act* 1999 to make express provision for the sentencing of corporate offenders, including the adoption of Part 2.5 of the Commonwealth *Criminal Code*.³¹ It was then observed that this legislation did not itself make very clear that the sentencing objectives identified in s 3A applied to corporate offenders (see discussion at [3.28]). Nevertheless, the legislation is applied by NSW courts in the sentencing of corporations.
- 43 The NSW Commission also recommended the adoption of aggravating and mitigating factors particularly relevant to corporations, in addition to those presently fixed by s 21A of the 1999 Act. The section presently provides:

21A Aggravating, mitigating and other factors in sentencing

(1) General

In determining the appropriate sentence for an offence, the court is to take into account the following matters:

- (a) the aggravating factors referred to in subsection (2) that are relevant and known to the court,
- (b) the mitigating factors referred to in subsection (3) that are relevant and known to the court,
- (c) any other objective or subjective factor that affects the relative seriousness of the offence.

³¹ NSW Law Reform Commission, *Sentencing: Corporate Offenders*, Report No 102 (2003).

The matters referred to in this subsection are 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.

(2) Aggravating factors

The aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

- (a) the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work,
- (b) the offence involved the actual or threatened use of violence,
- (c) the offence involved the actual or threatened use of a weapon,
- (ca) the offence involved the actual or threatened use of explosives or a chemical or biological agent,
- (cb) the offence involved the offender causing the victim to take, inhale or be affected by a narcotic drug, alcohol or any other intoxicating substance,
- (d) the offender has a record of previous convictions (particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences),
- (e) the offence was committed in company,
- (ea) the offence was committed in the presence of a child under 18 years of age,
- (eb) the offence was committed in the home of the victim or any other person,
- (f) the offence involved gratuitous cruelty,
- (g) the injury, emotional harm, loss or damage caused by the offence was substantial,
- (h) the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability),

- (i) the offence was committed without regard for public safety,
- (ia) the actions of the offender were a risk to national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* of the Commonwealth),
- (ib) the offence involved a grave risk of death to another person or persons,
- (j) the offence was committed while the offender was on conditional liberty in relation to an offence or alleged offence,
- (k) the offender abused a position of trust or authority in relation to the victim,
- (l) the victim was vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim's occupation (such as a taxi driver, bus driver or other public transport worker, bank teller or service station attendant),
- (m) the offence involved multiple victims or a series of criminal acts,
- (n) the offence was part of a planned or organised criminal activity,
- (o) the offence was committed for financial gain.

The court is not to have additional regard to any such aggravating factor in sentencing if it is an element of the offence.

(3) **Mitigating factors**

The mitigating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

- (a) the injury, emotional harm, loss or damage caused by the offence was not substantial,
- (b) the offence was not part of a planned or organised criminal activity,
- (c) the offender was provoked by the victim,
- (d) the offender was acting under duress,
- (e) the offender does not have any record (or any significant record) of previous convictions,
- (f) the offender was a person of good character,
- (g) the offender is unlikely to re-offend,

- (h) the offender has good prospects of rehabilitation, whether by reason of the offender's age or otherwise,
- (i) the remorse shown by the offender for the offence, but only if:
 - (i) the offender has provided evidence that he or she has accepted responsibility for his or her actions, and
 - (ii) the offender has acknowledged any injury, loss or damage caused by his or her actions or made reparation for such injury, loss or damage (or both),
- (j) the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability,
- (k) a plea of guilty by the offender (as provided by section 22),
- (l) the degree of pre-trial disclosure by the defence (as provided by section 22A),
- (m) assistance by the offender to law enforcement authorities (as provided by section 23).
- (4) The court is not to have regard to any such aggravating or mitigating factor in sentencing if it would be contrary to any Act or rule of law to do so.
- (5) The fact that any such aggravating or mitigating factor is relevant and known to the court does not require the court to increase or reduce the sentence for the offence.

(5A) Special rules for child sexual offences

In determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.

(5B) Subsection (5A) has effect despite any Act or rule of law to the contrary.

(6) In this section:

child sexual offence means:

- (a) an offence against section 61I, 61J, 61JA, 61K, 61M, 61N, 61O or 66F of the Crimes Act 1900 where the person against whom the offence was committed was then under the age of 16 years, or
- (b) an offence against section 66A, 66B, 66C, 66D, 66EA, 66EB, 91D, 91E, 91F, 91G or 91H of the Crimes Act 1900, or

- (c) an offence against section 80D or 80E of the Crimes Act 1900 where the person against whom the offence was committed was then under the age of 16 years, or
- (d) an offence against section 91J, 91K or 91L of the Crimes Act 1900 where the person who was being observed or filmed as referred to in those sections was then under the age of 16 years, or
- (e) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in any of the above paragraphs.

serious personal violence offence means a personal violence offence (within the meaning of the Crimes (Domestic and Personal Violence) Act 2007) that is punishable by imprisonment for life or for a term of 5 years or more.

44 Plainly not all of these provisions are relevant to corporations. The recommended additions were:

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.

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.

45 The NSW Commission also recommended the adoption of alternatives to the imposition of a fine such as incapacitation orders, correction orders, community service orders, publicity orders, orders in relation to the dissolution of a company, as well as disqualification orders preventing corporations from engaging in commercial activities, revoking or suspending licences held, disqualifying the corporation from entering certain contracts and denying the use of profits for a specified period. Orders preventing directors reincorporating a dissolved company, or having a beneficial interest in a company that substantially carries on the same activities as the dissolved company were also proposed.

46 These recommendations have largely not been acted upon, although specific legislation empowers some orders of this kind. The *Occupational Health and Safety Act 2000* (NSW), for example, permits restoration orders requiring an offender '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' (s 113); orders requiring the offender

‘to publicise the offence, its consequences, the penalty imposed and any other related matter’(s 115); and orders requiring the offender to ‘carry out a specified project for the general improvement of occupational health, safety and welfare’ (s 116).

- 47 In my experience such orders, indeed any orders other than fines and costs, are not commonplace in corporate prosecutions. Neither prosecutors nor defendants tend to seek them, with the result that even if inclined to consider making such orders, no evidence is led as to obvious matters which would require a sentencing judge’s consideration, before such orders could be formulated as part of the punishment befitting the crime in question.
- 48 In 2006, the Australian Law Reform Commission produced its report on the sentencing of federal offenders.³² In Chapter 30 the Commission considered whether additional sentencing options should be available to courts sentencing corporations for federal offences. It recommended that federal sentencing legislation should include options such as orders disqualifying a corporation from undertaking commercial activities; that they undertake corrective action within the organisation; that they undertake activities for the community; that they publicise the offending conduct and orders dissolving the corporation.
- 49 Other recommendations dealt with the specification of factors relevant to corporations, which must be taken into account when sentencing and requiring officers of a corporation to be present at sentencing. While general sentencing principles are now specified in s 16A of the *Crimes Act* 1914 (Cth), they do not deal specifically with corporations.³³ Section 21B permits the making of reparation orders and s 20AB provides some other alternatives, but the recommendations made by

³² Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006).

³³ See *ACCC v Chubb Security Australia Pty Ltd* [2004] FCA 1750 at [70]-[84] for an example of the application of these provisions to a corporation.

the Commission have largely not been taken up in general sentencing legislation. Section 16A provides:

16A Matters to which court to have regard when passing sentence etc.

- (1) In determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.
 - (2) In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court:
 - (a) the nature and circumstances of the offence;
 - (b) other offences (if any) that are required or permitted to be taken into account;
 - (c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character—that course of conduct;
 - (d) the personal circumstances of any victim of the offence;
 - (e) any injury, loss or damage resulting from the offence;
 - (f) the degree to which the person has shown contrition for the offence:
 - (i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or
 - (ii) in any other manner;
 - (fa) the extent to which the person has failed to comply with:
 - (i) any order under subsection 23CD(1) of the *Federal Court of Australia Act 1976*; or
 - (ii) any obligation under a law of the Commonwealth; or
 - (iii) any obligation under a law of the State or Territory applying under subsection 68(1) of the *Judiciary Act 1903*;
- about pre trial disclosure, or ongoing disclosure, in proceedings relating to the offence;

- (g) if the person has pleaded guilty to the charge in respect of the offence—that fact;
 - (h) the degree to which the person has co operated with law enforcement agencies in the investigation of the offence or of other offences;
 - (j) the deterrent effect that any sentence or order under consideration may have on the person;
 - (k) the need to ensure that the person is adequately punished for the offence;
 - (m) the character, antecedents, age, means and physical or mental condition of the person;
 - (n) the prospect of rehabilitation of the person;
 - (p) the probable effect that any sentence or order under consideration would have on any of the person's family or dependants.
- (2A) However, the court must not take into account under subsection (1) or (2) any form of customary law or cultural practice as a reason for:
- (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or
 - (b) aggravating the seriousness of the criminal behaviour to which the offence relates.
- (2B) In subsection (2A):
- criminal behaviour*** includes:
- (a) any conduct, omission to act, circumstance or result that is, or forms part of, a physical element of the offence in question; and
 - (b) any fault element relating to such a physical element.
- (3) Without limiting the generality of subsections (1) and (2), in determining whether a sentence or order under subsection 19B(1), 20(1) or 20AB(1) is the appropriate sentence or order to be passed or made in respect of a federal offence, the court must have regard to the nature and severity of the conditions that may be imposed on, or may apply to, the offender, under that sentence or order.
- (4) For the purposes of a reference in this section to a family, the members of a person's family are taken to include the following (without limitation):
- (a) a de facto partner of the person;

- (b) someone who is the child of the person, or of whom the person is the child, because of the definition of **child** in section 3;
- (c) anyone else who would be a member of the person's family if someone mentioned in paragraph (a) or (b) is taken to be a member of the person's family.

50 It seems that there is still room for further constructive law reform in relation to the prosecution and sentencing of corporations.

General Sentencing Principles – a punishment which fits the crime

51 How then are sentences determined by a court when sentencing a corporation? By the application of well established sentencing principles of general application, once a company has been convicted, the prosecutor having established to the necessary standard matters such as incorporation; that the company was responsible for the conduct in question, either vicariously, on an attributive basis, or directly, as the particular offence may require; and that it constituted the commission of that offence. A punishment which fits the crime and has appropriate regard to the circumstances of the corporation in question must then be fixed. This is a complex exercise, requiring the exercise of a discretion, not the simple application of a formula. While proper account must be taken of patterns of sentencing,³⁴ there is no single correct sentence.³⁵ These principles are well known, but their application may raise particular challenges in the case of corporations.³⁶

52 It is not possible in this paper to deal with the differing positions in every jurisdiction, but the challenges facing sentencing judges dealing with a corporate offence, can be readily seen. In NSW, for example, the

³⁴ See *R v Mungomery* (2004) 151 A Crim R 376 at [5].

³⁵ *Markarian v the Queen* (2005) 228 CLR 357 at [27].

³⁶ See *Manpac Industries Pty Ltd (formerly t/a Pacific Concrete & Quarries Pty Ltd) v WorkCover Authority of New South Wales (Inspector Glass)* [2001] NSWIRComm 190; (2001) 106 IR 435 at [70].

sentencing task must be approached in light of the provision made in s 3A of the *Crimes (Sentencing Procedure) Act 1999*, which provides:

3A Purposes of sentencing

The purposes for which a court may impose a sentence on an offender are as follows:

- (a) to ensure that the offender is adequately punished for the offence,
- (b) to prevent 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.

53 In *R v King*³⁷ the NSW Court of Criminal Appeal, observed:

[130] Troublesome though the task may be, it is essential that the sentence reflect the factors set out in s 3A. The fact that s 3A confers a discretion upon the sentencing judge as to the factors to be taken into account does not detract from that proposition. It reflects legislative recognition of the principles in *Veen v The Queen (No 2)* and, in particular, the necessity to reconcile and rationalise the s 3A purposes in considering the sentence appropriate to the particular offence. The sentencing judge must reach an "instinctive synthesis" which takes account of and balances the "conflicting and contradictory" factors which bear upon the sentencing exercise: *Wong v The Queen*.

³⁷ (2004) 150 Crim R 409 (McColl JA, Howie and Buddin JA agreeing).

54 While there has been some debate as to whether the enactment of s 3A constituted a change from the common law position, for present purposes it may be accepted as reflecting what is required at common law. In *R v MA*³⁸ it was said;

[23] Section 3A is in substance a codification and elaboration of the purposes of criminal punishment described in *Veen v The Queen (No 2)* where the High Court recognised the troublesome but unavoidable difficulty in giving weight to each of those purposes which overlap, and it was pointed out that none of them can be considered in isolation when determining the appropriate sentence in a particular case.

55 The regulatory offences for which corporate offenders tend to come before courts are often committed in a context where legislation imposes complex obligations on the corporation, which must implement programmes and procedures which ensure that the obligations are satisfied. The difficulty for prosecutors proving corporate fault for such offences by concepts such as vicarious liability and aggregation, no doubt led to the development of the Commonwealth *Criminal Code* provisions in relation to corporate culture.³⁹ Evidence about such matters will often be relevant to sentencing, even in prosecutions where these provisions do not apply, but can provide real challenges for prosecutors and in my view, help explain the growth of civil penalty provisions. In *Trade Practices Commission v CSR Ltd*,⁴⁰ it was observed, for example:

There was little convincing evidence of a corporate culture seriously committed to the need to comply with the requirements of the Act. The compliance program as indicated by the evidence appeared desultory and in need of reinforcement. No indication of any corrective measures or revitalisation of that program was offered. The corporate

³⁸ (2004) 145 A CrimR 434 at 439.

³⁹ See Part 2.5, s 12.3.

⁴⁰ (1991) ATPR 41-076 at 52,155.

culture was, I think, reflected in CSR's dealings with the Commission and the conduct of this litigation. It is to its credit that it has withdrawn its defences and submitted to injunctions restraining further contravention. However that withdrawal and submission came nearly two years after proceedings were instituted and followed a period of protracted stonewalling in CSR's dealings with the Commission. I have no doubt that the preparation of the case by the Commission has consumed an enormous amount of time and financial resources.

The objective gravity of the offence

- 56 Whatever be the offence in question, the sentencing task must be approached in light of the maximum penalty fixed for the worst case,⁴¹ having regard to the gravity of the particular offence in question, that is, its relative nature and seriousness; any applicable minimum penalty, as well as any relevant guideline judgment. When maximum penalties are raised, this is regarded to be the sign of an intention by the legislature that higher penalties should be imposed.⁴² The converse is true when maximum penalties are reduced.⁴³
- 57 There may also be a statutory obligation to consider particular aggravating or mitigating matters, as s 16A of the *Crimes Act* 1914 (Cth) and s 21A of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) require, in so far as they can be applied to corporations. Account may have to be taken of penalties imposed in other cases and relevant sentencing statistics may have a role to play in arriving at a sentence, but they are most useful in helping to identify a range or pattern of sentences for a particular offence.⁴⁴

⁴¹ See *R v Moon* (2000) 117 A Crim R 497 at [70], where *Howie J* described "the nature of the criminal conduct proscribed by an offence and the maximum penalty applicable to the offence" as being "crucially important factors in the synthesis which leads to the determination of the sentence to be imposed upon the particular offender for the particular crime committed". See also *Markarian v the Queen* (2005) 228 CLR 357 at [31].

⁴² See *R v Way* (2004) 60 NSWLR 168 at [52].

⁴³ See *R v Ronen* (2006) 62 ATR 321 at [30].

⁴⁴ See *R v Bloomfield* (1998) 44 NSWLR 734.

58 As well as a consideration of the circumstances in which the offence occurred, its seriousness may be judged by reference to a variety of factors which will shed light on whether a higher or lower penalty should be imposed. The aim is both to achieve a just, proportional punishment for the particular offence,⁴⁵ as well as consistency in sentencing.⁴⁶ Consistency is a perennial challenge for sentencing judges.⁴⁷ Assistance provided by prosecutors or defendants may be slim or non-existent. Sentencing statistics may not always be available, or very helpful, given the nature of the offence or the size of the statistical sample.

59 In many cases the evidence will show that there were a number of entities and/or individuals who contributed to the circumstances which led to the charge, which will require consideration in determining the seriousness of the particular offence in question and in ensuring consistency in the sentences imposed on various offenders.⁴⁸

60 **Foreseeability.** An offence committed when the harm in question was foreseen, but where available measures were not taken to prevent the harm, or where it was reasonably foreseeable, will usually be taken into account in determining the gravity of an offence. The foreseeability of a risk to safety and failure to take available steps which would have prevented the risk materialising in the case of an occupational health and safety offence are relevant considerations.⁴⁹ Statutory provisions such as the *Protection of the Environment Operations Act 1997* (NSW)

⁴⁵ See Justice Bruce DeBelle, 'Sentencing: Legislation or Judicial Discretion?' (Paper presented at the National Judicial College Sentencing Conference, Canberra, 8 February 2008) at [7].

⁴⁶ See Chief Justice Spigelman, 'Consistency and sentencing' (Paper presented at the National Judicial College Sentencing Conference, Canberra, 8 February 2008).

⁴⁷ See *Griffiths v The Queen* (1977) 137 CLR 293 at 326-327; *Postiglione v The Queen* (1997) 189 CLR 295 per Kirby J at 341, Dawson and Gaudron JJ at 301-30; *Warman International Ltd v WorkCover Authority of New South Wales* (1998) 80 IR 326 at 341.

⁴⁸ See for example *WorkCover Authority of New South Wales (Inspector Mansell) v Anytime Industrial Services Pty Ltd* (2001) 110 IR 34; *WorkCover Authority of New South Wales (Inspector Farrell) v Morrison (No 2)* (2002) 112 IR 312; *WorkCover Authority of New South Wales (Inspector Mansell) v Orica Australia Pty Ltd* (2002) 116 IR 158 and *WorkCover Authority (NSW) v Consolidated Constructions Pty Ltd* (2001) 109 IR 316.

⁴⁹ See *Capral Aluminium Ltd v WorkCover Authority of New South Wales* [2000] 49 NSWLR 610 at [82].

may also make express provision requiring consideration to be given to foreseeability in determining sentence.⁵⁰

61 While a risk or harm that was foreseen or foreseeable is an indicator of a more serious offence, the absence of foreseeability, does not necessarily make the offence a trivial one.⁵¹

62 **Harm caused:** The gravity of an offence may, but need not necessarily be revealed by the harm which it has caused. In occupational health and safety and certain environmental prosecutions in NSW, where the statutory offences are concerned with risks to safety in the former case, or harm caused as well as that likely to be caused in the latter, it is not only the harm actually caused which is a relevant consideration in determining penalty.⁵² Such provisions can of course give rise to evidentiary difficulties.

63 **Systematic or deliberate defiance:** An offence which results from systematic or deliberate defiance of the law will also be regarded as a more serious offence.⁵³ Premeditation and planning may evidence a higher level of objective criminality, for example, in the case of fraud.⁵⁴ In *Environment Protection Authority v Middle Harbour Constructions Pty Ltd*⁵⁵ the NSW Court of Criminal Appeal observed at [57]:

[57] This submission takes too simplistic a view of the significance of the maximum penalty provided. Environmental offences are liable to be committed by a wide variety of persons -- from lowly paid employees to the largest corporations in the State. They are liable to be committed in a wide variety of circumstances including by accident and even despite a great deal of care. They may be committed deliberately after a cost/benefit analysis by the

⁵⁰ See s241(c) and *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 699-700 per Kirby J.

⁵¹ See for example *Capral Aluminium Ltd v WorkCover Authority of NSW* (2000) 49 NSWLR 610 at 646.

⁵² See *Capral Aluminium Ltd v WorkCover Authority of NSW* (2000) 49 NSWLR 610 at 650.

⁵³ See *Bentley v Gordon* [2005] NSWLEC 695 at [125] and [126] per Preston J.

⁵⁴ See *R v Araya* (2005) 155 A Crim R 555 at [96].

⁵⁵ (2002) 119 LGERA 440.

perpetrator. They may result in no, or alternatively a great deal of, environmental damage. To ensure all such persons and situations are covered, to ensure that penalties are sufficient to hurt even very large corporations and to induce the taking of precautions, even costly precautions, the maximum must be high.

The circumstances of the corporation

- 64 Various subjective matters must also be weighed in determining penalty, although in a case of extreme culpability where the maximum penalty is warranted, there is little role for a consideration of subjective factors.⁵⁶ Both aggravating and mitigating matters arise.
- 65 ***The nature of the corporation:*** Corporations come in many shapes and sizes, a matter which a court will have to have some regard to in sentencing. There are companies which are merely the alter ego of a sole director and shareholder, or a husband and wife partnership; companies owned by a number of directors who are all engaged in its management; companies controlled by directors who have but little ownership of its shares; listed companies of various sizes, some with large, diverse shareholding, controlled by directors who may or may not themselves have a substantial shareholding; and companies which have come into the hands of an administrator or receiver.
- 66 ***Prior record, good character and financial means:*** Matters such as prior record, the company's good character⁵⁷ and the financial means of the corporation are all matters to be taken into account in fixing a sentence. While prior convictions are not a basis for increasing a penalty, they may be a basis for refusing leniency in sentencing, because the record evidences a continuing attitude of disobedience to

⁵⁶ See *R v Harris* (2000) 50 NSWLR 409.

⁵⁷ See *Ryan v The Queen* (2001) 206 CLR 267; *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 701.

the law.⁵⁸ Prior good record may ameliorate an offence perceived to be an aberration. In the case of occupational health and safety prosecutions, record may have to be considered in the context of factors such as the company's size, length of operation and the dangerous industry in which it operates.⁵⁹

67 It is in this context that the attraction of the phoenix company to the unscrupulous can be understood. Winding up a company with a poor criminal record and starting again, has obvious attraction to those not too concerned with obeying the criminal law.

68 While unlike the European speeding laws which fix the penalty to fit the offender's means, a company's financial circumstances is nevertheless a matter which must generally be taken into account in fixing penalty. Not to increase an otherwise appropriate fine because the corporation has the means to bear a higher penalty, but to ensure that a penalty is not fixed on a basis which is oppressive. In NSW the view has been taken that it is not the court's task to impose a penalty which would put a company out of business.⁶⁰ *The Fines Act* 1996 (NSW) requires that consideration be given to information 'reasonably and practically available' (s 6). The *Crimes Act* 1914 (Cth) also requires such consideration in s 16C. However, even where a company is going into liquidation, a fine may be imposed.⁶¹

69 Paying appropriate regard to a company's financial position is sometimes difficult, when adequate evidence of its financial circumstances is not led. Inadequate evidence is not a basis upon which a lower penalty may be imposed. In the absence of relevant evidence, courts tend to assume that the penalty warranted by the

⁵⁸ In the context of s 21A of the *Crimes (Sentencing Procedure) Act* 1999 see *R v McNaughton* (2006) 66 NSWLR 566.

⁵⁹ See *Haynes v C I & D Manufacturing (No 2)* at 456-457 and *WorkCover Authority of New South Wales (Inspector Ankusic) v Crown in the Right of State of New South Wales (Department of Education and Training)* (2001) 112 IR 1 at [61].

⁶⁰ see *Attorney General v Meyers* (NSWCA, Unreported, 28 March 1984).

⁶¹ See *ACCC v Fila Sport Oceania Pty Ltd* [2004] FCA 376 at [23]-[25].

circumstances is one which the company has the means to bear. Section 16C of the *Crimes Act* 1914 (Cth) also provides that a court is not prevented from imposing a fine because financial circumstances cannot adequately be identified.

- 70 **Remorse or contrition** – Remorse is a significant mitigating factor to be taken into account. It may be evidenced in various ways - by an early plea of guilty;⁶² or by steps taken to deal with the consequences of the offence; by assistance provided to an investigator; or by promises of future co-operation.⁶³ A plea when caught red handed is not evidence of remorse.⁶⁴ An offender which pleads not guilty must not be penalised for defending itself, if found guilty.⁶⁵
- 71 Difficult questions can arise, where a trial judge forms the view that a corporation has evidenced no real contrition for the offence in question. *DPP v Esso Australia Pty Ltd*⁶⁶ provides a notorious example of such a situation. The company was convicted of 11 offences under the *Occupational Health and Safety Act* 1985 (Vic). The judgment reveals that the trial judge took the view that three matters showed that while there was regret over the death and injuries caused by the offences proven, there was no real remorse for the offences themselves, as opposed to their consequences.
- 72 The first matter was Esso's litigious treatment of employees who were called to give evidence as to whom it was said at [44]:

The truth is there was only one entity responsible for lack of knowledge on that day: Esso. It, and it alone, should have properly trained the operators and supervisors not only in production, which it did, but also in safety. It, and it alone, failed to do so. Mr Ward and the employees did not fail. Esso failed. These tragic events will always live with these decent, impressive and brave men, a number of whom have received

⁶² In NSW see the guideline judgment of *R v Thompson; R v Houlton* (2000) 49 NSWLR 383.

⁶³ See *Crimes Act* (Cth) s21E; *R v Gladwoski* [2000] QCA 352 at [12].

⁶⁴ *R v Power* [1999] NSWCCA 25 at [21].

⁶⁵ *Siganto v The Queen* (1998) 194 CLR 656 at 663-4.

⁶⁶ [2001] VSC 263.

bravery awards, including Mr Visser and Mr Ward, but these events occurred through no fault of theirs.

- 73 The second matter was the conduct of the trial, as to which it was said at [45]:

While Esso properly is to be given credit for limiting the issues in the trial and making admissions, and I do give Esso full credit, the defence advanced was one of obfuscation - designed not to clarify, but to obscure. Esso sought to make it appear that the identification of hazard, risk and cause was impossibly difficult. To that end, prosecution experts were cross-examined in technical detail to undermine proof which, with its other hand, Esso was promoting to its own experts: the smoking gun, as Mr Richter called it, the letter of Esso's solicitors of 30 May 2000 produced at the eleventh hour, exhibit 61.2. The convoluted and obscure question asked by the defence of the defence witness, Dr Baybutt, at pages 4464 to 4466 - all 38 lines of it - and the convoluted and obscure scenario posited by Dr Baybutt at pages 4657 to 4659 - all 58 lines of it - are testimony to the defence of obfuscation; and the words were hollow when, as was put in the question at p4466 line 5, "That's about as simply as I can put it," and by Dr Baybutt in the answer at p4657 line 27, "I'll try to keep it as simple as I can."

- 74 The third matter was Esso's repeated refusal to answer the question put directly to it - "does Esso accept responsibility for the fatal and injurious events?" His Honour concluded at [48]:

Normally in sentencing, a failure to accept responsibility sounds in the matter of specific deterrence. This is not so here, because Esso has demonstrated by its subsequent operational reforms that it has acted responsibly to remedy past deficiency. But its lack of acceptance of responsibility has a relevance in my not accepting that Esso's expression of remorse is practical and operational. Esso's failure still to accept responsibility for these tragic events is a serious deficiency.

- 75 The accident in question had lead to the death of two men and injuries to eight others, as well as affecting gas supplies in Victoria for some weeks. The maximum penalty was imposed in relation to some of the offences of which Esso was convicted, with a total penalty of \$2 million

imposed. Subsequent commentary suggested that even this level of penalty had no real impact on this company, given that Esso was reputed to be generating revenue streams significantly greater than that each week in the Bass Strait operations where the accident occurred. It was a subsidiary of a company which showed profits in excess of \$1.8 billion in 2000.⁶⁷

- 76 This is one of the difficulties of fines fixed even at a maximum level, where profitable companies can treat criminal penalties as merely a cost of doing business to their advantage, explaining perhaps the European approach to speeding offences and the \$17 million German penalty.
- 77 Genuine contrition can be evidenced by matters such as assistance to investigators; action taken to address the harm caused by the offence and action taken to address the cause of the offence. The attendance of senior officers of the corporation at the hearing may also evidence contrition. In some statutory contexts voluntary reporting of an offence may evidence remorse, in others mandatory reporting is required and compliance will not be a factor relevant to contrition. Failure to report may of course assist in establishing that the offence was the result of deliberate defiance of the law.

Deterrence – General and Specific

- 78 At common law both general and specific deterrence must be considered when sentencing corporate offenders.⁶⁸ General deterrence is not a matter mentioned in the *Crimes Act 1914* (Cth), but is a matter which should be taken into account in fixing a sentence.⁶⁹ Specific deterrence is referred to in s 16A(2)(j).

⁶⁷ Jonathan Clough & Carmel Mulhern, *The Prosecution of Corporations* (2002) at 207.

⁶⁸ See for example *Capral Aluminium Limited v WorkCover Authority of New South Wales* (2000) 49 NSWLR 610 at [74].

⁶⁹ See *Director of Public Prosecutions (Cth) v Said Khodor El Karhani* (1990) 21 NSWLR 370, discussed in *ACCC v Chubb Security Australia Pty Ltd* at [115]-[120].

- 79 In some cases specific deterrence may have a lesser role to play in the sentence imposed. In *Capral Aluminium Ltd v WorkCover Authority of New South Wales*⁷⁰ it was said at 644-645:

In sentencing, a court may disregard the element of specific deterrence if satisfied that the risk of re-offending is low or non-existent. The court may form such a view as a result of the rehabilitation of the offender: *R v Corner* (unreported, Court of Criminal Appeal, 19 December 1997) or because the offender will not have the opportunity to commit a similar offence in the future: *R v Macdonell* (unreported, Court of Criminal Appeal, 8 December 1995). However, we think it unlikely that the weight to be attached to specific deterrence could be reduced to zero in cases of offences under the Act.

- 80 The sentence must however be directed to inducing the corporation and other potential offenders to alter their future conduct and to change internal structures, policies and procedures which will guide that conduct. Whether a penalty imposed on a corporation is an effective deterrent, when the individuals involved in the offence are not also prosecuted, is a matter of ongoing debate.⁷¹

Victim Impact Statements

- 81 The impact of an offence on victims is an aspect of the assessment of the seriousness of an offence. All States and Territories have enacted legislation governing the use of victim impact statements, although they differ as to the use which may be made of them and the inferences which may be drawn from such statements. It is State laws, as to what use may be made of a victim impact statement in determining sentence, to which reference must be made.

⁷⁰ (2000) 49 NSWLR 610.

⁷¹ See Jonathan Clough & Carmel Mulhern, *The Prosecution of Corporations* (2002) at 189-193.

- 82 The Australian Law Reform Commission has recommended that such statements should be allowed in the sentencing of federal offenders, irrespective of whether the victim is an individual or corporation.⁷² Reference was there made to the submission made by ASIC as to the impact of corporate crimes, often on a large number of victims.⁷³ This reform has not proceeded, although s 16A of the *Crimes Act* 1914 (Cth) requires that consideration must be given to the circumstances of any victim and s 36 of the *Judiciary Act* 1903 (Cth) applies State and Territory procedural laws to federal prosecutions in State and Territory courts.
- 83 In NSW, for example, such statements may be used in proceedings in the Supreme or District Courts in the case of offences resulting in death or actual physical body harm⁷⁴ and in prosecutions under the *Occupational Health and Safety Act* 2000 for offences which result in death or actual physical body harm.⁷⁵ For a discussion of the role of such a statement in the sentencing process see *R v Thomas*.⁷⁶

The utilitarian savings flowing from an early plea

- 84 Section 16A(2)(g) of the *Crimes Act* 1914 (Cth) requires that a court must take a plea of guilty into account. How that is to be done is not specified. An early plea can evidence contrition, but may also be relevant in other ways in the sentencing exercise.⁷⁷ In *Makarjian v R*⁷⁸ the High Court rejected any two tiered approach to sentencing, favouring the process of instinctive synthesis of all relevant matters.

⁷² See Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) at [14.38].

⁷³ At [14.14].

⁷⁴ See *Crimes (Sentencing Procedure) Act* 1999, s 28.

⁷⁵ See *Crimes (Sentencing Procedure) Act* 1999, s 27.

⁷⁶ [2007] NSWCCA 269 at [36].

⁷⁷ See *Cameron v The Queen* (2002) 209 CLR 339.

⁷⁸ (2005) 228 CLR 357.

85 In NSW *R v Thomson; R v Houlton*⁷⁹ is a guideline judgment as to the discount to be given for a plea of guilty for the utilitarian value that the plea yields to the administration of criminal justice. That utilitarian value was assessed to be in the range of 10-25% on sentence, with only a plea entered at the earliest opportunity to result in the maximum discount. The operation of the discount was further explained in *R v Borkowski*.⁸⁰ In some cases the *Criminal Case Conferencing Trial Act* 2008 (NSW), which established a scheme for discounts in matters to which the scheme applies, will have to be considered.

Parity

86 The parity principle requires that persons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence.⁸¹ Inconsistency in sentencing may give rise to a justifiable sense of grievance, but there is no rule of law that requires co-offenders to be given the same sentence for the same offence.⁸² It also requires consideration of respective culpability for what occurred.⁸³

87 In the case of corporate offenders, co-offenders are not necessarily charged with the same offence and not infrequently, the individuals involved are not prosecuted. The difficulty of pursuing individuals involved in corporate misconduct has often been discussed, particularly

⁷⁹ [2000] NSWCCA 309.

⁸⁰ [2009] NSWCCA 102 at [32].

⁸¹ *Lowe v The Queen* (1984) 154 CLR 606 at [609].

⁸² *R v Li* [2005] NSWCCA 154 at [40].

⁸³ See for example *Inspector Alan Jones v Dewcape Pty Ltd & Anor; Dewcape Pty Ltd & Anor v Inspector Alan Jones* [2008] NSWIRComm 171 at [39] to [41].

in the context of white collar crimes. For example in *Regina v Williams*,⁸⁴ Woods CJ at CL said:

- 44 They are such as to call for the Defendant to be sentenced in accordance with the approach to white collar or commercial crime which has been consistently confirmed. For example in *R v Corner* NSWCCA 19 December 1997, the court (Powell JA, Beazley JA and Sperling J) said, in a Crown appeal against leniency, brought in respect of sentences imposed for breaches of the *Companies (NSW) Code* (at p.9):

“The seriousness with which this Court approaches white collar or commercial crime and the need for deterrence as an important consideration in the sentencing process, especially as offences of this sort are notoriously difficult to detect, is well documented. As Wood J (Carruthers J agreeing) said in *Pantano* (1990) 49 A Crim R, 328 at 330:

"[T]hose involved in serious white collar crime must expect condign sentences. The commercial world expects executives and employees in positions of trust, no matter how young they may be, to conform to exacting standards of honesty. It is impossible to be unmindful of the difficulty of detecting sophisticated crime of the kind here involved, or of the possibility for substantial financial loss by the public... The element of general deterrence is an important element of sentencing for such offences".

See also *McKechnie* (unreported, Court of Criminal Appeal, NSW, 1 October 1987); *Yuill* (unreported, Supreme Court, NSW, 14 September 1994 Dunford J); *Yuill (No 2)* (unreported, Supreme Court, NSW, 13 December 1995, Barr AJ); *Craven* (1995) 17 ACSR 368; *Carter* (unreported, Supreme Court, NSW, 29 September 1995, Barr AJ); *Glenister* [1980] 2 NSWLR 597; *Hawkins* (1989) 45 A Crim R 430 at 436.”

- 45 These comments were also cited with approval in *R v Rivkin* [2004] NSWCCA 7 at [423].
- 46 In *Corner* the Court also noted (at p 10) the relevance of particular and general deterrence in the sentencing process for crimes of this nature, citing the well known

⁸⁴ [2005] NSWSC 315.

observation in *R v Radich* [1954] NZLR 86 where the Court stated at 87:

“One of the main purposes of punishment...is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilized countries, in all ages, that has been the main purpose of punishment, and it still continues so. The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment, or with only light punishment.”

- 47 Although said in relation to a different form of white collar crime, the observations of the Court of Criminal Appeal of Victoria in *R v Moffat*, Vic CCA 15 December 1992, which were cited with approval in *R v Martin* (1994) 74 A Crim R 252 at 256, also underline the fact that the general deterrence factor is important in this area of criminality, and may require a custodial sentence, even though the offender has an unblemished prior record. See also the observations of the Court of Appeal in *R v Brown* [2002] VSCA 99 at [52] as to the need for the element of deterrence, in cases such as the present, to impact both on the total sentence and the minimum term, a theme which was also taken up in *DPP v Bulfin* (1998) 4 VR 114 at [131] to [132].
- 48 As Smart AJ also made clear in *R v Boskovitz* [1999] NSWCCA 437 the individual responsibility of Directors in not engaging in corporate conduct that involves dishonesty, or the making of false statements, cannot be overemphasised. His Honour observed that the decision of the Court in that case should stand as a strong warning to others: see observations to similar effect in *Regina v Wall* [2002] NSWCCA 42. Although it was submitted that the present case was not a suitable vehicle for general deterrence, I am not persuaded why that should be so.

88 When a court is dealing with a situation where all co-offenders are not prosecuted, or when an earlier sentence imposed on a co-offender is manifestly inadequate, problems can arise. In *WorkCover Authority of*

*New South Wales v Walco Hoist Rentals Pty Limited (No 2)*⁸⁵ it was said of such a situation at [34]:

The significance of the failure to prosecute, or to continue the prosecution of the other potential defendants, is not that fact but rather the fact that any assessment of the role of the present defendants must be considered in the light of the consideration that the criminality for the breach of occupational health and safety was one which did not fall solely on the shoulders of these defendants. That fact, of itself, involves consideration of matters which may mitigate the conclusion as to the objective seriousness of the offences committed and thus the penalty which should be imposed in relation to them.

- 89 There may also be difficulties when co-offenders plead guilty to charges on the basis of agreed statements of facts, which diverge markedly; in each case suggesting that the co-offender had greater culpability for the offence in question. An example can be found in *Inspector Patton v Australian Steel Mill Services Pty Ltd*⁸⁶ where I had to consider that situation when sentencing a third corporate offender, after two others had earlier been sentenced in relation to an uncontrolled release of blast furnace gas from the steelworks at Port Kembla.
- 90 In the case of closely held companies, where both the company and a director are charged in relation to the same misconduct, regard may be paid to the sentence imposed on one defendant, when sentencing the other. Sometimes this is treated as an aspect of the application of the totality principle.⁸⁷ A similar approach has been adopted where two closely related companies were each charged in respect of the same workplace accident,⁸⁸ although it has been suggested that this reflects an aspect of proper apportionment of responsibility and avoiding the imposition of an excessive penalty.⁸⁹

⁸⁵ [2000] 99 IR 163.

⁸⁶ [2006] NSWIRComm 372 at [21] to [29].

⁸⁷ See *Gosford City Council v Build Max Developments Pty Ltd* [2000] NSWLEC 224 at [23].

⁸⁸ See *Haynes v CI & D Manufacturing (No 2)* (1995) 60 IR 455 at 458.

91 In *McColl v John Watson Building Services Pty Limited*,⁹⁰ a Full Bench of the NSW Industrial Court said:

[25] . . .

1. In the context of determining penalties in prosecutions for a breach of occupational health and safety legislation by a corporation, it may be appropriate, in some limited circumstances, for the Court to have regard to whether the defendant's corporate structure is little more than a means of distributing earnings arising from personal exertion or where the burden imposed by a fine will fall on one person or family, compared with a corporation which is functioning as "a company with assets of a substantial kind": see *Haynes v CI & D Manufacturing Pty Ltd (No 2)* (1995) 60 IR 455 at 457. However, it is now also clear that the fact that a corporation may represent the alter ego of a person or family and that any penalty imposed on the corporation will consequently have a financial impact on that person or family does not, of itself, warrant a reduction in penalty: *WorkCover Authority (NSW) v Chen* (2004) 137 IR 33; *Inspector Maddaford v Coleman* [2004] NSWIRComm 317.
2. The financial position and the means of a defendant should be taken into account when determining penalty. It is well established that, notwithstanding such considerations, the penalty must ultimately reflect the objective seriousness of the offence: *Ferguson v Nelmac Pty Ltd* (1999) 92 IR 188 at 209; *WorkCover Authority (NSW) v Schrader* (2002) 112 IR 284 at 308-309; *Manpac Industries Pty Ltd (formerly t/a Pacific Concrete & Quarries Pty Ltd) v WorkCover Authority (NSW)* (2001) 106 IR 435.

92 A recent example of a case where a company and two directors were all prosecuted in respect of the same workplace accident can be found in *Inspector Webster v AGG Concreting Pty Ltd, Darryl Coffey and Steven Stathis*⁹¹ where consideration was given⁹² to the fact that the impact of the penalty imposed on the corporation would fall on the individuals.⁹² The result was a penalty of \$70,000 for the corporation and penalties of \$3,500 for the individuals. An example of a sentencing

⁸⁹ See NSW Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) at [15.12].

⁹⁰ (2004) 137 IR 310.

⁹¹ [2009] NSWIRComm 55.

⁹² [2009] NSWIRComm 55 at [33].

decision which I gave, where some of these difficulties arose is *Inspector Chaston v Moussalli & Ors*.⁹³ There two corporations and their directors, each the controlling mind in one case of the head contractor, and the other of a sub contractor, were all prosecuted. The sub contractor company was not sentenced, because it had gone into liquidation after the collapse of a wall on a building site.

Totality

93 The totality principle requires that where an offender is being sentenced in respect of a number of offences, the court must ensure that the penalties in aggregate are just and appropriate.⁹⁴ The application of this principle has an obvious interaction with the parity principle, which must be paid attention.⁹⁵ In the case of federal offences, s 4K of the *Crimes Act 1914* (Cth) may also arise for consideration.

94 The effect of the application of the totality principle is to reduce the total amount of the penalty, as well as the amount imposed for each individual offence.⁹⁶

Alternatives to Fines

95 The *Crimes Act 1914* (Cth) provides in s 4B(3) that a fine imposed on a corporation may be up to five times that imposed on a natural person. Other federal legislation provides certain alternatives to fines. For a discussion of the sentencing alternatives available in the case of various NSW environmental offences, see 'Principled Sentencing for

⁹³ [2008] NSWIRComm 58.

⁹⁴ *Mill v The Queen* [1988] HCA 70; (1988) 166 CLR 59 at 62-3.

⁹⁵ See the discussion in *Postiglione v The Queen* (1997) 189 CLR 295.

⁹⁶ See *ACCC v Chubb Security Australia Pty Ltd* [2004] FCA 1750 at [189] - [194] for the application of these provisions.

Environmental Offences', *Preston J*, Chief Judge Land and Environment Court of NSW.⁹⁷

- 96 They include orders for restoration and prevention; for payment of costs, expenses and compensation; to pay investigation costs; publication orders; environmental service orders; environmental audit orders; payment into environmental trusts; orders to attend training; orders to establish training courses; and orders to provide financial assurance. From his Honour's reference to decided cases it is apparent that these alternative sentencing options are in practical operation in that court.
- 97 By way of contrast, in the *Occupational Health and Health and Safety Act 2000* (NSW), orders available to be made in addition to the imposition of a fine⁹⁸ include orders for restoration (s 113); orders regarding the costs and expense of litigation (s 114); orders to publicise or notify offence (s 115) and orders to undertake OHS projects (s 116). These orders are infrequently made. The challenges of seeking and making such orders were discussed in *WorkCover Authority of NSW (Insp Mansell) v Chen*⁹⁹ at [59]:

[59] More significantly, is the process whereby the order was sought in the first instance. In our view, any application for such an order, must be properly supported by details of the order sought under s 115 of the Act and grounds in support of the same. An order sought under s 115 should be precisely formulated in writing both as to the person or classes of persons to whom the order is intended to be published for or notified to. As well, it would be necessary to specify with clarity where such a notice is to be published, the precise terms of the notice as well as any other related matter sought to be included in the publication or notice. That much is necessary, it seems to us, so that an offender is on notice as to the precise terms of the order sought and the

⁹⁷ (Paper presented at the 4th International IUCN Academy of Environmental Law Colloquium, Compliance and Enforcement: Toward More Effective Implementation of Environmental Law, October 2006).

⁹⁸ *Insp Clothier v Malcolm McIntyre t/as Corambie Pastoral Company* [2007] NSWIRComm 40.

⁹⁹ [2004] NSWIRComm 247; (2004) 137 IR 33.

steps that it (or he or she) must take in order to comply with the order. The power of the Court to make such an order is discretionary. In the exercise of that discretion, the Court will consider whatever matters the offender may wish to raise as to why such an order should not be made. The offender is unable to do that unless the matters we have identified are clearly and precisely specified by the party seeking the order. No such steps have been taken here and notwithstanding the appellants last minute written proposals, we do not propose to make the order sought in these proceedings.

- 98 A Victorian example where Leighton Contractors Pty Ltd was ordered to pay a fine of \$325,000, an additional \$70,000 to two charities and a further \$90,000 into trust funds of the deceased workers children can be found in a prosecution under the Victorian *Occupational Health and Safety Act* in *R v Leighton Contractors Pty Ltd*.¹⁰⁰
- 99 There are undoubtedly problems to be faced with these alternatives, which have perhaps delayed any general legislative schemes being enacted and prosecutorial reluctance to pursue them, even where available. They include the potential expense of their pursuit, natural justice questions and the question of the cost of the alternatives, which may be difficult to quantify, thus making it difficult to know whether the upper limit of any jurisdiction may be infringed by the making of certain alternative orders.¹⁰¹
- 100 It seems, nevertheless, that these alternatives warrant further consideration by both prosecutors in appropriate cases when available under the relevant legislative scheme, as well as by legislatures on a more general basis. In appropriate cases such alternatives may be a more effective punishment than a fine.

¹⁰⁰ (unreported, Victorian County Court, Gebhardt J, 27 May 2004).

¹⁰¹ See NSW Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) for a discussion of orders preventing reincorporation at [8.29] - [8.32] and the difficulty of jurisdictional limits at [13.2] - [13.4].

Room for consideration

101 It seems to me that three areas warrant some final comment.

Prosecution of other wrongdoers – questions of parity

102 The impact on sentencing of corporate offenders when other obvious wrongdoers are not prosecuted, should not be overlooked. Law Reform Commissions have suggested that it would be useful for greater guidance to be given to prosecutors as to the circumstances when individuals involved in the commission of corporate crimes should also be pursued. It seems that there is some value in this suggestion being further considered.

Non-pecuniary penalties

103 The most common penalty imposed on a corporation is a fine, whether prosecutors pursue criminal or civil sanctions in respect of corporate misconduct. Most other penalties imposed on a corporation undoubtedly also ultimately involve cost, all of which must be borne by shareholders, unless the company is able to pass the cost on to its customers through higher prices. Payment of such costs may be avoided by those who are in a position to reincorporate. Given the level of available fines imposed to reflect the gravity of a particular offence, fines may be treated by some corporations as just the price of being in business.¹⁰²

104 In that context, it may be that the public interest in punishment of corporate misconduct has been well served by the growth of civil penalty provisions. While it seems unarguable that some corporate

¹⁰² See NSW Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) for discussion of fines being regarded as ‘the going price of crime’ at [6.7] and [7.23] and ‘a mere cost of doing business’ at [6.3].

misconduct is truly criminal and should be dealt with accordingly, still the question remains whether the criminal law is best suited to dealing with some types of corporate misconduct, especially certain types of regulatory offences.

105 If the only practically available penalty - a fine – is truly regarded by corporations as merely the price of their pursuit of conduct which they perceive to be to their advantage, even if it is criminal, is a fine really an effective sanction for such an offence? Any pecuniary penalty is just as difficult, or easy, for a corporation to meet, whether the fine results from criminal or civil proceedings. It is just as readily avoidable by those prepared to re-incorporate. In those circumstances, the obvious question arises - what is the true purpose of pursuing a corporation for a criminal offence rather than a civil penalty?

106 It may be that experience has now grown to the point where it is apparent that the various potential alternatives to fines discussed in Law Reform Reports as suitable punishment for corporate crimes, may well be more likely to inflict an effective punishment on a corporation and those involved in such a crime, than any fine can.

107 The purpose of a publication order was, for example described in *Workcover Authority of NSW (Inspector Mansell) v Chen*¹⁰³ in this way:

It is apparent that the legislature intended to make provision for offences and penalties imposed to be publicized or notified in a way that brought to the attention of relevant persons or classes of persons the existence of the offences dealt with by the Court and the nature of the penalties imposed. Undoubtedly, such an order, once effected, would have the impact of drawing attention to the defendant's offending behavior and act as an ongoing deterrent to influence the offender to address attention to workplace health and safety in an ongoing and proactive manner in order to avoid the adverse consequences that such publicity or notification may bring to the offender's corporate reputation. As well, it may deter potential offenders to be more alert to their health and safety obligations.

¹⁰³ (2004) 137 IR 33 at [59].

108 We live in an age of information overload. There is another obvious question. Is any available fine imposed by a court in criminal proceedings of limited utility, if not accompanied by effective publicity? Perhaps further legislative guidance to prosecutors in this area would be useful, or as an alternative, wider adoption of the approach recently taken in NSW by the NSW Food Authority which has established a website where a register of penalty notices and prosecutions are published and may be searched.¹⁰⁴ This has certainly led to greater media interest in where the public may safely eat.

¹⁰⁴ <http://www.foodauthority.nsw.gov.au/penalty-notices/>

Prosecutors

- 109 It is commonplace for bodies which are concerned with the investigation of corporate crimes to be agencies which have a number of other important roles, which potentially conflict. Bodies such as the Australian Tax Office, ASIC, the ACCC, environmental protection agencies and agencies such as the NSW WorkCover Authority, which deals with workplace safety, are not only responsible for investigating offences, but also have educative and assistance roles, as well as in some cases, prosecutorial functions. Typically they have significant powers of investigation, wider than those granted to police. It is also the case that in some instances, particular agencies can benefit financially from the imposition of criminal fines, by the making of moiety orders in their favour.
- 110 The approaches which these agencies take to the pursuit of criminal offences can and does alter over time. In my experience, sometimes education and negotiation takes the front foot and at other times, prosecution comes to the fore. This is then later reflected in the number of prosecutions undertaken and who is prosecuted. In NSW for example, the *Occupational Health and Safety Act 1983*, was repealed with the enactment of the *Occupational Health and Safety Act 2000*. Annual Reports of the Industrial Relations Commission of NSW show that in 1999 there were 373 prosecutions brought, 188 in 2001, and 193 in 2006.¹⁰⁵ These figures wax and wane, but do not seem to reflect changes in the level of workplace accidents out of which they arise.
- 111 The more traditional divide between an investigating police force and an independent prosecutor – the model which operates in NSW with the DPP, and federally with the Commonwealth DPP, does not operate in the case of all regulators. A divorcing of the prosecutorial function

¹⁰⁵ NSW Industrial Relations Commission, *Annual Report* (2006); NSW Industrial Relations Commission, *Annual Report* (2003).

might see a different approach to prosecutions in particular areas and might make it easier for guidance to be given to as to who should be criminally prosecuted.

- 112 Whether or not such a division would result in a better balance in the prosecution of corporations and individuals involved in their offences could certainly not be guaranteed, but given the discretions which rest in a prosecutor, divorcing prosecutorial decisions from the bodies which have roles as advisers, educators and investigators, seems like it might help to achieve the right balance.

Conclusion

- 113 I think that we are unlikely to see any \$17 million speeding fines in the near future in Australia, but whether we have got that difficult balance right when prosecuting and sentencing corporate offenders and those involved in their offences, will remain a matter of ongoing controversy.
