[14]

Cartel Offences and Non-Monetary Punishment: The Punitive Injunction as a Sanction against Corporations

BRENT FISSE*

INTRODUCTION: RESPONDING TO THE LIMITATIONS OF MONETARY SANCTIONS AGAINST CORPORATIONS

Cartel regulation around the world relies heavily on corporate liability and the deterrent punishment of corporations.[1] Yet the main form of punishment used against corporations — a fine or civil monetary penalty — has many limitations. The first and foremost is lack of assurance that the impact of monetary punishment against a corporation will be experienced by the individuals involved in the offending conduct or will catalyse effective action against repetition. Secondly, there is the risk of spillover effects on consumers and other innocent bystanders.[2] Thirdly, the money exacted typically is channelled into state coffers without attending to the compensation of victims.[3]

Fines and civil monetary penalties imposed on corporations for cartel conduct have increased markedly in amount over the past decade.[4] That increase has led some to question whether monetary sanctions against corporate cartelists have reached or exceeded their useful

* Adjunct Professor, University of Sydney; Principal, Brent Fisse Lawyers, Sydney. Thanks are due to the Editors for their comments.

1 See C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Melbourne, Cambridge University Press, 2011) (forthcoming) ch 7.

2 See Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974* (Report No 68, 1994) [10.3]; New South Wales Law Reform Commission, *Sentencing Corporate Offenders* (Report 102, 2003) [6.1]–[6.20].

3 See, eg Canada Law Reform Commission, *Criminal Responsibility for Group Action* (Working Paper 16, 1976) 47 (fines should be used to satisfy civil judgments or otherwise to fund victim compensation); JC Coffee, Jr, 'No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 *Michigan Law Review* 387, 413–24 (proposal for equity fine as a sanction against corporate offenders, with equity to vest in victim compensation fund); American Bar Association, Section of Antitrust Law, 'The State of Federal Antitrust Enforcement — 2001', Report of the Task Force on the Federal Antitrust Agencies (2001) 4–5; —— 'Cartel Fines Could Be Better Used' 2007 8(3) *ReguLetter* 1.

4 SD Hammond, Deputy Assistant Attorney General for Criminal Enforcement, US DOJ, Antitrust Division, 'The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades', Speech at the 24th Annual National Institute on White Collar Crime (25 February 2010); EC, 'Cartel Statistics' (19 May 2010); Beaton-Wells and Fisse, above n 1, ch 11, section 11.3.1.

limits.[5] Thus, in the context of the regime of corporate penalties under EU competition law,[6] Faull and Nikpay have highlighted the following dilemma now faced by the EC:[7]

> On the one hand, it may be reluctant to increase fines to a level that would entail companies being wiped off the market, with the negative consequences this would have on the competitive process, and without necessarily guaranteeing deterrence. On the other hand, it cannot accept that the level of financial penalties be capped at an under-deterrent level, nor undertake to significantly reduce the fines imposed on companies facing financial difficulties, since this would confer on them an unfair advantage over their healthier competitors. In this context, one may wonder whether the Community system of sanctions, based exclusively on financial penalties on companies, is not reaching its limits.

In other jurisdictions, including the US, the UK, Australia, Canada and New Zealand, the need for high monetary sanctions against corporations is reduced to some extent by the availability of individual criminal liability and/or individual civil liability. Moreover, the limitations of fines against corporations have been relied on by some commentators to support the introduction of individual criminal liability for cartel conduct under European competition law.[8] However, given the limited extent to which individual liability can be imposed in public or private enforcement actions, corporate liability is an important complementary platform for anti-cartel enforcement.[9]

This chapter gives an overview of what might be done to avoid or at least mitigate the limitations of monetary sanctions against corporations by developing a particular kind of non-

---

[5] This is not the only or most fundamental issue associated with the use of monetary sanctions as the sole or primary mechanism for deterrence. For more wide-ranging critiques of the theory of optimal economic deterrence see Beaton-Wells and Fisse, above n 1, ch 11, section 11.3.1; B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (Melbourne, Cambridge University Press, 1994) ch 3; J Byrne and SM Hoffman, 'Efficient Corporate Harm: A Chicago Metaphysic' in B Fisse and PA French (eds), *Corrigible Corporations and Unruly Law* (San Antonio, Trinity University Press, 1985) 101; New South Wales Law Reform Commission, above n 2, [6.31]–[6.39].

[6] See EC, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C210/2.

[7] J Faull and A Nikpay, *The EC Law of Competition*, 2nd edn (Oxford, Oxford University Press, 2007) [8.589]. See also K Hofstetter, 'EU Cartel Fining Laws and Policies in Urgent Need of Reform: A Rebuttal to Philip Lowe's Article, Cartels, Fines and Due Process' (2009) *Global Competition Policy: The Antitrust Chronicle*; International Chamber of Commerce, 'The Fining Policy of the European Commission in Competition Cases', Discussion paper, Document No 225/659 (2 July 2009).

[8] See WPJ Wils, *The Optimal Enforcement of EC Antitrust Law: Essays in Law and Economics* (The Hague, Kluwer Law International, 2002) ch 8.

monetary sanction, namely the punitive injunction.[10] The punitive injunction is a variant of the civil injunction, the most essential difference being its design as an explicitly punitive sanction.

Discussion proceeds under the following headings:

- the limitations of monetary sanctions against corporations for cartel conduct (Part I);
- the punitive injunction as a corporate sanction against cartel conduct (Part II); and
- the potential advantages and disadvantages of the punitive injunction as a corporate sanction against cartel conduct (Part III).

This chapter draws to a large extent on the experience in the US and Australia but the discussion of the punitive injunction is seen as being relevant to the design of sanctions against cartel conduct in any jurisdiction. The implications for cartel regulation are drawn in the Conclusion.

I. LIMITATIONS OF MONETARY SANCTIONS AGAINST CORPORATIONS FOR CARTEL CONDUCT

A. Main Limitations of Monetary Sanctions against Corporations

The main limitations of monetary sanctions against corporations are well-known. They may be summarised as follows:

(1) Monetary sanctions convey the impression that the conduct prohibited is a purchasable commodity whereas the conventional understanding of serious

---

[9] See Fisse and Braithwaite, *Corporations, Crime and Accountability*, above n 5, ch 2; Beaton-Wells and Fisse, above n 1, ch 7, section 7.2.

[10] As originally proposed in B Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions' (1983) 56 *Southern California Law Review* 1141, 1164–5, in the context generally of corporate crime and sanctions against corporations.

contraventions is that they are unwanted even if a given offender is prepared to pay money for them.[11] As Coffee has observed of criminal prohibitions:[12]

> A world of difference does and should exist between taxing a disfavored behaviour and criminalizing it. We tax cigarettes, but outlaw drugs. Both are disincentives, but the criminal sanction carries a unique moral stigma. That stigma should not be overused, but, when properly used, it is society's most powerful force for influencing behavior and defining its operative moral code. … The message needs to be clearly communicated that there is no price that, when paid, entitles you to engage in the prohibited behaviour.

Civil penalty prohibitions of the kind prescribed by EU competition law[13] are not backed by the stigma of criminal conviction, but nonetheless are prohibitions; they are not merely pricing mechanisms.[14]

(2) Monetary sanctions are limited to money as a medium of social exchange. However, managers are also motivated by non-monetary values. The more important, as identified by Gordon, are: the urge for power, the desire for prestige, the creative urge, the need to identify with a group, the desire for security, the urge for adventure, and the desire to serve others.[15] This is not to

---

[11] HLA Hart, *Punishment and Responsibility — Essays in the Philosophy of Law* (Oxford, Oxford University Press, 1968) 6–7. See further P O'Malley, *The Currency of Justice: Fines and Damages in Consumer Society* (Oxford, Routledge-Cavendish, 2009); CA Williams, 'Corporate Compliance with the Law in the Era of Efficiency' (1998) 76 *North Carolina Law Review* 1266. As O'Malley notes, a fine is a licence paid in arrears: at 22. See further J Bowring (ed), *The Works of Jeremy Bentham*, Vol 1 (New York: Russell and Russell, 1962) 394.

[12] JC Coffee, Jr, 'Statement to US Sentencing Commission', Hearing, New York (11 October 1988). See further JC Coffee, JR, 'Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions' (1980) 17 *American Criminal Law Review* 419.

[13] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, art 23(2). See generally, J Faull and A Nikpay, *The EC Law of Competition*, 2nd edn, (Oxford, Oxford University Press, 2007) 1008–1121. See P Whelan, 'Criminal Cartel Enforcement in the European Union: Avoiding a Human Rights Trade-Off', chapter 10 in this volume, in particular, Part I.

[14] See, eg C-41/69 *Chemiefarma* [1970] ECR 661, [173]–[174] (object of fines imposed by EC is to suppress illegal activities and to prevent any recurrence); Commissioner N Kroes, 'Competition: Commission revises Guidelines for setting fines in antitrust cases' IP/06/857 (28 June 2006) ('Don't break the antitrust rules; if you do, stop it as quickly as possible, and once you've stopped, don't do it again').

[15] See, eg RA Gordon, *Business Leadership in the Large Corporation* (Berkeley, University of California Press, 1945) 305–6. See the discussion of individual characteristics and dispositional traits of cartel offenders

deny that survival in the corporate sector ultimately depends on profitability. Non-financial values are nonetheless sufficiently important to warrant the use of sanctions that impinge upon them. As Galbraith observed, '[i]n the American business code nothing is so iniquitous as government interference in the *internal* affairs of the corporation.'[16] It may also be argued that, even if profit were the sole preoccupation of corporate decision-making, the law should change the playing field. Sanctions that have non-financial impacts are distinct from matters of financial routine and serve as another means of commanding attention.

(3) Monetary sanctions are an indirect method of achieving sanctioning impacts on managers and other personnel in a position to control corporate behaviour. However, they may have little impact on those in a position of control.[17] Instead, they may inflict substantial loss on shareholders.[18] Alternatively or additionally, they may have adverse spillover effects on employees, consumers, and other innocent bystanders.[19] The worst case scenario for spillover effects on consumers is where all members of an oligopoly are fined for their participation in a cartel, have sufficient market power to be able to pass the fines on to their customers and are able to rely on some form of tacit collusion to coordinate future prices.[20] In theory, a fine is a sunk cost and will not be

---

in ME Stucke, 'Am I a Price Fixer? A Behavioural Economics Analysis of Cartels', chapter 12 in this volume, especially Part II; C Parker, 'Criminal Cartel Sanctions and Compliance: The Gap between Rhetoric and Reality', chapter 11 in this volume, especially Part II; C Harding, 'The Anti-Cartel Enforcement Industry: Criminological Perspectives on Cartel Criminalisation', chapter 16 in this volume, especially Part II.

16 JK Galbraith, *The New Industrial State* (London, Hamish Hamilton, 1967) 77.

17 See B Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions' (1983) 56 *Southern California Law Review* 1141, 1216–7.

18 See JW Adams, 'Trustbusting and the "Innocent" Shareholder: "Compensation" If Stock Prices Fall?' (1978) *Antitrust Law & Economics Review* 51. But see Fisse and Braithwaite, *Corporations, Crime and Accountability*, above n 5, 49–50. Other losses besides that from the fine often will ensue from exposure to enforcement action; see G Langusy, M Motta, and L Aguzzoni, 'The Effect of EU Antitrust Investigations and Fines on a Firm's Valuation' (8 July 2009).

19 See Fisse, 'Reconstructing Corporate Criminal Law', above n 17, 1219–20. Whether or not such spillover effects will occur in any given case is an empirical question. For the view that fines are unlikely to be passed on to consumers as higher prices see M Motta, 'On Cartel Deterrence and Fines in the European Union' (2008) 29 *European Competition Law Review* 209, 217–9. The passing on of a fine is a factor to be considered in sentencing under US federal criminal law: 18 USC §3572(a)(7).

20 However, there are many reasons why corporations may not pass on fines, including not only the risk of losing market share but also the 'stickiness' of prices; see generally AS Blinder, ERD Canetti, DE Lebow and

passed on to consumers: rational economic actors look to what they should do in future and do not try to recover sunk costs. However, whether or not corporations treat fines as sunk costs is an empirical question.[21] Moreover, if fines are treated as sunk costs, they emerge as a relatively weak form of deterrent punishment. Stronger forms of deterrent punishment (eg, jail; community service) impose a very different type of deprivation. The deprivation imposed by those stronger forms of punishment is calculated to make a striking impression that is ongoing and a pressing reminder of the consequences of committing an offence.

(4) Monetary sanctions, no matter how large, do not ensure that corporate offenders will respond by taking internal disciplinary action against those implicated in the offending conduct.[22] The cheapest and least embarrassing response may be simply to write a cheque in payment of the fine and continue with business as usual. Corporations have incentives not to undertake extensive disciplinary action. In particular, a disciplinary program may be disruptive, embarrassing for those exercising managerial control, encouraging for whistle-blowers, or hazardous in civil litigation against the company or its officers.

(5) Monetary sanctions, no matter how large, do not ensure that corporate offenders will respond by revising their internal operating procedures in such a way as adequately to guard against re-offending.[23] The response may be to treat the offence as an isolated incident and simply to write a cheque in payment of the fine, hoping or expecting that the incident will not be repeated.

JB Rudd, *Asking about Prices: A New Approach to Understanding Price Stickiness* (New York, Russell Sage Foundation, 1998).

[21] How sunk costs are treated in the real world as distinct from neoclassical economic theory is one of many items on the agenda of behavioural economics; see, eg C Jolls, CR Sunstein and R Thaler, 'A Behavioral Approach to Law and Economics' (1998) 50 *Stanford Law Review* 1471, 1482–3.

[22] Fisse and Braithwaite, above n 5, *Corporations, Crime and Accountability*, 8–12; Coffee, 'Corporate Crime and Punishment', above n 12, 458–9.

[23] See CD Stone, *Where the Law Ends* (New York, Harper & Row, 1975) ch 6.

(6) Monetary sanctions, as customarily used, are paid to the state without allocating them wholly or in part to the compensation of victims.[24] This approach reflects an unduly narrow conception of the aims of cartel regulation. Those aims are not limited to deterrence and retribution but also include victim compensation.[25]

(7) The level of a monetary sanction required for optimal deterrence may exceed the capacity of a corporation to pay.[26] If the only form of sanction that can be imposed on a corporate offender is monetary, the options are unsatisfactory:

(a) a low fine or a time payment plan may be imposed but this approach will depreciate the gravity of the offence or contravention; or

(b) a commensurate and immediately payable fine may be imposed but this approach may send the corporate offender into liquidation or result in cut-backs in employment and reduction in output.[27]

(8) Where monetary sanctions are imposed on government instrumentalities, the main effect may be for the loss to be funded by an arm of government and ultimately by taxpayers.[28]

The limitations of monetary sanctions summarised above should not be overstated. First, financial profit and loss is an essential means of propulsion in commerce, and monetary

---

[24] See the Introduction to this chapter.

[25] Fines might possibly be seen as a form of cy-près remedy the benefit of which is nationalised by the state.

[26] The 'deterrence trap': JC Coffee, 'No Soul to Damn', above n 3, 389–93.

[27] Some take the hard line view that companies in such a position are inefficient and should go out of business; see, eg *Australian Competition and Consumer Commission v Leahy Petroleum [No. 2]* (2005) 215 ALR 281, 284 [9]; M Motta, 'On Cartel Deterrence and Fines in the European Union' (2008) 29 *European Competition Law Review* 209, 217. Inability to pay is a factor taken into account under the EC Fining Guidelines in 'exceptional circumstances': EC, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C 210/02, cl 35. Inability to pay was taken into account in reducing the fines imposed on several undertakings in the recent EC civil penalty proceedings against steel producers (IP/10/863) and bathroom equipment manufacturers (IP/10/790). See further A Stephan, 'The Bankruptcy Wildcard in Cartel Cases' (2006) *Journal of Business Law* 511.

[28] *Cain v Doyle* (1946) 72 CLR 409, 418 (Latham CJ). See further B Fisse, 'Controlling Governmental Crime: Issues of Individual and Collective Liability' in P Grabosky (ed), *Government Illegality: Proceedings 1–2 October 1986* (Canberra, Australian Institute of Criminology, 1987) 121.

sanctions are geared directly to that engine. Accordingly, monetary sanctions have a significant role to play as one weapon against cartel conduct. Secondly, the conviction which accompanies the imposition of a fine may itself have a deterrent impact. Unlike the monetary impact of a fine, the stigma of a conviction is imprinted on the offender and is not fungible.[29]

B. Responses to the Limitations of Monetary Sanctions against Corporations

One response to the limitations of monetary sanctions against corporations is to provide for the use of non-monetary sanctions including the punitive injunction (see Part II). Before discussing that approach the deck should be cleared of three other possible responses that have been suggested:

(1) the limitations of monetary sanctions against corporations should be disregarded (see Part IB(i));

(2) the limitations can and should be mitigated (see Part IB(ii)); and

(3) the limitations can and should be side-stepped by relying on individual criminal and/or civil liability (see Part IB(iii)).

As discussed below, these responses are inadequate.

i. Response (1) — Disregard the Limitations of Monetary Sanctions against Corporations

One response to the limitations of monetary sanctions against corporations has been to disregard, or largely disregard, them.

Consider the report on Building Blocks for Effective Anti-Cartel by the ICN Cartels Working Group.[30] This report discusses the use of fines as a sanction against corporate cartel offenders in various jurisdictions but does not address the limitations of fines except to

[29] See further B Fisse and J Braithwaite, *The Impact of Publicity on Corporate Offenders* (Albany, NY, State University of New York Press, 1983), ch 21; SW Buell, 'The Blaming Function of Entity Criminal Liability' (2006) 81 *Indiana Law Journal* 473.

comment on the extent to which adjustments are to be made where a corporation is unable to pay a fine.[31] No mention is made of other significant problems, particularly the limited or non-existent effect that fines may have on management. The same neglect is apparent in the later Report of the ICN Cartels Working Group on setting fines for cartels.[32]

Consider also the view expressed by Posner that that the issue of ability to pay rarely arises in the context of antitrust.[33] However, given the maximum fines that can be imposed today, the high fines often imposed in the US and the EU, and the ongoing impact of the global financial crisis, that suggestion seems untenable.[34]

ii. Response (2) — Mitigate the Limitations of Monetary Sanctions against Corporations

A second response to the limitations of monetary sanctions against corporations has been to recognise those limitations and to advocate that steps be taken to mitigate them.

The problem of corporate inability to pay can be relieved by allowing time to pay (for example, under an instalment plan) or avoided by reducing the fine to a low level. However, as indicated in Part IA(7), these forms of mitigation are less than satisfactory. Allowing time to pay dilutes the deterrent effect to some extent and may not resolve the problem posed by corporate offenders that are on the brink of insolvency or in administration. Reducing fines to a payable level compromises general deterrence.

---

30 ICN, Cartels Working Group, *Defining Hard Core Cartel Conduct: Effective Institutions, Effective Penalties*, Report to the 4th ICN Annual Conference, Bonn (June 2005).

31 ICN, above n 30, 63–4.

32 ICN, Cartels Working Group, *Setting of Fines for Cartels in ICN Jurisdictions*, Report to the 7th ICN Annual Conference Kyoto (April 2008).

33 RA Posner, *Antitrust Law*, 2nd edn (Chicago, University of Chicago Press, 2001) 271.

34 See Wils, above n 8, 203–5. As noted earlier, inability to pay was taken into account in reducing the fines imposed on several undertakings in the recent EC civil penalty proceedings against steel producers (IP/10/863) and bathroom equipment manufacturers (IP/10/790). But see G Spagnolo, 'Criminalization of Cartels and Their Internal Organization' in KJ Czeres, MP Schinkel and FOW Vogelaar (eds), *Criminalization of Competition Law Enforcement* (Cheltenham, Edward Elgar, 2006) 136–8.

It has been suggested that the problem of fines being passed on to consumers could be controlled by means of a prohibition against such passing-on.[35] However, attempting to prevent corporations from passing on fines would be difficult given the ease with which other grounds could be found to explain and justify increases in price.

Other major limitations of fines are difficult or impossible to mitigate much less to overcome. The fine quintessentially imposes a monetary price to be paid for breaching the law and the payment of that price by a corporation does not necessarily lead to individual accountability within the organisation or revision of its internal controls. No amount of tinkering is capable of changing a monetary sanction into a sanction that reflects the prohibitory nature of a prohibition or which requires responsive action within a corporation.

It might be replied that deferred prosecution agreements or pre-sentence reports could be used as avenues to induce non-monetary preventive and other effects within a corporation that has been found liable for cartel conduct.[36] Such an approach would recognise the need for non-monetary sanctions. However, an informal regime of non-monetary sanctions lacks legitimacy[37] and does not equip a court with the non-monetary sanctions that may be needed to deal effectively with a corporation that reneges on a deferred prosecution agreement or fails to act in the way represented or suggested in a pre-sentence report.

iii. Response (3) — Side-Step the Limitations of Monetary Corporate Sanctions by Relying on Individual Criminal and/or Civil Liability

A third response to the limitations of monetary sanctions against corporations has been to focus on individual criminal and/or individual civil liability.[38]

---

35 See JB McAdams, 'The Appropriate Sanctions for Corporate Criminal Liability: An Eclectic Alternative' (1977) 46 *University of Cincinnati Law Review* 989, 992, fn 28.

36 See further B Garrett, 'Structural Reform Prosecution' (2007) 93 *Virginia Law Review* 853.

37 See, eg J O'Brien, 'Securing Corporate Accountability or Bypassing Justice? The Efficacy and Pitfalls of Pre-trial Diversion (2006) 19 *Australian Journal of Corporate Law* 161; FJ Warin and JC Schwartz, 'Deferred Prosecution: The Need for Specialized Guidelines for Corporate Defendants' (1997) 23 *Journal of Corporation Law* 121.

38 Wils, above n 8, ch 8. The introduction of individual criminal liability for cartel conduct in the UK under s 188 of the Enterprise Act exemplifies this approach.

This response has been elaborated by Wils in *The Optimal Enforcement of EC Antitrust Law*.[39] It is there argued that corporate liability for contraventions of EU competition law needs to be complemented by individual criminal liability, for two main reasons:

(a) the level of fines required to achieve effective deterrence would be problematically high;[40] and

(b) corporate fines do not always guarantee adequate incentives for responsible individuals within the firm.[41]

That policy prescription has two significant weaknesses. First, the proposal does not address the possibility of responding to the limitations of fines against corporations by designing and using non-monetary sanctions. Secondly, while the proposal recognises the importance of individual accountability as a means of social control, it fails to address the limited extent to which individual liability can be imposed by means of public enforcement proceedings against individual managers.[42] As is apparent from US cartel enforcement, the public enforcement process is highly selective and rarely deals with more than a small handful of the individuals who have participated in cartel conduct.[43]

II. THE PUNITIVE INJUNCTION AS A SANCTION AGAINST CARTEL CONDUCT

---

39 Wils, above n 8, ch 8.

40 Wils, above n 8, section 8.4.1. Some commentaries point to the value of an immunity policy as a way of increasing the risk of detection and imposition of liability. See, eg G Spagnolo, above, n 34, 138–9. In theory, that approach may reduce the need for very high fines in order to reflect a low risk of being caught. However, an immunity policy does not address the limitations inherent in monetary sanctions as a method of punishment.

41 Wils, above n 8, section 8.4.2.

42 Fisse and Braithwaite, *Corporations, Crime and Accountability*, above n 5, ch 2; Beaton-Wells and Fisse, above n 1, ch 6.

43 A recent example is the global air cargo price fixing conspiracy; see US DOJ, 'Dutch Airline Executive Agrees to Plead Guilty for Fixing Prices on Air Cargo Shipments', News Release 09-404 (29 April 2009) (15 airlines had pleaded guilty or agreed to plead guilty but only four executives). In Australia, civil penalty actions have been brought successfully against many airlines but no individual has been the subject of proceedings. In the case of Qantas, the meagre yield of enforcement action against individuals appears limited to one US Qantas executive (Mr B McCaffrey); see —— 'Ex-Qantas Freight Chief Pays Heavy Price for Cartel' *Sydney Morning Herald* (Sydney 4 May 2009) 24. Senior Qantas executives in Australia were not subject to extradition to the US: at that time there was not cartel offence in Australia (cartel offences came into effect on 24 July 2009). The civil enforcement proceedings taken in Australia by the ACCC did not extend to the Qantas employees who were implicated in the price fixing.

A. Introduction — Non-Monetary Sanctions against Corporations and the Punitive Injunction

The main possible forms of non-monetary sanctions against corporations[44] are:

(1) corporate probation orders;

(2) adverse publicity orders;

(3) community service orders;

(4) equity fines;

(5) disqualification from certain business activities (eg, supply of goods or services to the government);

(6) dissolution; and

(7) punitive injunctions.

Corporate probation (requiring specified internal organisational action to help prevent future law-breaking) is a sanction in some jurisdictions, most notably the US[45] and Australia.[46] Adverse publicity orders (requiring specified details about an offence or contravention to be published in specified media) and community service orders (a form of cy-près sanction requiring a project of public benefit to be performed by the defendant corporation) are authorised in Australia.[47] The equity fine (a parcel of shares vested in the state, to be disposed of by the state at will) is a concept devised by Coffee partly as a way of managing the 'deterrence trap' (ie the inability of some corporations to pay a fine commensurate with the

---

[44] See further Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974* (Report No 68, 1994) ch 10; Australian Law Reform Commission, *Principled Regulation* (Report 95, 2002) ch 28; Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report 103, 2006) ch 30; New South Wales Law Reform Commission, above n 2, chs 7–12; Beaton-Wells and Fisse, above n 1, ch 11, sections 11.3.5, 11.4.6.6; R Gruner, *Corporate Criminal Liability and Prevention* (New York, Law Journal Press, 2008) ch 12; M Jefferson, 'Corporate Criminal Liability: The Problem of Sanctions' (2001) 65 *Journal of Criminal Law* 235.

[45] 18 USC § 3551. See further R Gruner, above n 44, §12.03.

[46] Trade Practices Act s 86C(2)(b).

[47] Trade Practices Act ss 86D(1), 86C(2)(a).

gravity of an offence they have committed).[48] Disqualification from particular business activities (eg, suspension or debarment from acting as a contractor to government) is a sanction in some jurisdictions.[49] Dissolution should be available as an ultimate sanction but, even in the event of the most egregious criminal conduct, is not always available.[50]

The punitive injunction is a punitive variant of the mandatory civil injunction or a corporate probationary order.[51] It is intended to serve as a sanction against corporations for serious offences and serious civil contraventions without going to the extremes of disqualification from conducting business or dissolution. The punitive element is to require a corporate offender to act in a demanding way that may go beyond the limits of remedial action. The demanding response required is non-financial in terms of its direct impact within a corporation. The punitive effect sought to be achieved is to produce a positive regulatory outcome. The main kinds of positive regulatory outcome sought to be achieved in the context of cartel conduct are: (a) the imposition of internal accountability for the cartel offence or contravention; (b) the revision of organisational precautions against future possible cartel offences or contraventions; and (c) the facilitation of civil redress to the victims of a cartel offence or contravention.

The concept of the punitive injunction has been canvassed by Australian law reform agencies on several occasions.[52] The main reservation has been that it is sufficient to provide

---

48 Coffee, 'No Soul to Damn', above n 3, 413–24.

49 As in the US, where Federal Acquisition Regulation 9.407-2(a)(2) (48 CFR §9.407-2(a)(2)) authorises a purchasing agency to suspend contractors suspected of a violation of 'Federal or State antitrust statutes relating to the submission of offers'. Suspension or debarment may be unrealistic as where the corporation in question supplies goods or services at a price or of a quality unmatched by its competitors. The use of this type of sanction was recommended in Australian Law Reform Commission, *Principled Regulation*, above n 44, [28.24], but without referring to the contrary position taken in Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, above n 44, 19. The sanction is proposed and discussed in some detail in New South Wales Law Reform Commission, above n 2, 116–20.

50 See, eg the very limited grounds for deregistration under Corporations Act 2001 (Cth) s 601AB. The sanction of dissolution is recommended in New South Wales Law Reform Commission, above n 2, 121–7. See also American Law Institute, Model Penal Code, §6.04(2).

51 Fisse, 'Reconstructing Corporate Criminal Law', above n 17, 1164–5. Various existing statutory models lend themselves to modification to serve as provisions specifically authorising and governing the use of punitive injunctions; see eg Trade Practices Act s 80. For a discussion of s 80 see J Duns, 'The Statutory Injunction: An Analysis' (1989) 17 *Melbourne University Law Review* 56.

52 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, above n 44, 116–7; Australian Law Reform Commission, *Principled Regulation*, above n 44, 864; Australian Law Reform Commission, *Same Crime, Same Time*, above n 44, 746–7; New South Wales Law Reform Commission, *Sentencing Corporate Offenders*, above n 2, 143–8.

for corporate probation unless experience shows the need to introduce punitive injunctions.[53] Whether or not that point has been reached in Australia, the US or other jurisdictions is difficult to assess. However, as concern mounts about the impracticality and/or inefficacy of higher monetary sanctions against corporations as a means of cartel control, the punitive sanction invites further consideration and may warrant adoption.

This Part outlines key design parameters for legislation introducing the punitive injunction as a sanction against corporations that have committed a cartel offence or contravened a civil prohibition against cartel conduct.[54]

The design parameters discussed are:

- underlying enforcement strategies (Part IIB);
- purposes and limiting principles and rules governing the application of the punitive injunction (Part IIC);
- authorised types of punitive injunctive orders (Part IID);
- persons subject to punitive injunctive obligations (Part IIE);
- duration of punitive injunctions (Part IIF);
- monitoring compliance with a punitive injunction (Part IIG); and
- non-compliance with a punitive injunction (Part IIH).

B. Underlying Enforcement Strategies

Many discussions of fines against corporations proceed on the basis of an economic pricing model of crime and punishment and advocate a strategy of optimal economic deterrence based

---

53 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, above n 44, 117.

54 The punitive sanction is punitive and can be authorised for use in criminal and civil enforcement proceedings.

on that model.[55] However, a stand-alone strategy of optimal economic deterrence is much too single-minded and limited. In recent decades, a number of additional enforcement strategies have emerged from the empirical study of enforcement practices and as a result of strategic thinking about corporate regulation.

Six additional enforcement strategies underlie the design of the punitive injunction proposed in this chapter:

(1) pyramidal enforcement;

(2) enforced self-regulation;

(3) requiring responsive corporate reaction to law-breaking;

(4) holding accountable all individuals who contribute in a significant way to the commission of a cartel offence or contravention;

(5) countering cartel-conducive conditions within corporations; and

(6) exploiting the capacity of punishment to serve as a means of facilitating the recovery of damages by the victims of cartel conduct.

As explained below, these strategies project and give direction to the punitive injunction.

Pyramidal enforcement is the strategy of laying out a pyramid of sanctions ranging from negotiated settlements at the base of the pyramid to the most severe sanctions at the apex (jail for individual offenders, and dissolution for corporate offenders), and making it clear that the sanction for law-breaking can be escalated to the most severe form of sanction if need be.[56] Pyramidal enforcement is based partly on the game theoretic postulate that actors, individual or corporate, are most likely to comply if they know that enforcement is backed by sanctions which can be escalated in response to any given level of non-compliance, whether

---

[55] See generally Beaton-Wells and Fisse, above n 1, ch 11, section 11.3.1.

[56] See I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York, Oxford University Press, 1992) ch 2. See also Fisse and Braithwaite, *Corporations, Crime and Accountability*, above n 5, 141–5.

minor or egregious. The pay-offs are loaded against non-compliance and strong downwards pressure is exerted towards negotiation and bargaining as the main way in which cases are handled.

The punitive injunction is located at or near the apex of the pyramid of enforcement envisaged here. Its role is therefore as a 'big gun'[57] for use in cases where coercion proves necessary to achieve an outcome unattainable through settlement and insecurable by a monetary penalty on its own.

Enforced self-regulation is the strategy of allowing corporations to regulate their own conduct but insisting that self-regulation does in fact occur.[58] Compliance is more likely to ensue if nurtured in a spirit of cooperation (enforcement policies should avert organised business cultures of resistance). Efficiency considerations are also important and require that intervention in the internal affairs of corporations be kept to a minimum. Another precept of enforced self-regulation is the utilitarian principle of least drastic means; more drastic means are available but are used primarily as a contingent threat.

As envisaged here, use of the punitive injunction is guided by the strategy of enforced self-regulation. Thus, a corporation should be given the opportunity in advance of sentence or penalty to indicate what it has done or what it proposes to do by way of imposing internal accountability, revising internal precautions and/or facilitating redress. Unless the action taken or proposed is patently inadequate, there would be no justification for imposing a punitive injunction. To the extent that further action is proposed and needs to be made the subject of a binding obligation, that need can be met by less drastic means (eg, an undertaking, a condition of probation, or a condition of release).[59]

Requiring responsive corporate reaction to law-breaking: corporations are capable of responding constructively to the commission of an offence or contravention by learning from experience and rectifying the particular problem that has emerged. A sound regulatory strategy seeks not only to secure liability for the offence or contravention that has occurred

---

[57] Ayres and Braithwaite, above n 56, 19.

[58] J Braithwaite, 'Enforced Self-Regulation: A New Strategy for Corporate Crime Control' (1982) 80 *Michigan Law Review* 1466.

[59] As under Crimes Act 1901 (Cth) s 19B, Trade Practices Act ss 79B and 86C(2)(b).

but also to insist upon responsive corporate remedial reaction to having committed that offence or contravention.[60]

The punitive injunction enables a court or administrative agency to insist that responsive remedial action be taken by a corporate offender. The remedial action may be of various specified kinds, including internal disciplinary action (see Part IID(i)) and revising and strengthening standard operating procedures that relate to the prevention of cartel conduct (see Part IID(ii)).

Holding accountable all individuals who contribute in any significant way to the commission of a cartel offence or contravention: consistently with the Nuremberg principle of personal responsibility for wrongdoing, those individuals responsible for cartel conduct should be held responsible.

One feature of the punitive injunction is its capacity to activate the internal discipline systems of corporations and thereby uphold individual accountability for cartel conduct across a wider front than could ever be achieved by reliance solely on prosecutions and enforcement proceedings against individuals. That is the purpose of internal accountability orders, as discussed in Part IID(i).

Countering cartel-conducive conditions within corporations: deterring or preventing corporate conduct requires corporations to do more than merely exercise inhibition and self-restraint; they need to have effective control procedures.[61] The aim of deterring or otherwise preventing cartel conduct by corporations is unlikely to be achieved unless controls are in place to counter the onset of cartel conduct. The most obvious possibility in the context of cartel conduct is to limit and regulate contacts by a corporate offender with competitors.[62]

---

[60] B Fisse and P French, 'Corporate Responses to Errant Behavior: Time's Arrow, Law's Target' in Fisse and French (eds), above n 5; Fisse and Braithwaite, *Corporations, Crime and Accountability*, above n 5, 210–3.

[61] Fisse, 'Reconstructing Corporate Criminal Law', above n 17, 1159–67.

[62] See Part IID(ii). There are of course many possible situational factors that can contribute to cartel conduct; see ME Stucke, 'Am I a Price Fixer? A Behavioral Economics Analysis of Cartels', chapter 12 in this volume; S Simpson and C Kope, 'The Changing of the Guard: Top Management Characteristics, Organizational Strain, and Antitrust Offending' (1997) 13 *Journal of Quantitative Criminology* 373; N Shover and A Hochsteter, *Choosing White-Collar Crime* (New York, Cambridge University Press, 2006).

Implementing this enforcement strategy requires the power to intervene if necessary to modify the conditions under which a corporate offender will operate. The punitive injunction is geared to enabling such intervention, as discussed in Part IID(ii).

Exploiting the capacity of punishment to serve as a means of facilitating the recovery of damages by the victims of cartel conduct: the punishment of cartel conduct and the redress of cartel conduct typically have been handled in different proceedings. Little attempt has been made to bring both into alignment or convergence.[63] One underlying assumption seems to be that punishment is a negative or deadweight form of social control and that the more positive aim of compensating victims is best achieved in proceedings dedicated to that objective. However, that assumption fails to recognise the potential use of punishment as a means of assisting the provision of compensation in separate proceedings.[64]

As discussed below in Part IID(iii), the punitive injunction could well be used to require a corporate offender to facilitate the recovery of damages by the victims of cartel conduct.

C. Purposes, Limiting Principles and Rules Governing the Application of the Punitive Injunction

The punitive sanction is a sanction designed for the concurrent pursuit of the standard aims of sentencing — deterrence (general and specific), incapacitation, retribution and rehabilitation.[65] Where the punitive injunction is in the form of a redress facilitation order, the sanction also relates to the aim of compensation or redress.

The punitive injunction is punitive in character and is not solely remedial in function. This characteristic distinguishes it fundamentally from both an equitable injunction[66] and a

---

63 See, eg Beaton-Wells and Fisse, above n 1, ch 11, section 11.5.

64 See Fisse, 'Reconstructing Corporate Criminal Law', above n 17, 1231–3.

65 See further Australian Law Reform Commission, *Same Crime, Same Time*, above n 44, ch 4 (including restoration as an additional purpose of sentencing).

66 Contrast the statutory injunctive power under Trade Practices Act s 80, which is broader and may be used as a form of deterrent punishment: *Trade Practices Commission v ICI Australia Operations Pty Ltd* (1992) 38 FCR 248, 268 (French J).

corporate probation order.[67] The basic form of criminal and civil punitive injunctions is the same. The view taken here is that the punitive injunction is not inherently criminal in character but is also suited to use as a civil penalty where more severe punishment than a civil monetary penalty is warranted.

The standard sentencing principles of proportionality, totality and parity would govern the application of the punitive injunction in the criminal process.[68] Those principles should also apply where the sanction is deployed as a civil penalty.[69]

The punitive injunction would be available as a stand-alone sanction and as a sanction that could be imposed in combination with a monetary sanction or another non-monetary sanction (eg, an adverse publicity order). Where used in combination with other sanctions, the principles of totality and proportionality would be important safeguards against excessive punishment.

Use of the punitive injunction should be limited to cases where a less severe sanction is considered by the court or administrative agency to be insufficient to reflect the severity of the offence or contravention and unlikely to achieve the aims of punishment.[70] However, unlike the position in equity where an injunction is sought, the test is not one of remedial necessity: a punitive injunction should be available whether or not the injunction is necessary to prevent a repetition of the offence or contravention.[71]

D. Authorised Types of Punitive Injunctive Orders

What provision should be made for the types of orders that can be made under a punitive injunction? A broad empowering provision would create flexibility but more specific direction is also necessary to guide the use of the sanction by courts or administrative agencies. It would

---

[67] A corporate probation order under s 86C(2)(b) of the Trade Practices Act is expressly characterised as a non-punitive order. There is no such limitation under US federal criminal law; see R Gruner, above n 44, §12.03[5].

[68] See further Australian Law Reform Commission, *Same Crime, Same Time*, above n 44, 5.

[69] See further Beaton-Wells and Fisse, above n 1, ch 11, sections 11.3.3, 11.4.4.

[70] Consider the comparable limitation on the imposition of imprisonment under s 17A(1) of the Crimes Act 1901 (Cth).

be advisable explicitly to authorise three main kinds of punitive orders that could be made (whether alone or in combination), namely:

(i) an accountability order (Part IID(i));

(ii) an organisational precautions order (Part IID(ii)); and

(ii) a redress facilitation order (Part IID(iii)).

i. Accountability Orders

The idea of requiring corporate offenders to police themselves by undertaking internal inquiries and taking disciplinary action against the individuals implicated in an offence or contravention has been supported by a number of commentators and endorsed by various law reform agencies.[72] In the US, internal disciplinary action is relevant as a factor to be taken into account in sentencing a corporation[73] and can be required as a condition of corporate probation.[74] These approaches heed the fact that public enforcement proceedings are able to target only a small number of the individuals typically involved in cartel conduct.

Under an accountability order, a corporate defendant and designated personnel would be required to:

(a) make an inquiry into:

(i) the circumstances in which the cartel offence or contravention took place;

---

71 As is the position under s 80 of the Trade Practices Act: *Trade Practices Commission v ICI Australia Operations Pty Ltd* (1992) 38 FCR 248, 256–7 (Lockhart J).

72 See Fisse and Braithwaite, *Corporations, Crime and Accountability*, above n 5, chs 5–6; Beaton-Wells and Fisse, above n 1, ch 6, section 6.6; Coffee, 'No Soul to Damn', above n 3, 429–33, 445–6; Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, above n 44, 107; Australian Law Reform Commission, *Same Crime, Same Time*, above n 44, [30.15]–[30.16], recommendation 30-1; New South Wales Law Reform Commission, above n 2, [9.8]–[9.13], recommendation 9.

73 18 USC §3572(a)(8); Gruner, above n 44, § 11.02[11][i].

74 18 USC §3563(b)(21); Gruner, above n 44, § 12.03[1][3].

(ii) the individuals directly concerned in the commission of the offence or contravention;

(iii) the action taken to prevent that offence or contravention by the managers responsible within the organisation for supervising the conduct of those individuals;

(b) take disciplinary action against any officers and employees who have been implicated in the offence or contravention; and

(c) provide a compliance report detailing the action taken and certifying the veracity of the report.

Several key terms would require definition. The term 'disciplinary action' means the imposition of personal accountability and the imposition of a sanction reasonably calculated to deter or prevent the officer or employee from engaging in similar conduct in future. 'Sanction' means a form of disposition that makes the person disciplined worse off but does not preclude an accompanying positive incentive. The term 'implicated in the offence or contravention' means implication by reason of engagement in or assistance or encouragement of the commission of the offence or contravention or failure to take reasonable supervisory or other action to prevent the commission of the offence or contravention. Implication in this sense does not necessarily require a finding of individual criminal or civil liability. Nor does it pre-suppose a fault-based system of internal accountability.[75]

The task of conducting the investigative or disciplinary work specified in an order would be undertaken by the managers and staff of the defendant, with or without the assistance of outside experts such as lawyers or accountants. The report prepared would be filed with the court or administrative agency as a matter of public record. The investigative inquiry required would not be subject to legal professional privilege. The privilege against self-incrimination would remain available to individual personnel, but those relying on this protection would be identified in the report.

---

[75] See Fisse and Braithwaite, *Corporations, Crime and Accountability*, above n 5, 195.

What relationship is envisaged between internal and external sanctions against individuals? First, internal sanctions imposed pursuant to accountability orders relate to a much larger number of individuals implicated in cartel conduct than could ever be proceeded against for an offence or contravention. Accordingly, relatively few individuals are likely to be subject to both internal sanctions and sanctions imposed by way of public enforcement proceedings. Secondly, where an individual is subject to both internal and external sanctions, the type and severity of the internal sanction imposed is a factor to be taken into account when determining the type and quantum of an externally-imposed sanction.[76] However, protection against double jeopardy would not be appropriate: internal accountability and discipline is a matter of internal corporate control[77] and hence the liability rules that apply to internal sanctions are broader than those applicable to externally-imposed sanctions.[78] Thirdly, guidelines are recommended to guide the exercise of enforcement discretion in relation to the use of accountability orders and the selection of cases where individuals are to be prosecuted or made the subject of other public enforcement action.[79]

Other key elements of proposal, including safeguards against the risks of scapegoating and corporate cheating, are discussed elsewhere.

The potential relevance of accountability orders in the context of cartel conduct is suggested by a number of glaring examples where individual accountability has not been imposed.

A classic illustration is the reaction of the Westinghouse Corporation upon being convicted and sentenced for its role in the heavy electrical equipment price fixing conspiracies

---

[76] The severity of an external sanction is also relevant to the assessment of internal disciplinary action but that does not mean that internal disciplinary action would be unnecessary or inappropriate where an individual has been prosecuted and jailed or fined. Generally speaking, the more severe the external sanction the stronger the justification for demoting or dismissing an employee.

[77] Abuse of power by the state through over-zealous use of the public justice system is a distinctive type of political illegitimacy that calls for distinctive solutions, one of which is protection against double jeopardy.

[78] As discussed in Part IID(i), an accountability order does not require a finding of individual criminal or civil liability and does not pre-suppose a fault-based system of internal accountability. Nor do accountability orders pre-suppose that the conduct prescribed under internal liability rules is or should be co-defined with liability rules under public law: the former should be consistent with the latter but often need to be more extensive and tailored to the particular organisation.

[79] See Fisse and Braithwaite, *Corporations, Crime and Accountability*, above n 5, 145–6.

of 1959–61.[80] Westinghouse decided against disciplinary action, partly on the ground of the lame excuse that: 'anybody involved was acting not for personal gain, but in what he thought was the best interests of the company.'[81] By contrast, the internal discipline exacted by General Electric was relatively severe. All persons implicated in violations of corporate antitrust policy were disciplined by substantial demotion long before any of them were convicted. Those who were later convicted were asked to resign because 'the Board of Directors determined that the damaging and relentless publicity attendant upon their sentencing rendered it both in their interest and the company's that they pursue their careers elsewhere.'[82]

Another example is the recent bid rigging case in the construction industry in the UK. The OFT announced on 22 September 2009 that it had imposed fines totalling over £129 million on 103 construction firms that had engaged in bid rigging with competitors.[83] All the parties fined were companies. No prosecutions were brought for cartel offences under the Enterprise Act.[84] There is no general provision for individual liability for breaches of the prohibitions against anticompetitive agreements in the Competition Act 1998 and disqualification orders under the Company Directors Disqualification Act 1986 (UK) are limited in scope (they apply only to a person who is a director)[85] and have yet to be used in relation to cartel conduct.[86] It is difficult to understand why, in a case of this kind, the hundreds of individuals directly implicated in cartel conduct should be allowed to escape any demonstrated form of personal accountability.[87]

---

80 See CC Walton and FW Cleveland, *Corporations on Trial: The Electric Cases* (Belmont, Wadsworth, 1964) 103. The other companies involved, with the exception of General Electric, also refrained from internal disciplinary action: see J Herling, *The Great Price Conspiracy* (Washington DC, Luce, 1962) 311.

81 Walton and Cleveland, above n 80, 103.

82 US Senate, *Administered Prices, Pts 27 and 28, Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary*, 87th Cong, 2nd Sess (1961) 17671–2.

83 OFT, 'Construction Firms Fined for Illegal Bid-Rigging', Press Release 114/09 (22 September 2009).

84 See J Joshua, 'DOA: Can the UK Cartel Offence Be Resuscitated?', chapter 6 in this volume.

85 The power to order disqualification from managing a company under s 86E of the Trade Practices Act applies to any person. For a critique of disqualification as a sanction see Beaton-Wells and Fisse, above n 1, ch 11, section 11. 3.7.

86 However, the OFT has re-issued its threat to use the sanction: see OFT, *Director Disqualification Orders in Competition Cases: An OFT Guidance Document* (2010).

87 See further B Fisse, 'Recent OFT Cartel Decisions Illustrate Fundamental Flaws in UK Cartel Law' (4 October 2009) www.brentfisse.com/publications.html.

A remarkable feature of anti-cartel enforcement by the EU at the Community level to date is that so little attention has been paid to individual accountability.[88] Large civil penalties are imposed but liability is exclusively corporate. Moreover, internal disciplinary action is not a factor specified in the Fining Guidelines.[89] Proposals have been made by some commentators for introducing individual criminal liability[90] but these proposals raise many legal and practical difficulties.[91] Nor do they address the wider issue of enforcing individual accountability within corporations.

ii. Organisational Precautions Orders

Orders requiring changes to organisational practices and procedures have been authorised and made in many areas of corporate regulation, including antitrust consent decrees.[92] Their use as a sentence against corporate offenders has been recommended by commentators and law reform agencies.[93] They are available as a condition of corporate probation in the US[94] and Australia.[95]

---

88 As reflected by I Simonsson, *Legitimacy in EU Cartel Control* (Oxford, Hart Publishing, 2010) ch 7, where this fundamental issue is not mentioned. Contrast C Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Cullompton, Devon, Willan Publishing, 2007).

89 See EC, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C210/2

90 See, eg Wils, above n 8, ch 8; P Whelan, 'A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law' (2007) 4 *Competition Law Review* 7.

91 As documented, for example, in P Whelan, 'Criminal Cartel Enforcement in the European Union: Avoiding a Human Rights Trade-Off', chapter 10 in this volume; I Simonsson, 'Criminalising Cartels in the European Union: Is There a Case for Harmonisation?', chapter 9 in this volume.

92 See, eg AI Gavil, WE Kovacic and JB Baker, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy* (St Paul, Thomson-West, 2002) 1021–38; JJ Flynn, 'Consent Decrees in Antitrust Enforcement' (1968) 53 *Iowa Law Review* 983; RA Epstein, *Antitrust Consent Decrees in Theory and Practice* (Washington DC, American Enterprise Institute, 2007); LS Solomon and NS Kowak, 'Managerial Restructuring: Prospects for a New Regulatory Tool' (1980) 56 *Notre Dame Lawyer* 120. See also the remedial order power under Corporate Homicide Act 2007 (UK) s 9.

93 See Stone, above n 23, ch 17; Coffee, 'No Soul to Damn', above n 3, 448–55; B Fisse, 'Reconstructing Corporate Criminal Law', above n 17, 1221–6; Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, above n 44, 107–11; Australian Law Reform Commission, *Same Crime, Same Time*, above n 44, [30.17], recommendation 30-1; New South Wales Law Reform Commission, above n 2, [9.14]–[9.34], recommendation 9.

94 18 USC §3563(b)(21); Gruner, above n 44, § 12.03[1][2].

95 Trade Practices Act ss 86C(2)(b),(4)(c). For a critique of these provisions see Beaton-Wells and Fisse, above n 1, ch 11, section 11.3.5.2.

Under an organisational precautions order, a corporate defendant and designated personnel would be required to institute specified procedural or other precautions reasonably related to the deterrence or prevention of cartel conduct[96] and to provide a compliance report detailing the action taken and certifying the veracity of the report.

As noted in Part IID(ii), the prime type of organisational precaution order relevant in the context of cartel conduct would be an order limiting and regulating the extent to which the corporate offender and its officers, employees and agents may have contact with competitors. Guidance on contacts with competitors is standard in antitrust compliance programs.[97] As illustrated below, restrictions on communications or other dealings with competitors are not uncommon as a condition of settlement of an enforcement action.

A well-known example is the consent agreement negotiated by the US DOJ in 1977 with General Electric and Westinghouse as a response to the facilitating practice of publishing detailed present and past pricing information about turbine generators.[98] The consent decree prohibited General Electric and Westinghouse from signalling pricing information, as by prohibiting the publication or distribution of any information designed to invite any other manufacturer to agree to 'raise, fix, maintain, stabilize, or otherwise affect' turbine generator prices or sales terms and the distribution of pricing books or lists relating to turbine generators. The decree also prohibited each company from communicating to anyone except its employees any compilation of outstanding bids or quotations for the sale of large turbine-generators for a period of five years from the date when the bids or quotations were made, or the prices and terms and conditions of sale quoted on transactions involving the sale of large turbine-generators for a period of thirty months from the date of those quotations.

---

96 The wording in Trade Practices Act s 86C(4)(c) ('an order directing the person to revise the internal operations of the person's business which lead to the person carrying on the contravening conduct') is unduly restrictive for the purpose of a punitive injunction.

97 See, eg Roche, *Behaviour in Competition: A Guide to Competition Law* (February 2010) www.roche.com/behaviour_in_competition.pdf; Agility, *Competition Compliance Policy* (July 2008) www.agilitylogistics.com/EN/GIL/Documents/Agility_PDF/CompliancePolicy.pdf.

98 *United States v General Electric Co*, 1977-2 Trade Cas (CCH) 61 660 (ED Pa 1977); *United States v Westinghouse Electric Corp*, 1977-2 Trade Cas (CCH) 61 661 (ED Pa 1977). The case is discussed in GA Hay, 'Facilitating Practices', in ABA Section of Antitrust Law, *Issues in Competition Law and Policy*, Vol 2 (Chicago, ABA Book Publishing, 2008) ch 50, 1189, 1208–10.

To give another example, criminal charges against Israel's four leading banks were brought in 1984 for unlawfully combining to fix interest rates on negotiable certificates of deposit.[99] The case was resolved in 1986 by a plea bargain that included rules of conduct ('Bank Rules') to prevent future contraventions. The Bank Rules included a rule against concerted practices in relation to interest rates and fees or service charges, and another against providing information to or consulting with another bank about the same subject-matters.

A more recent illustration is the enforcement action under the Connecticut Antitrust Act against the La Quinta hotel group for adopting a 'Call-Around' practice whereby pricing and other information was regularly exchanged with competing hotels.[100] The action was settled by an agreement prohibiting the practice of calling around other hotels. The agreement stipulated that the prohibition did not apply to the use of commercially available industry reports nor to communication with a competitor for legitimate guest or business needs in specified situations (eg, the need to relocate guests).

There are other possible types of organisational precautions orders. One is an order requiring specified additional supervision to be undertaken in the particular area of operations where cartel conduct occurred.[101] Another is an order requiring a corporate offender to encourage employees to report suspected cartel conduct to management by adopting a whistleblower protection policy[102] and/or an internal immunity policy based closely on the public immunity policy of the local competition enforcement agency.[103]

Before imposing an organisation precautions order, a court or administrative agency would be required to satisfy itself that the parties have had due opportunity to negotiate an agreed solution. The corporate defendant would also be given the chance to indicate its preferred course of action, as by submitting a compliance plan outlining the program that the

---

[99] See L KestenBaum, 'Preventing Price Fixing by Israeli Banks: Antitrust Rules in Settlement of a Criminal Case' (1986) 21 *Israel Law Review* 177.

[100] Connecticut, Attorney General's Office, 'Attorney General Announces Agreement to Stop Hotels from Anticompetitive Exchanges Of Price Information', Press Release (1 April 2010).

[101] See Gruner, above n 44, § 12.03[2].

[102] See, eg AS 8004, *Whistleblower Protection Programs for Entities* (2003).

[103] See D Klawiter and J Driscoll, 'A New Approach to Compliance: True Corporate Leniency for Executives' (2008) 22 *Antitrust* 77 (proposal for adopting this approach on a voluntary basis).

company proposes to implement. This approach reflects the underlying strategy of enforced self-regulation.[104]

iii. Redress Facilitation Orders

Attempting to provide compensation to the victims of cartel conduct as part of public enforcement proceedings would rarely be feasible given the typically large number of victims and the likely complexity of assessing the amount of damages payable. However, it may be feasible at least to use the opportunity and need to punish a corporate offender to require the offender to take certain steps to facilitate the provision of redress in separate civil proceedings for damages. This possibility was suggested by the author in 1983:[105]

> Corporate criminal law is already used to help victims pursue civil remedies. The present means of facilitation, however, are limited primarily to the use of the collateral estoppel effect of criminal convictions in later civil actions. But other forms of redress facilitation could be used as criminal sanctions to assist in a more direct way the subsequent application of civil remedies. Punitive discovery orders might be used to expedite or increase the flow of information from convicted corporate defendants to plaintiffs in subsequent civil litigation. Because it is punitive, a discovery order issued as a criminal sanction could be used more intrusively than could an order for civil discovery. For example, a sentence might require that plaintiffs be given access to a defendant's computer-based litigation support system. Such techniques may be especially useful in the context of class actions or other forms of complex litigation. Punitive redress facilitation sanctions could also be used to short circuit potentially onerous notice requirements by requiring the defendant corporation to publicize the conviction and thereby provide notice to potential claimants.

The settlement agreement between class action plaintiffs and Lufthansa and Swiss International Air Lines in the US in the wake of air cargo price fixing is highly instructive.[106] This agreement sets out cooperation obligations, including an obligation to produce relevant

---

104 See Part IIB.

105 B Fisse, 'Reconstructing Corporate Criminal Law', above n 17, 1231–2.

106 In re Air Cargo Shipping Services Antitrust Litigation, 'Settlement Agreement between Air Cargo Plaintiffs and Defendants Deutsche Lufthansa AG, Lufthansa Cargo AG, and Swiss International Air Lines Ltd', Master File 06-MD-1775 (CBA)(VVP), 2006, US District Court, Eastern District of New York, www.aircargosettlement.com. I thank Kim Parker of Maurice Blackburn Lawyers, Melbourne, for drawing my attention to these cooperation provisions.

documents and to make directors, officers and employees available to give evidence.[107] These cooperation obligations are comprehensive, detailed and finely worked. They provide a useful blueprint for the drafting of redress facilitation obligations in a punitive injunctive order.

E. Persons Subject to Punitive Injunctive Obligations

The obligation to comply with a punitive injunction would be imposed not only on the corporation but also on the directors, employees and agents of the corporation.[108] The individuals with primary responsibility for achieving compliance ('Compliance Managers') should be specified.[109] The Compliance Managers should include the Chief Executive Officer, and executive directors and senior managers whose span of control or sphere of influence encompasses the particular areas of the corporation's activities where the cartel offence or contravention was committed. Compliance Managers would be placed under a personal duty to exercise reasonable care and due diligence to ensure compliance with the order.

One reason for imposing an obligation to comply on Compliance Managers is simply to impress upon them the need personally to act in the way required by a punitive injunctive order. Another is to facilitate the imposition of individual liability in the event of non-compliance with such an order.[110]

F. Duration of Punitive Injunctions

---

[107] See Section J of the agreement.

[108] As is the standard approach adopted in consent decrees in US antitrust law and in injunctions under s 80 of the Trade Practices Act. See, eg cl 5 of the consent decree in *United States v General Electric Co*, 1977-2 Trade Cas (CCH) 61 660 (ED Pa 1977). The directors, employees and agents need not be parties to the proceedings and often will not be.parties.

[109] See Fisse and Braithwaite, *Corporations, Crime and Accountability*, above n 5, 151–2. Those designated as Compliance Managers need not be parties to the proceedings in which the punitive injunction is ordered (*cf Hartford-Empire Co v United States*, 323 US 386 (1945), which is not followed in the approach proposed here). Nor need they be accomplices in the conduct giving rise to the punitive injunction or otherwise liable for breaching some antecedent legal obligation. See further the approach advocated in SW Hansen, 'Use of the Federal Injunction to Protect Constitutional Rights' (1976) 12 *Gonzaga Law Review* 231.

[110] See Fisse and Braithwaite, *Corporations, Crime and Accountability*, above n 5, 151–2.

The maximum period of subjection to a punitive injunction should be limited. The maximum period in Australia is three years.[111] and five years in the US.[112]

As a punitive element, a corporation subject to a punitive injunction should be placed under pressure to comply as a matter of urgency. A limit of three months would be appropriate for accountability orders, subject to extension for a further period of three months where justification is shown. The maximum period of operation for organisation precautions orders and redress facilitation orders would need to be longer (for example, three years) but provision should be made for stringent time limits to be set for each of the main tasks required to be performed under the punitive injunction.

G. Monitoring Compliance with a Punitive Injunction

Those subject to a punitive injunction would be required to file a compliance report setting out details of the measures taken and explaining why it is believed that the action taken complies with the punitive injunctive order.

Provision needs to be made for a mechanism for monitoring compliance with a punitive injunction.[113] Generally, it would be sufficient to establish an internal monitoring committee, with one or more outside directors.[114] Alternatively, where independent supervision is considered necessary, a special master would need to be appointed. The powers and functions of an internal monitoring committee and a special master would be specified.[115] These powers and functions would be limited to investigation, oversight and making recommendations. Unlike the role of a special administrator appointed to run a company for the purposes of insolvency administration or winding up, their role would be to act as a

---

111 Trade Practices Act s 86C(2)(b).

112 18 USC §3561(b).

113 See Australian Law Reform Commission *Compliance with the Trade Practices Act 1974*, above n 44, 109–10.

114 See, eg Corporations Act 2001 (Cth) pt 5C.5 (compliance committee for managed investment schemes).

115 See, eg Corporations Act 2001 (Cth) s 601JC (functions of compliance committee for managed investment schemes). Controversy has arisen in the US as a result of failure to regulate the powers of monitors; guidelines have been introduced in response: US DOJ, 'Memorandum for Heads of Department Components United States Attorneys, Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations' (7 March 2008).

watchdog to safeguard the public interest. The cost of the internal monitoring committee or a special master would be borne by the corporation.

The underlying strategy is to exploit the spirit of voluntary cooperation within corporations but to escalate the degree of intervention in the manner required to deal with any given level or type of intransigence. Thus, the more the intransigence the greater the degree of interference, the higher the consequential cost of compliance to the corporation.

A different approach may be required in the case of a foreign corporation. Supervision of internal operations overseas is unlikely to be feasible. However, it is possible to impose operational restrictions on activities that take place within the jurisdiction and to take steps to ensure compliance with those restrictions locally. The general point is that no locally-imposed sanction can ever be fully satisfactory as a means of deterring or otherwise preventing global cartel conduct.[116]

H. Non-Compliance with a Punitive Injunction

As indicated above, the individuals and corporations subject to a punitive injunction would be placed under a duty to exercise reasonable care and due diligence to comply with the obligations imposed under the injunction. Failure to comply would be a contempt of court or a separate offence[117] punishable by imprisonment or, in the case of a corporate offender, a fine and a further and more demanding punitive injunction, sequestration[118] or dissolution.[119]

III. POTENTIAL ADVANTAGES AND DISADVANTAGES OF THE PUNITIVE INJUNCTION

This Part outlines the potential advantages and disadvantages of the punitive injunction in comparison with monetary sanctions against corporations. These advantages and

---

116 Which partly explains the emergence of proposals for a system of global competition law; see generally BJ Sweeney, *The Internationalisation of Competition Rules* (London, Routledge, 2010).

117 See further M Chesterman, 'Comtempt: in the Common Law, but not the Civil Law' (1997) 46 *International and Comparative Law Quarterly* 521.

118 See further CJ Miller, *Contempt of Court*, 2nd ed (Oxford, Oxford University Press, 1989) 456–62.

119 See Part IIA. For a specific proposal for dealing with non-compliance in a way geared to enforced self-regulation see B Fisse, 'Community Service as a Sanction against Corporations' (1981) *Wisconsin Law Review* 970, 987–9.

disadvantages need to be considered when deciding the future role of monetary and non-monetary sanctions as artillery to deter or prevent cartel conduct.

A. Potential Advantages of the Punitive Injunction

The potential advantages of the punitive injunction may be summarised as follows.

(1) The punitive injunction is the antithesis of a pricing approach to the control of corporate crime. The message conveyed by a punitive injunction is that serious offences are not forms of conduct that can be engaged in at will if the going price is paid but are prohibited and will be prevented if necessary by forcible intervention in corporate choice.

(2) The punitive injunction is aimed at making an impression on non-financial motivations and concerns within corporations. The sanction relates to managerial autonomy and corporate freedom and inserts a spinal tap into the nervous system of free enterprise.

(3) The punitive injunction focuses on the internal control systems of organisational defendants and the impact of punishment is directed at a key region within the corporation rather than at the blank exterior of the corporate mass. This means that the impact of a punitive injunction falls primarily on management: the sanction requires a managerial task force to take internal disciplinary action and/or to take additional organisation precautions, an impact borne by the task force. Non-financial privations are imposed and, unlike fines against corporations, these non-financial privations cannot be transferred to shareholders, consumers and others in the same way that fines can be passed on.[120] The hypothesis may be suggested that, the more intrusive the capability of a corporate sanction, the more the control over the risk of unacceptable spillovers and unwanted side-effects.

---

[120] As envisaged here, the punitive injunction would require performance of the obligation imposed by directors and employees, and could not be discharged by engaging an independent contractor to perform the work. The role of independent contractors would be limited to providing advice or specialist supporting assistance where justified in advance by the corporate defendant and specified in the injunction. See further B Fisse, 'Community Service', above n 119, 985.

(4) Monetary sanctions, no matter how large, do not ensure that corporate offenders will respond by taking internal disciplinary action against those implicated in the offending conduct. By contrast, the punitive injunction uses corporate liability as a lever for attaining individual accountability. An accountability order requires disciplinary action to be taken against those implicated in cartel conduct. It also pinpoints those who are responsible for complying with the terms of the injunction.

(5) Monetary sanctions, no matter how large, do not ensure that corporate offenders will respond by revising their internal operating procedures in such a way as adequately to guard against re-offending. By contrast, the punitive injunction insists that specified organisation precautions be taken, including precautions against cartelgenic contacts with competitors.

(6) The punitive injunction may be used as a means of facilitating redress for the victims of cartel conduct. Although it will rarely be feasible to make compensation orders to such victims as part of the public enforcement process in proceedings, it may well be possible to use redress facilitation orders to require a corporate defendant to cooperate by providing documents and other evidence for the purpose of separate civil proceedings for damages.

(7) The punitive injunction provides a means of punishing a corporation that has insufficient liquidity to pay a fine of the amount needed to reflect the seriousness of an offence. This deterrence trap can be avoided by imposing accountability orders or organisational precautions orders given that such orders require no financial outlay and yet achieve a punitive impact by requiring responsive action by management.

(8) The punitive injunction offers a way around the difficulties posed by governmental instrumentalities that commit serious offences. Imposing fines on such organisations is often problematic, partly because they are not profit-making businesses, and partly because to impose a fine may simply mean that the burden will be transmitted to taxpayers or ratepayers. The punitive injunction, unlike the fine, does not presuppose that the organisation will be

profit-oriented. Furthermore, the mode of punishment is not infliction of a monetary liability but detraction from autonomy, which is an impact borne primarily by managers rather than by taxpayers or other bystanders. The hypothesis thereby suggested is that, the more intrusive the capability of a corporate sanction, the more suited its application to diverse kinds of organisation.

B. Potential Disadvantages of the Punitive Injunction

The potential disadvantages of the punitive injunction, as compared with the advantages of monetary sanctions against corporations, are essentially fivefold:

(1) The impact of a punitive injunction cannot readily be quantified. In theory, punitive injunctions could be quantified in terms of monetary cost, excluding the cost of the action required under the injunction. Maximum or guideline range amounts for various offence levels might then be specified accordingly. In practice, however, the financial costing would be complex and, in any event, inexact. Another possible approach would be to use task force time as a surrogate measure. The terms of a punitive injunction might conceivably spell out the hours to be expended by the task force in complying with the injunction. Maximum or guideline range amounts for different offence levels could then also be expressed in terms of time. However, such an approach would be prone to corporate evasion. More fundamentally, if action needs to be taken to impose individual accountability or institute organisational precautions, that action should be taken. Efficient corporations should not be required to take more time than is necessary and inefficient corporations should not be allowed to get off the hook by merely racking up a given number of hours.

(2) A monetary sanction does not interfere with the internal affairs of corporations whereas a punitive injunction is a form of interventionist regulation and need to be used sparingly. The punitive injunction should be used only where a monetary penalty alone is incapable of reflecting the severity of a cartel offence or contravention or preventing its recurrence and where less intrusive possible

solutions have not been arrived at during the enforcement process. As noted earlier, the empowering legislation should provide that corporate defendants be given the opportunity to indicate before sentence what disciplinary action and organisational precautions they propose to take in response to their cartel conduct. Another safeguard is the adoption of a pyramid of enforcement[121] under which punitive injunctions are reserved for the worst cases (eg, cases of corporate recidivism) and where liability is structured so that corporations have the choice of complying with the law or suffering a progressive and rapid escalation of remedies and punishments until they do comply. A further possible safeguard, proposed under the American Bar Association Standards for Criminal Justice, would be to impose a per se bar against incursions into the sphere of 'business judgment' decisions.[122]

(3) A monetary sanction is relatively easy to specify and administer whereas a punitive injunction requires careful drafting and the need at a later stage to ensure that the injunction has been complied with. This disadvantage can be avoided to some extent by means of the strategy of enforced self-regulation: as noted above, corporate defendants should be given the opportunity to indicate before sentence what disciplinary action and organisational precautions they propose to take in response to their cartel conduct. However, a mechanism is needed for ensuring that the terms of a punitive injunction are complied with by the parties to the injunction. That mechanism can and should be designed to avoid imposing an excessive burden on courts or administrative agencies. In particular, use should be made of special masters to supervise any monitoring or supervision that may be required.[123] Nonetheless, any such mechanism will entail the need for additional administration. In cases of serious cartel conduct, ultimately a choice needs to be made between imposing a monetary sanction, which is 'efficient' in terms of costs of administration but inadequate alone as a

---

[121] See Part IIB.

[122] American Bar Association, *Standards for Criminal Justice: Sentencing, Compliance Programs for Organizations* (1994) Standard 18-3.14(c)(iii) (a compliance program ordered as a sentence 'should not interfere with or delay the making of legitimate "business judgment" decisions by the organization's management, governing board, shareholders, or members').

means of deterrence and prevention, and imposing a sanction like the punitive injunction that is less efficient in terms of administration but likely to be more effective as a means of deterrence and prevention.

(4) Consistency or parity in sentencing or in determining penalties is more readily achievable by means of monetary sanctions, whereas there is no readily quantifiable measure of the impact of a punitive injunction. However, this comparison should not be overdrawn. There is of course a difference between the formal court-ordered amount of punishment and the actual impact of that punishment upon the particular offender.[124] The internal impacts of fines of the same amount may vary widely within different organisations, including organisations of the same size.[125]

(5) The punitive injunction is more prone to corporate cheating and evasion than a monetary sanction. Corporations are notorious for manipulating the law to their own advantage.[126] One important safeguard against corporate cheating is pyramidal enforcement.[127] Under this enforcement strategy, a corporate cheat is faced with the threat of sanctions of escalating severity including progressive more demanding punitive injunctions and ultimately sequestration[128] or dissolution. The more intrusive the capability of a corporate sanction, the greater the capacity to control or discourage evasive tactics. A second safeguard is to pinpoint individual representatives of the company as persons responsible for complying with the terms of the punitive injunction[129] and to require compliance to be confirmed on oath by those parties so that the threat of criminal liability for perjury is used as an additional deterrent against feigned

---

123 See, eg US Federal Rules of Civil Procedure, Rule 53. There are other possible approaches; see, eg Corporations Act 2001 (Cth) Part 5C.5 (compliance committee for managed investment schemes).

124 B Fisse and J Braithwaite, *The Impact of Publicity*, above n 29, 310–2.

125 It is also possible that, the more intrusive the capability of a corporate sanction, the greater the prospect of achieving consistent actual preventive impacts.

126 See further WS Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (Chicago, University of Chicago Press, 2006) chs 4–5.

127 See Part IIB.

128 See further CJ Miller, *Contempt of Court*, 2nd ed (Oxford, Oxford University Press, 1989) 456–62.

129 See Part IIE.

compliance. A third safeguard, as discussed earlier, is to equip courts or administrative agencies with the power to deploy independent monitoring and supervisory controls.[130]

CONCLUSION — THE IMPLICATIONS OF THE PUNITIVE INJUNCTION FOR CARTEL REGULATION

Consideration should be given to introducing the punitive injunction as an additional sentencing or penalty option against corporations for serious cartel conduct. The punitive injunction is a variant of the civil mandatory injunction but is punitive as well as remedial in function. The essence of the concept is that corporate offenders are punishable by means of an injunctive order requiring them to activate their internal controls in ways that are exacting while also being remedial and designed to minimise unwanted overspills on consumers, employees and shareholders.

A basic legislative design has been outlined for the introduction of three types of punitive injunction: accountability orders, organisational precaution orders and redress facilitation orders. These possibilities emanate from a wide range of practices, approaches and ideas in many different areas of corporate regulation. They are indicative of what might be done to punish corporations for serious cartel conduct where sole reliance on a monetary sanction is incapable of reflecting the severity of the offence or contravention or where a fine of sufficient severity would have unacceptable side-effects.

There are several implications for cartel regulation. The first and foremost is the implausibility of trying to adopt a single-minded strategy for the control of cartel conduct.[131] In particular, the theory of optimal economic deterrence is too single-minded and too limited a strategy to have any prospect of succeeding alone.[132] A much wider range of strategies, including pyramidal enforcement, enforced self-regulation and enforced individual

---

[130] See Part IIG.

[131] Powerful antidotes to any such monism include RE Goodin, 'Institutions and Their Design' in RE Goodin (ed), *The Theory of Institutional Design* (Cambridge, Cambridge University Press, 1996) 1; B Morgan and K Yeung, *An Introduction to Law and Regulation* (Cambridge, Cambridge University Press, 2007); K Hawkins, *Law as Last Resort* (Oxford, Oxford University Press, 2002); SS Simpson, *Corporate Crime, Law and Social Control* (Cambridge, Cambridge University Press, 2002).

accountability is available and such other strategies immediately open up ways of combating cartel conduct by means other than merely using the pricing mechanism of fines. The punitive injunction is one of those possible additional means.

A second implication is the undue limitation of a strategy that tries to combat cartel conduct merely by adding the threat of individual liability for jail to monetary penalties against corporations.[133] The public enforcement process cannot be expected to target let alone hold liable more than a sprinkling of the numerous individuals typically implicated in cartel conduct. Given that individual accountability is valued as a foundation of social control, an enforcement strategy will be fundamentally suspect unless it addresses the challenge of making individual accountability the rule rather than the exception.[134]

A third implication is the need for more work on the design and application of sanctions against corporations. Little is known about the actual impacts of monetary sanctions within corporate offenders.[135] There is no clear specification of what exactly monetary sanctions against corporations are supposed to achieve.[136] Much needs to be done on the design of non-monetary sanctions against corporations, both at a theoretical level and in extracting the insights tucked away in a century or more of experience with negotiated

---

132 As shown by the failure of optimal deterrence theoreticians to resolve the fundamental problem of allocation of individual and corporate responsibility for law-breaking in modern societies; see Fisse and Braithwaite, *Corporations, Crime and Accountability* above n 5, ch 3.

133 See, eg Wils, above n 8, ch 8; G Werden, 'Sanctioning Cartel Activity: Let the Punishment Fit the Crime' (2009) 5 *European Competition Journal* 19. Adding a power of disqualification, as proposed in DH Ginsburg and JD Wright, 'Antitrust Sanctions' (4 May 2010) https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=ALEA2010&paper_id=224, is not a solution to that problem, and raises other issues: Beaton-Wells and Fisse, above n 1, ch 11, section 11. 3.7.

134 This is the main theme of Fisse and Braithwaite, above n 5.

135 Empirical studies of actual impacts are all too rare; see, eg A Hopkins, *The Impact of Prosecutions under the Trade Practices Act* (Canberra, Australian Institute of Criminology, 1978); LS Solomon and NS Kowak, 'Managerial Restructuring: Prospects for a New Regulatory Tool' (1980) 56 *Notre Dame Lawyer* 120; Fisse and Braithwaite, *The Impact of Publicity*, above n 29.

136 On one view, the corporation is a rational actor and will decide for itself what if anything it should do by way of internal disciplinary action or revision of internal procedures and other controls. On another (and far more realistic) view, the corporation acts through agents and agents need to be given incentives to align their interests with those of the corporation and its shareholders. Working out what those incentives should be is complicated. Indeed, the exercise is so complicated that most corporations avoid attempting to engage in it. Instead, they adopt and apply a simple rule of action: if you break the law or our internal rules you will be held accountable and disciplined. See further Fisse and Braithwaite, above n 5, 88–93.

settlements and consent orders.[137] Moreover, the great divide between public enforcement action and private redress needs to be bridged by sanctions that avoid the spectacle of the state using public enforcement as a revenue-raiser and doing little or nothing to assist the provision of redress to victims.[138]

Fourthly, there is no truth in the strange rumour that corporations can be punished only means of a fine or other monetary sanction.[139] Non-monetary sanctions of different kinds have a long legal tradition[140] and others, including the punitive injunction, are readily conceivable. Moreover, there is no reason to assume that the fine is necessarily an 'optimal' or 'superior' type of sanction. As discussed in Part IA, monetary sanctions have many limitations. Furthermore, the 'optimal' or best approach for deterring and preventing serious cartel conduct may require the use of not one sanction but several in combination.

Fifthly, the potential of the punitive injunction to serve as a hard-hitting sanction against corporations bears on the question, still relevant in some jurisdictions, whether corporate criminal liability should apply to cartel conduct.[141] The contention that corporate criminal liability is unnecessary because monetary punishment can be imposed by means of civil penalties overlooks the potential use of severe forms of non-monetary sanctions against corporate offenders, the punitive injunction being a prime example.

---

137 One of many examples is the instructive experience that resulted from the SEC enforcement action against Gulf Oil for foreign bribery; see JC Coffee Jr, 'Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response' (1977) 63 *Virginia Law Review* 1069; JJ McCloy, NW Pearson and B Matthews, *The Great Oil Spill: The Inside Report, Gulf Oil's Bribery and Political Chicanery* (New York, Chelsea House Publishers, 1976). Another example is the relevance of the cooperation obligations in the air cargo price fixing class action settlement agreements: see Part IID(iii).

138 See Part IID(iii).

139 A rumour implicit in eg Wils, above n 8, 198–9.

140 See, e.g., R Pound, 'Visitatorial Jurisdiction over Corporations in Equity' (1936) 49 *Harvard Law Review* 369; WJ Donovan and BP McAllister, 'Consent Decrees in the Enforcement of Federal Anti-Trust Laws (1933) 46 *Harvard Law Review* 885; JJ Flynn, 'Consent Decrees in Antitrust Enforcement' (1968) 53 *Iowa Law Review* 983.

141 As in the UK, where cartel conduct is subject to individual but not corporate criminal liability, and the EU, where cartel conduct is not subject to individual or corporate criminal liability. By contrast, criminal liability for cartel conduct in the US, Australia and Canada is both corporate and individual. See further Beaton-Wells and Fisse, above n 1, ch 7, section 7.2. On the philosophical and sociological basis for corporate criminal liability, see N Lacey, 'Philosophical Foundations of the Common Law: Social Not Metaphysical' in J Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (Oxford, Oxford University Press, 2000) 17.

Sixthly, the possible development of more potent sanctions like the punitive injunction highlights the desirability of devising cogent principles of fault-based corporate criminal liability.[142] Imposing corporate criminal liability on the basis of vicarious responsibility may be a tolerable compromise where a corporate offender is subject to a fine but the introduction of tougher sanctions such as the punitive sanction would make that compromise more questionable.

Finally, it is much to be hoped that the chorus of complaints about the limited current efficacy of fines as a weapon against cartel conduct[143] will lead to productive thinking and more constructive solutions than the prescription of letting higher and higher quantities of blood from the financial arteries of corporations. The leech is a limited response to the 'cancer'[144] of cartel conduct. Radioactive bullet treatment and laser surgery are conceivable via the punitive injunction.

[142] See further Beaton-Wells and Fisse, above n 1, ch. 7, section .7.4; SW Buell, 'The Blaming Function of Entity Criminal Liability' (2006) 81 *Indiana Law Journal* 473.

[143] See, eg JM Connor, *Global Price Fixing*, 2nd edn (New York, Springer, 2007) ch 17.

[144] This metaphor is often used by some competition regulators; see, eg G Samuel, 'Current issues on the ACCC's Radar', Paper presented at Competition Law Conference, Sydney (29 May 2010). Hirudotherapy remains in use for treating several medical conditions and, like the fine, can be effective in some cases.