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Entrepreneurial Crime: Impact, Detection and Regulation

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It has become quite clear that the major challenge facing our nation as the next century approaches is to ensure Australia's competitiveness in the world economy. To this end, gratuitous intervention in the affairs of business is to be avoided. At the same time, there must be some safeguards to ensure that the public interest is protected. Recent history is littered with examples of corporate failure, where great harm has been done to the economy as the result of unrestrained business activity which was not necessarily productive.

The entrepreneurial excesses of the 1980s cost Australia's commercial reputation dearly. Australian capital markets suffered accordingly. This Trends and Issues offers explanations for entrepreneurial crime and discusses current proposals for changes to the Corporations Law which are designed to prevent irresponsible conduct by directors without constraining the entrepreneurial spirit which is essential to Australia's economic viability.

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The issue of entrepreneurial crime is of current interest as the 'decade of reckoning' follows the excesses of the so-called 'decade of greed'.

Entrepreneurial crime as a concept refers to punishable acts which are committed by individuals in controlling positions within corporations, using the resources and power deriving from the corporate form as a vehicle to achieve ends which benefit the entrepreneur personally. Corporate crimes, in general, may be considered as punishable acts committed by directors or agents on behalf of the company, which benefit the company. Entrepreneurial crime and corporate crime are both forms of white-collar crime.

Obviously, some punishable acts which benefit a company also have benefits which accrue to individual protagonists, in the form of promotions, bonuses, and salary increases, which may well be anticipated by the protagonists. Some overlap between the two concepts exists, therefore. These acts should be distinguished from other punishable acts against the interests of the company which are committed for personal gain by agents or associates of a company not in controlling positions, such as embezzlement or misuse of company property.

Entrepreneurial crimes may victimise the corporation itself, for example, when the assets of a company are stripped off for

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private use. Alternatively, the corporation may be used as a powerhouse or fortress for the commission of crimes, such as insider trading, price rigging, or 'milking' public companies and channelling the money into linked private companies owned by one or two shareholders. These crimes may impact directly upon minority shareholders, creditors and even the company itself. Victims may, however, be unaware that crimes have been committed against them, if the market is 'bullish' and transgressions do not result in obvious losses.

The Impact of Entrepreneurial Crime

The precise cost of entrepreneurial crime over the last decade is incalculable. A number of major cases are currently before the courts or are the subject of royal commissions. Some remarks about white-collar crime in general may be made as a backdrop, however. The cost of white-collar crime to the Australian community is believed to be much greater than all other forms of crime combined. White-collar offenders are generally at less risk of apprehension or being convicted than other types of offenders, and on conviction they are likely to incur a lesser penalty. Mr Henry Bosch, speaking of corporate deviance in general, has observed that: ‘There might be 50 problem [public] companies among the 1300 or 1400 which are listed on stock exchanges' (Warneminde 1990, p. 45). The excesses of this minority have attracted considerable attention both at home and abroad.

In considering the impact of entrepreneurial crime on the Australian community, it should be remembered that though there has been an enormous increase in the rate of bankruptcy over the last five years, very few of these cases have been proven to be associated with criminal activity. Although the community may feel a desperate need for retribution in return for the losses corporate collapses inflict upon shareholders, investors, employees and creditors, non-criminal factors, such as bad luck, poor business sense or the recession are more likely to be central determinants.

The potential losses from such crimes are very large indeed. Comparison of Victorian police investigations in 1989 which involved alleged fraud totalling some $335m, most of which relates to a single case, against a total of only $2.8m for armed robbery, highlights the magnitude of potential gains, though it is widely believed that this still only reflects the tip of the iceberg.

Some cases which have come before the courts and not resulted in convictions have drawn attention to problems of proof under existing legislation, particularly with regard to insider trading charges. The impact of these and many other incidents upon the broader Australian community is summarised below:

- Losses to small shareholders have wrought great personal tragedy, particularly for older investors facing an impoverished retirement.
- Investment in the corporate sector represents a major part of the community's savings base. If these funds are not well managed, the potential for enhanced prosperity arising from these savings is diminished accordingly. Jobs are not created, confidence is eroded, taxation benefits are not returned to the community and so on.
- The confidence of investors in the Australian share market is undermined by perceptions of price rigging or insider trading, with the result that efforts to raise share capital by legitimate businesses are disadvantaged.
- The tarnished international reputation of Australian corporate performance makes efforts to raise money abroad by the private and the public sector more difficult and more expensive (Sykes 1990, p. 6).
- Increased borrower premiums on offshore loans impact upon Australia's $164 billion foreign debt.
- Legitimate businesses suffer as it is hard to compete honestly in a marketplace occupied by dishonest players. These businesses also endure increased regulation and scrutiny which consumers eventually pay for.
- Governments are brought into disrepute where they are seen to have had questionable associations with certain entrepreneurs.
- Where governments have underwritten failed financial institutions and taxpayer funds have been directed away from projects in the general interest, increases in charges or downgrading of services may be required to pay for large losses.
- Confidence in the so-called 'free enterprise system' is eroded with attendant effects on political stability.

Explanations for Entrepreneurial Crime

Factors contributing to the commission of entrepreneurial crime range from the psychological characteristics of individuals operating in a corporate culture which values risk-taking, to factors at the macro-economic level which may provide opportunities for such individuals.

Sutherland (1983, p. 240), in developing his theory of 'differential association' to account for white-collar crime, emphasised that attitudes to unethical and illegal behaviour are learned in the workplace. 'White-collar criminals as well as street criminals should be viewed as conformists rather than as deviants because they have taken over behaviour patterns that are dominant in their social worlds.' (Cressey 1986, p. 196). Such behaviour is sanitised with rationalisations about distaste for government interference in private enterprise, the 'unreasonable' demands of bureaucratic red tape, and so on.

Braithwaite (1989) highlights the role of a 'culture of compliance', in which illegal or unethical activities can become routine. The hiring and promotion policy of senior management may entrench these attitudes. Management, because of its isolation from significant interaction with others outside of the corporate community, can itself be vulnerable to 'ethical numbing' (Coleman 1990, p. 22). Moreover, wealth and corporate success are highly prized values in modern industrial societies. Conversely, failure and the fear of failure are negatively valued.

To play 'chicken' with the maze of sometimes contradictory taxation and company laws, and win, may be seen as a culturally legitimate challenge in itself in the corporate world. Finding such legal loopholes is certainly a highly paid art form. Sometimes schemes are deliberately designed which risk incurring minor penalties for technical breaches, or are so convoluted that regulators would be unlikely to take up pursuit. Henry Bosch (1990, p. 28) recounts the story of one 'very well known business executive who wished to carry out an intricate financial manoeuvre. When he was told by his legal advisers that it was illegal he replied, "Yes, but can you go to jail for it?"' The risk of incurring a financial penalty becomes merely a part of the calculation of overall risk. And risk-taking is part of being in business.

Braithwaite (1987, p. 2) cautions against accepting a concept of motivation for white-collar crime which only has currency within a capitalist economy, such as the pursuit of profit. White-collar crime has been documented in non-capitalist economies. He points to other equally strong motivations, even within capitalist economies, such as 'expansion by diverting profits to empirebuilding investment, [and] protection of the top management team from a hostile takeover', concluding that it is the overriding emphasis on goals per se that is critical. These goals need not necessarily be competitive or profit oriented.

Braithwaite (1987, p. 4) proposes a formulation of motivation to commit such crimes in which 'people in positions of responsibility are put under enormous performance pressures to achieve economic or cultural goals . . . in contexts where structural blockages to legitimate means of goal attainment occur'.

Economic and Related Factors

Deterioration in ethical standards of business conduct tends to be cyclical, corresponding with the boom peaks of economic cycles. Similarly, moves toward reform of regulatory practices tend to be strongest in times of 'bust', when recriminations for losses sustained are most strident. However, major changes to the economic landscape occurred during the 1980s, providing a range of quite new opportunities, significantly increasing the potential financial rewards from the commission of entrepreneurial crime.

Deregulation

In keeping with international trends, a policy of market deregulation was adopted to stimulate economic activity. This included the lifting of foreign exchange controls, freeing up foreign investment rules, floating of the exchange rate, acceptance of foreign banks, and deregulation of the futures industry. Together, these policy measures resulted in significant growth in the size and breadth of the financial services sector.

There is a view that deregulation compounded already existing weaknesses in corporate regulation. The inability to control the competitive frenzy in the financial services sector, which resulted from deregulation, highlighted these inadequacies. Certainly, the increasing complexity and uncertainty of the deregulated marketplace may blur the distinction between right and wrong even for the honest operator. For example, as Henry Bosch noted: '. . . When the corporate law was written before anyone had thought of interest rate swaps, debt defeasance or flip-flopping companies, it is not always clear how to apply the old rules to the new situations' (Bosch 1990, p. 35).

Growth in the financial services sector.

Some analysts have described the growth of the financial services sector in Australia and overseas as the development of a 'casino economy' (McManamy 1990; Calavita & Pontell 1990). 'Although billions of dollars are being churned about, no new jobs are being created (save their own), no new factories are being built, no additional goods and services are being provided' (McManamy 1990, p. 10). The 'deal' became more important than any tangible relationship to a product or to real value.

Explosion of credit availability

With expansion in the breadth of the financial services sector came increased aggressiveness in pursuit of borrowing customers. Bank executives were paid with large bonuses and commissions for loan deals, in the race for market share. Inevitably, especially in the context of a bullish market and high interest rates, unwise and hasty loans were made, and many companies were unable to service these debts after the market crashed. In the rash of bankruptcies of good and bad companies that followed, shareholders are anxious to determine the extent of malpractice that may have contributed to some bankruptcies. A major parliamentary inquiry into banking practices has just concluded.

Technological changes.

Electronic information and satellite technology have transformed the operation of the marketplace, creating computer-based product portfolios, screen trading and international linkages between markets. In the anonymity of electronic speculation, where the trading of paper back and forth reigns, responsibility to shareholders may decline. Mistakes and outright fraud are easy to bury in the roundabout of electronic transactions.

Perceived Decline of Business Ethics

The factors described above are perceived by some observers, notably Bosch, to have contributed to an environment in which the observance of traditional business ethics has been eroded. New attitudes developed—do not make things: make money. Forget the Depression mentality; debt is good. Don't spend decades developing your own businesses; take over someone else's in a few months. However, it is doubtful that appeals for revived standards of corporate ethics will produce marked changes of attitude, unless backed up with adequate measures for detection, investigation and prosecution.

In reviewing the perceptions of good corporate citizenship of a sample of directors of listed companies, Tomasic (1992) found that many regarded the concept as a marketing ploy or a public relations issue—as a means 'to avoid excessive scrutiny from legal rules and regulations'. On the one hand a reputation as a good corporate citizen can assist in capital raising; on the other, it should not interfere with profit maximisation.

Referring to the extent to which good corporate citizenship accords with assisting regulators in their task of cleaning up the corporate sector, Tomasic refers to a pervasive reluctance to break with a peer ethos against assisting 'corporate cops' in pursuit of business mates. 'It was seen to be better to exact discipline privately against those who had breached the understandings of the group or network, rather than seeking to involve the formal agencies of the law.' (Tomasic 1990, p. 378).

Detection

The initial detection of entrepreneurial crime is likely to be undertaken by company directors, accountants and auditors. However, these agents are not consistently vigilant, and at worst may be highly paid handmaidens, if not protagonists in the commission of entrepreneurial crimes.

Attention is now focussed on the adequacy of auditing and disclosure standards. The McCusker investigation into Rothwells Ltd (McCusker 1990) demonstrated the costs to ordinary taxpayers of the failure of auditors to report on irregularities in company affairs. The duties of auditors in detecting and reporting breaches of the *Corporations Act 1989* (Cwlth) to the Australian Securities Commission (ASC) have subsequently come under close scrutiny. In this debate auditors have defended their claims of limited responsibility, arguing that they are not lawyers, and that directors are responsible for their own commercial judgments and the correctness of their accounts. Confusion regarding the precise meaning of auditors' statements that accounts are 'true and fair' is of concern, as is the need for more comprehensive and intelligible accounting standards.

Marketplace pressures to provide auditing services at cut price rates tend to erode the quality of those services. Following through with the reporting of irregularities is in itself time consuming and expensive, impacting on market competitiveness. There is also an intrinsic conflict of interest between the paying expectations of auditor's clients, and the auditor's responsibilities to regulatory agencies, particularly when clients are overbearing. Audit committees have been proposed as a possible solution to some of these problems (*see* section on Legislative Changes).

The implication of audit failure as a major factor in the collapse of Rothwells, Tricontinental and the National Safety Council and other instances as far back as the Nugan Hand Royal Commission point to the need for an urgent tightening and clarification of the responsibilities of auditors in protecting the interests of shareholders and management.

Calls have been made for more effective regulation of the flow of information to the share market to ensure prompt disclosure of more reliable information, particularly regarding the activities of unlisted subsidiaries of listed companies. Effective information flow is certainly critical to effective detection.

The task of detecting illegal activity may often be obstructed by the complexity of corporate structures. There may be hundreds of companies within a given group. The controllers may operate the structure as a single company. However, the resulting labyrinth provides a fortress against outsiders, in itself deterring investigation, obscuring money flows, and dissipating responsibility and accountability. Any legal challenge would be costly and time consuming. Increasing the cost of setting up limited liability companies would make it more difficult and expensive to set up such structures.

Legislative Changes

The general thrust of both legislative and self-regulatory initiatives has been to improve the quality of corporate governance. Efforts have been made to improve the content and flow of information to shareholders, to provide checks and balances in corporate decision making, and to make those responsible for making decisions more accountable.

The Corporations Law became operational on 1 January 1991. This legislation underpins the new national scheme of corporate regulation, including provision for the establishment of the Australian Securities Commission to administer the new law. Breaches of the legislation will attract criminal prosecutions and civil actions. The Government is undertaking a review of penalties under the Corporations Law, as part of the process of legislative review in the corporate arena. Under consideration is the appropriate form penalties should take, as well as the magnitude of penalties. Some penalties have increased substantially already. For example, breaches of the insider trading provisions have been increased tenfold, up to $200,000 for individuals and $1m for companies.

The new law includes provisions previously in the state and federal companies codes. Although it provides a more coherent configuration of legislation, most of the provisions remain unchanged. However, a number of recent reports, including the report of the Senate Standing Committee on Legal and Constitutional Affairs (Australia 1989)—also known as the *Cooney Report*¾ have addressed the need for legislative reform in the area of director's duties. Significant changes were also proposed by the Companies and Securities Advisory Committee in its report on corporate financial transactions, which included a draft Bill for consideration. The Government subsequently incorporated many of the recommendations from this report in its own exposure draft Bill, released in 1992. Provisions relate to:

- **Loans to directors and related companies**; the class of regulated transactions has been broadened to cover all types of financial assistance; a company will be prohibited from entering into loans with its directors, subject to certain exemptions; a company will be prohibited from entering into loans to related bodies corporate, or bodies corporate to which it is 'linked' unless a strict members' approval procedure is followed and approval obtained; a strict members' approval procedure must be followed before a company may obtain approval to enter into any asset transfer transactions with associates of the company.
- **Disclosure of conflicts of interest by directors**; any transaction or arrangement in which a director has an interest must be disclosed; fuller information must be disclosed to the Board regarding the director's interest; directors are restricted from voting on transactions in which they have an interest; companies are required to keep a register of director's interests.
- **Disclosure of benefits given to directors**; all payments over $50,000 which directly or ultimately benefit a director, including payments to relatives or spouses and any artificial devices for the receipt of benefits such as consultancies and 'management companies', require disclosure to the ASC, and in the company's annual accounts and directors' report.

These specific changes in regulatory requirements have been accompanied by significant common law developments relating to director's liability:

- **Clarification of the concept of dishonesty** in the exercise of a power or the discharge of a duty, as it applies to corporate officers. Some confusion has arisen in the interpretation of the concept of 'dishonesty' between the normal criminal law concept, which involves the existence of a 'guilty mind', and the fiduciary concept of dishonesty which requires that a fiduciary has acted to further their own personal interests, in contrast to the interests of the beneficiaries. 'The general object of fiduciary law . . . is to ensure that the power or capacity that that person [the fiduciary] possesses is not used to further any interest other than the beneficiary's interests—the company's interest.' (Finn, cited in Australia 1989, p. 37). Fiduciary honesty turns upon the upholding of this trust regardless of individual intent.

Some commentators suggest that a clearer definition of the concept of 'dishonesty', is needed arguing that a concept 'which does not involve moral turpitude' or a guilty mind (*Australian Growth Resources Pty Ltd v. Van Reesma* (1988) 13 ACLR 261) is at odds with ordinary usage of the term (Fisse 1991, p. 3). The judicial interpretation of this requirement in the above case implies that criminal liability may be incurred although a director has, 'according to his own lights', acted honestly, for a purpose which is improper under the law relating to the fiduciary duties of directors.

The proposed amendments in the Bill which apply civil penalties to sections 232 (2), (4), (5), and (6) will confine criminal liability to acts involving dishonest intent as conventionally understood. Breaches falling short of dishonest intent will attract civil penalties, thus clarifying the confusion between the two concepts of dishonesty.

- **The extension of liability to cover passive neglect by corporate officers**, thereby raising the level of diligence required in the performance of director's duties. Directors are obliged under s. 232(4) of the Corporations Act 'to exercise a reasonable degree of care and diligence in the prevention of the commission of fraud by or against the company' (Fisse 1991, p. 6). Accordingly, directors may be personally liable for the payment of debts incurred by a company at a time when there were reasonable grounds to suspect that the company would be unable to repay all its debts as and when they fell due. Recent cases have demonstrated that it is not enough for the director to delegate these responsibilities to co-directors and claim immunity through ignorance generated by neglect. (*Metal Manufacturers Ltd v. Lewis* (1988) 13 NSWLR 315, and *State wide Tobacco Services Ltd v. Morley* (1990) 8 ACLC 827) (Fisse 1991, p. 7).

Currently, the standard of the duty of care owed by directors is determined by a particular director's knowledge and experience, thus making the standard subjective. This standard has been criticised as inadequate and unclear. Accordingly, amendments in the Bill provide criteria upon which an objective standard for fulfilment of a duty of care can be assessed. These and other provisions relating to the personal liability of company directors may be expected to have a direct bearing on the number of boards upon which directors may sit and still remain adequately informed and free of conflicts of interest.

The ability of directors to comply with increased personal liability is complicated by the realities of decision-making within the modern corporation. Tomasic (1992) has investigated the relationship between corporate executives and company boards of directors. He found that in many cases, de facto control, policy directions and initiatives were in the hands of executives, effectively relegating the role of the board to that of a rubber stamp. The extent to which this is the case will depend upon how well-informed board members are, strength of personalities, and the level of executive representation on the board. In some cases, the chair of the board is also the chief executive officer, an arrangement that reduces the checks and balances on both positions. While such a situation may be adequate for a small corporation, it is considered unacceptable practice for large corporations.

One suggested means of neutralising the potential for executive officers to dominate the boards of publicly listed companies has been the introduction of audit committees, comprised of a majority of non-executive directors, to review financial information and to monitor the 'effectiveness of management information and other systems of internal control' (Bosch 1991, p. 5). These committees could 'blow the whistle' on management inadequacies, or act as go-betweens for the board and management. However, such committees will only be as good as the competence of the directors sitting on them.

Another recommendation has been that boards of publicly listed companies should include 'a majority of non-executive directors with an appropriate mix of skills and experience' (Bosch 1991, p. 4). Both recommendations are set out in a paper produced by a task force including representatives from the Australian Stock Exchange, the Business Council of Australia, the Australian Institute of Company Directors and the Institute of Chartered Accountants in Australia. The paper emphasises the need for more effective self-regulation, through recognition of principles for the development of codes of corporate practices and conduct. The government stated in its response to the *Cooney Report* that it will monitor the impact of these and other self-regulatory proposals before considering a legislative response.

Under the proposed amendments to the Corporations Law, shareholder discretion is broadened through the requirements for shareholder approval of prescribed transactions in the form of loans and other transactions. In addition, there are requirements for detailed disclosure of information to shareholders prior to voting upon resolutions. If these provisions prove to be workable, they will go some way to providing a more preventive approach, focusing on the quality of decision-making within corporations. This is a more practical strategy than reliance solely on detection and prosecution, both of which are much more expensive.

Shareholders are currently inhibited from seeking redress from miscreant directors through the courts due to the enormous costs of litigation, particularly when company directors can call upon company funds to cover their legal expenses. The high cost of litigation effectively protects directors against actions of this type. Additionally, the benefits from any successful action against directors by a company would be shared amongst all shareholders, not just the individual shareholder commencing legal action (Ramsay 1990, p. 37).

There has been vigorous opposition to the new legislative changes. The Business Council of Australia and others, see too great an emphasis on 'black letter law' which they believe could over-regulate business to the detriment of honest entrepreneurs. It is also argued that this will increase the opportunity for exploitation of technical loopholes in legislation. Self-regulation is seen by the commercial sector as a more appropriate solution to the problems of corporate regulation. The targets of self-regulatory vigour include individual company director's ethics, the development of structural checks and balances such as audit committees, and more general corporate community discipline through reprimands from professional bodies such as the Institute of Chartered Accountants. Others see the notion of self-regulation more cynically, as 'a sort of magical incantation used to ward off nosy government regulators' (*Australian Financial Review*, 19 July 1991, p. 14). How the self-regulatory approach will impact upon those entrepreneurs who take no account of ethical values is not clear.

As regulations tighten the personal liability of directors in Australia, it will be interesting to note whether there will be an increase in squeamishness in taking up such responsibilities.

It should be noted, however, that the definition of a 'director' in s. 60 of the Corporations Law includes a reference to 'a person in accordance with whose directions or instructions the directors of the body are accustomed to act', excluding persons whose advice is sought in a professional capacity or as part of a business relationship with the directors or the members of the board. The clarity of this distinction will be tested as the full weight of director's liability is felt in the corporate sector.

Regulation

In their analysis of the behaviour of Australian regulatory agencies Grabosky and Braithwaite (1986, p. 2), conclude that there is no shortage of powers to enforce regulations. 'Indeed the majority of agencies we studies are vested with statutory powers of entry, search, seizure and investigation which would make them the envy of most Australian police forces.' However, the agencies have previously most often chosen a non-adversarial approach to regulation, particularly when large organisations are involved.

Under-funding of regulatory agencies has been a key factor in their choice of modus operandi. It has been reported that only $150,000 of the NCSC annual budget of $7m was available for prosecutions and investigations. By comparison, the replacement Australian Securities Commission is reported to have allocated $50m for legal work and investigations (*The Age*, 10 October 1991).

Individuals with the highly developed legal and commercial skills necessary to master the complexity of the corporate environment are in short supply and can command high prices for their expertise. More often than not they have been working for the entrepreneurs and not the regulators up until now.

The ASC has responsibility for the administration of the Corporations Law. The amalgamation of state and federal responsibilities came after a decade of at times bitter opposition to the idea of a powerful, centralised national regulator from the states' corporate affairs bodies, particularly South Australia and Western Australia. The amalgamation was supported, however by the Australian Stock Exchange and the Business Council of Australia.

The ASC has improved investigative powers, stronger prosecuting powers and vastly increased financial resources, initially of $111m, with forward estimates of $118m and $137m for the succeeding two years (compared with an estimated $70m spent by the state corporate affairs commissions and the NCSC combined). The current level of funding of the ASC is surpassed internationally only by the funding of its American counterpart, the US Securities and Exchange Commission.

The ASC initially identified 16 companies on which it will initially focus investigations. These include Bond Corporation, Quintex, Rothwells, Estate Mortgage Trusts, Independent Resources, Speedily, and Hooker Corporation, each of which will be pursued by its own ASC task force. While some of these investigations have been concluded, others may take some years to complete.

Sanctions

Determining an effective sanction for entrepreneurial crime presents special dilemmas for courts. Many offences are addressed through civil proceedings, because there are fewer delays and, in general, the monetary amounts of damages awarded are greater than those fines which would be imposed following conviction in a criminal court. In a civil court, damages claims are determined by current market values whereas in a criminal court legislative ceilings on monetary penalties apply, which may never have reflected the potential damage which could be inflicted, and/or the prescribed penalty may be years out of date. Moreover, the burden of proof 'beyond reasonable doubt' in criminal proceedings means that many cases are never taken to court at all, particularly insider trading cases. In a civil action the plaintiff's less onerous requirement of proof on 'the balance of probabilities' applies. Some analysts have suggested that Australia should consider the American option in civil cases in which double or triple damages can be awarded to litigants, to make damages more punitive (Professor R. Tomasic 1991, pers. comm.).

The central issue from the shareholders' point of view, is the recovery of lost funds. While increased criminal penalties may serve as a deterrent, and satisfy the need for vengeance, they do not replace the lost savings of these people. The cost of litigation also obstructs the satisfaction of their claims. Professor Walker of the Australian Shareholders' Association believes that some form of tribunal system similar to the Consumer Claims Tribunal may provide an effective alternative to the existing high cost legal mechanisms (Professor R.G. Walker 1990, pers. comm.).

Some analysts in submissions to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into company director's duties, have argued for the 'decriminalisation of company law' in favour of civil remedies. Professor Baxt, the former Chairman of the Trade Practices Commission, maintains that criminal penalties are inappropriate for minor administrative offences, for example, failure to file accounts (Australia 1989, p. 189). The less stringent standard of proof required in civil proceedings would make legal action more feasible. In his submission, Professor Fisse sought to highlight the distinction between negligence and blameworthiness to clarify the role of criminal sanctions (Australia 1989, p. 190).

Many commentators see a stronger deterrent effect in criminal sanctions, especially imprisonment, particularly due to its potential to inflict public shame and humiliation upon offenders.

There is an ever louder clamour for fines to be increased to give greater sting to sanctions and for penalties to reflect more accurately the damage inflicted by offences. Professor Baxt argued for increases in maximum trade practices penalties from $250,000 to $5m. By way of comparison, the United States Sentencing Commission has recommended a maximum fine of approximately $A383m for corporate crimes.

Community service orders are an alternative criminal sanction which must be personally discharged. This sanction is seen as less severe than a gaol sentence, though often having greater personal impact than fines.

Publicity of illegal activities can itself serve as a sanction. To harness this deterrent potential, Fisse and Braithwaite (1983, p. 313) have called for 'emphatic stigmatising' for particularly egregious offences. Henry Bosch was criticised for his active employment of this sanction through the media to achieve ends which were perceived to be inaccessible through the courts. However, as Tomasic (1990, p. 371) and others have remarked, any discussion of penalties is 'quite academic in nature in view of the dearth of prosecutions under Australian companies and securities laws'.

Conclusion

It is to be hoped that as Australia moves into the next century, the ritual cycle of corporate greed followed by government inquiry will generate more than highly paid hand-wringing. The proposed legislative changes appear to offer hope that future corporate governance in listed companies will be based upon principles which clearly spell out the fiduciary responsibilities of directors. The quality of information to share-holders and directors should improve, thus enhancing decision making at both levels. The effectiveness of the proposed changes will need to be monitored and assessed, to determine how preventive their impact will be in the boardroom. Further initiatives are needed to provide opportunities for redress against miscreant entrepreneurs, which are not prohibitively expensive.

Government will always feel threatened by possible loss of political support if they are seen to be reining in the corporate sector. Ideally, changes would impose minimal inconvenience upon legitimate law abiding entrepreneurs on whom the future stability of the Australian economy depends.

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