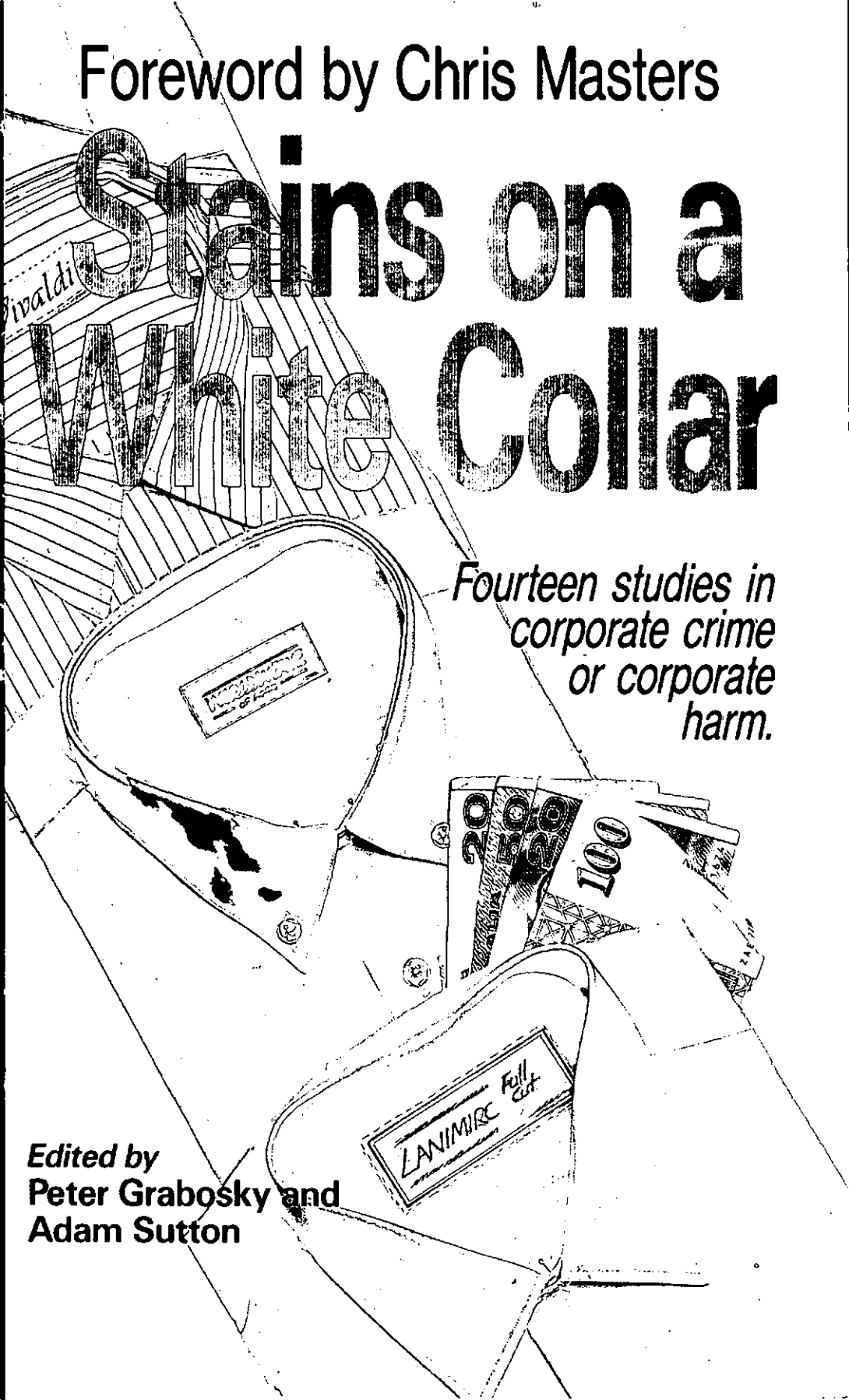


Foreword by Chris Masters

Stains on a White Collar

*Fourteen studies in
corporate crime
or corporate
harm.*

*Edited by
Peter Grabosky and
Adam Sutton*



STAINS ON A WHITE COLLAR

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Fourteen Studies In Corporate Crime or Corporate Harm

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Foreword by Chris Masters

THE FEDERATION PRESS

Published in Sydney by
The Federation Press
101A Johnston Street
Annandale, NSW. 2038

In association with
Bow Press Pty Ltd
208 Victoria Road
Drummoyne, NSW. 2047

National Library of Australia
Cataloguing-in-Publication entry

Stains on a white collar: fourteen studies in
corporate crime or corporate harm.

Bibliography.
ISBN 1 86287 009 8.

1. Commercial crimes — Australia — Case
studies. 2. Corporations — Australia —
Corrupt practices — Case studies. 3. White
collar crimes — Australia — Case studies.

I. Grabosky, Peter N. (Peter Nils),
1945- . II. Sutton, Adam Crosbie.
364.1'68'0994

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Cover designed by Hand Graphics
Text designed by Steven Dunbar

Typeset in 10 pt Century Old Style by Midland Typesetters, Maryborough
Printed in Australia by Griffin Press
Production by Vantage Graphics, Sydney

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FOREWORD

Australia can no longer afford the lazy greed of the corporate criminal. But when we search for the face of the faceless men who steal from us, we begin to see our own reflection. The third party car insurance fraudster is more inclined to be a fellow motorist than some high-flying banker.

The fact that we can identify the villains, point the finger at them, 'dob them in', if you like, signifies the arrival of a new age. It is no longer a case of them and us, the them is us.

There is a new mandate to bring the corporate criminals to book. The hard part is identifying the culprit. In my work as an 'investigative journalist', I have specialised to some extent in the subject of police corruption. What occurs to me is this is a refreshingly uncomplicated crime. The bent copper is a social evil but at least the offence is obvious. The media reports, with consistency, these obvious crimes. We are not so concerned about the less obvious ones.

I once attempted to report on bank robbery from the other side of the counter. I discovered that bank managers and bank employees were responsible for a large and as yet unknown number of offences. Once detected, the banks were likely to cover up rather than publicly expose the offenders. To do so would cause the public to lose confidence. But we pay anyway. The banks simply pass on the cost to the consumer. I suspect electronic fraud in banking causes an even greater cost. The potential for the computer criminal behind the counter to plunder our accounts is certainly there. Automatic Teller Machine fraud is a big problem and more a problem for us than the banks. If you read the small print you will see you will probably be held liable should your account be pilfered by a young white-collared computer wizard.

The working class criminal, to his credit will in the vernacular, 'put his hand up'. The gaols are full of these people partly because they are more likely to accept their fate. The corporate criminal is not a practised confessor.

This book doesn't stop with the thief. The corporate criminal, by neglect or outright irresponsibility can also contribute to loss of life. More recently I worked on the subject of asbestos related diseases in Australia. I learned we have the worst record for mesothelioma deaths of any country in the world. Mesothelioma is a particularly vicious form of cancer which attacks the lining of the lung and causes painful and inevitable death. It seems there are two reasons for the high incidence of this disease in Australia. The first is the substance which causes the disease, asbestos. The second is a more serious epidemic of secrecy.

There is overwhelming evidence that the knowledge that asbestos is harmful has been with us for decades, if not centuries. Yet mine and factory managers appeared to err on the side of profit when imposing safety standards. They put dollars before men's lives.

As this book points out, Industry executives rarely have contact with cancer patients. They are somewhat like the WWI bomber pilots who pressed the button, watched the flickering lights below and turned for home. Their failure to protect the workers; their guilt in covering up the dangers in the workplace has left the most shameful stain of all.

The safety officers who allowed the mine managers to clean up before the Inspector's visit. The theatre sister who turned a blind eye to yet another unnecessary operation have all helped shield the corporate criminal. All too frequently I have seen the investigator in the Australian Federal Police or the Health Department, cast the file into the Too Hard Basket. They are dedicated to a quiet, untroubled life. Why would a lowly paid officer of the Fraud and Overservicing Division take on one of the most powerful medical practitioners in the land?

So we all have a role to play in stripping the protective barriers away. I wonder whether a new age may bring us to the recognition that the tall poppy syndrome is a myth and there is little cause to take pride in the fact that we are not a nation of doblers.

CHRIS MASTERS

INTRODUCTION

Companies in Australia, like people in general, are capable of performing good works and of doing great evil. Australian industry provides employment, produces goods and services which significantly enhance the quality of our lives, and otherwise contributes to a level of material well-being that makes Australians the envy of most of the world's population. And yet some Australian companies, large and small, are capable of causing great harm. They steal, in amounts which can only be described as massive. While they may not intend to do so, they poison, kill and maim.

The victims of corporate crime are not only those who suffer the direct consequences of a company's criminal act. In addition to workers, consumers, creditors, investors and taxpayers, the burdens of corporate crime are also borne by those honest businessmen and women who suffer competitive disadvantage at the hands of their colleagues. Ultimately, the image and the legitimacy of the entire system of Australian enterprise are tarnished by corporate crime.

It is the goal of this book to make a modest contribution to a greater degree of corporate responsibility by demonstrating some of the ways in which Australian industries engage in harmful conduct, and by illustrating how companies themselves, and society in general, respond to incidents of criminal or of questionable corporate behaviour. Ask the average Australian what image the term "crime" invokes, and he or she is likely to respond in terms of murder, rape, robbery, break-ins or drugs. There nevertheless exists an entirely different world of criminal behaviour. And the costs of this activity are staggering.

According to the Australian Government's Draft White Paper 1985¹ annual revenue losses from tax evasion exceed \$3,000 million with an even greater loss through tax avoidance schemes. The

Australian Medical Association itself estimated the cost of fraud and overservicing by medical practitioners at \$100 million a year.² Hundreds of Australians die, and thousands more are injured in the workplace each year, in many cases because their employers violated laws relating to occupational health and safety.³ The discharge of toxic substances into air, soil or water may cause inestimable harm, the full dimensions of which may not become apparent for years. People are killed or injured by dangerous or defective products. And as a result of price fixing, people pay thousands of millions of dollars more for goods and services than they would under free market conditions. Corporate affairs commissions around Australia are deluged with cases of companies in liquidation which are unable to pay their creditors more than 50 cents in the dollar. The principals of many of these companies incurred debts which they had neither the hope nor the expectation of paying.

Despite the prevalence of corporate crime in Australia, public awareness of its dimensions seems limited. At the same time, such opinion survey data as exist indicate punitive community attitudes toward corporate crime.⁴ Scholarly attention has only recently begun to focus on corporate crime, and the literature remains thin. This collection provides descriptive accounts which illustrate the kinds of harmful conduct of which Australian companies are capable, and the difficulties faced by governments (and citizens) in controlling corporate misbehaviour.

Earlier narrative accounts of incidents or patterns of Australian corporate misconduct include the two volumes by Timothy Hall⁵ and four cases of complex company fraud compiled by Sutton and Wild⁶. In addition, Fisse and Braithwaite⁷ include four Australian case studies in their book on the impact of publicity on corporate offenders, and Hopkins⁸ reviews a number of prosecutions under the Trade Practices Act. These works, and the present collection, follow in the overseas tradition largely inspired by Sutherland⁹. Among the more valuable examples of this genre are Geis'¹⁰ essay on the heavy electrical price-fixing conspiracy of the early 1960s, Knightley et al's¹¹ monograph on the thalidomide disaster; Cullen, Maakestad and Cavender's¹² review of the Ford Pinto manslaughter case, Vaughan's¹³ study of the Revco medical fraud, and Mintz's

book on the Dalkon Shield¹⁴. More general discussion of industry-wide misconduct have been published by Braithwaite¹⁵ on the pharmaceutical industry, Carson¹⁶ on the off-shore oil drilling industry, and Brodeur¹⁷ on the asbestos products industry. Recent collections of case studies include those of Hills¹⁸ and Mokhiber¹⁹.

While a number of the cases involve indisputable criminal conduct on the part of the companies or their agents, some do not. Others concern corporate behaviour which at worst, may entail tortious liability. The reality or threat of considerable harm, however, characterises each case. It is hoped that this range of cases might shed some more light on the adequacy of the remedies which are available to individuals and governments, and might serve as a catalyst to law reform, where appropriate.

The criminal law as it applies to corporate conduct is at times flexible, at times ambiguous. In the domain of environmental protection, industries may be exempted entirely from criminal or civil liability for pollution by Act of Parliament. In the area of company law, precisely what constitutes a true and fair account is unclear. Among the more important Australian studies tracing the development of laws relating to business conduct are Hopkins's study of the *Trade Practices Act*²⁰ and Creighton's discussion of occupational health and safety policy in Victoria.²¹

The criminal law as it exists is not immutable. Indeed, the history of the criminal law is replete with examples of behaviour once permissible which was subsequently prohibited, and of behaviour once subject to savage penalties but now entirely within the bounds of law. There is a substantial body of overseas scholarship addressing those factors, organisational and environmental, which contribute to the occurrence of corporate crime.

ORGANISATIONAL factors are those which pertain to a company's structure, its decision-making processes, or its internal information flow. It has been suggested, for example, that decentralised organisations, whose top management are unable to exercise fully informed oversight, are more likely to offend than those companies which have a "flatter" organisational structure. Hopkins provides an excellent discussion of the organisational antecedents of corporate crime in Australia.²²

A common characteristic is the distortion of information

transmitted from lower echelons to top management. Information favourable to the interests of a corporation flows freely in an upwards direction.²³ On the other hand, adverse information may be minimised or muted altogether.²⁴ Senior executives may thus be unaware of an impending crisis until it actually occurs.

ENVIRONMENTAL factors, on the other hand, are those economic, political, financial and industrial circumstances within which a company conducts its business.

Among the elements which may contribute to corporate misconduct is poor financial performance. A company with declining profits may be more likely to cut corners than a company performing well. One would also expect to see more misconduct by companies in highly competitive industries. Clinard and Yeager, in their study of corporate crime in the United States, found that offending companies were drawn disproportionately from three competitive industries—automobiles, pharmaceuticals, and petroleum, but found no association between company profitability and criminal conduct.²⁵

The cases in this book describe acts which are neither crimes of passion nor crimes of need. Only a minority—those involving fraud—appear to have been based on a calculated intent to do harm. A number of others, however, show a blatant lack of concern for life and property. Some of the largest corporations in Australia have demonstrated a callous disregard for the well-being of their employees, and for the health and safety of the Australian public.

It is convenience, not necessity, which produces this disregard. The pursuit of profit can blind people to likely consequences of action. To meet or exceed a sales quota or production deadline can become a single-minded goal. Under such pressures, cutting corners or taking risks may become not merely tempting, but standard practice. And so it is that corporate crimes are committed.

Another environmental factor which bears upon corporate conduct is the regulatory setting. When the likelihood of detection is not great, and the probability of punishment, given detection, is low, the incentives to cut corners are even greater. Overseas studies of business regulation suggest that most regulatory officials do not regard themselves as law enforcers, preferring instead to use conciliatory and persuasive techniques.²⁶ Recent research by

two contributors to this volume reveals distinctly similar patterns.²⁷ The vast majority of Australian business regulators prefer the gentler means of friendly persuasion. The case studies which follow suggest that government agencies must share responsibility for much of the corporate crime which occurs in Australia. From occupational health and safety to insurance regulation, case after case suggests that regulatory authorities have failed in their role of protecting the public.

These studies shed considerable light on the circumstances behind regulatory failure. In some, the law is unable to address harmful corporate conduct. In others, the penalties available at law have been inadequate. In others still, the legal apparatus may be sufficient but the enforcement agency may be co-opted by the industry which it oversees. Alternatively, the agency may be crippled by inadequate resources, by administrative incompetence, or by political forces.

It is generally accepted in the common law world that corporate offenders are treated with greater leniency by courts than are conventional "street criminals".²⁸

In Australia, criminal penalties for offences relating to the disposal of hazardous chemical wastes have been criticised by a parliamentary inquiry.²⁹ In the area of consumer protection, the leniency of penalties imposed and indeed, of the statutory maxima available, have been cited as insufficient to justify the cost of a criminal prosecution.³⁰ A survey of the major business regulatory agencies of Australia revealed that in the rare event that criminal penalties are imposed, they tend to be limited to trivial fines.³¹

Some of the cases which follow illustrate that Australian governments often lack the political will to confront corporate misconduct and that regulation is essentially a charade, with businesses allowed to do largely as they please. This freedom enjoyed by Australian enterprise may be explained in historical terms by the traditional affinity of business and government in Australian society, and more immediately, by the fact that business holds the balance of power in contemporary Australian politics at both Federal and State levels. A simple declaration of confidence (or lack thereof) by business organisations can affect the outcome of an election. Under conditions of economic uncertainty, the party

leader in Australia who threatens business does so at his or her peril.

The selection of cases for inclusion in this collection was not random. Admittedly, this will limit our ability to generalise from the observations made in the chapters which follow. But hopefully, it will not prevent us from achieving some improved understanding of the nature of harmful corporate conduct and the way in which Australian governments respond to it.

A number of principles guided us in the selection of cases for this collection. First we sought matters where harm inflicted or potential harm was serious, involving actual or imminent death, serious bodily injury, or substantial financial loss.

In addition, we have included a variety of harmful corporate behaviour. Further, we selected cases from as many different governmental jurisdictions as possible. In some respects, we were not entirely successful. The fact that four cases address occupational health and safety issues in New South Wales may be less than ideal. But the cases are compelling, each for a different reason, and New South Wales, where one third of the Australian workforce is employed, constitutes a regulatory jurisdiction of great significance.

Another criterion was whether the cases occurred in the relatively recent past—recent enough not to have been forgotten. On the other hand, given the glacial pace at which Australian legal processes operate, we have run the risk of selecting some which may not have been finalised at the time the manuscript went to press. In these cases, even if the entire story may not yet have been told, we felt that there was enough of a tale to tell to warrant inclusion.

It might be argued by some that the cases in this book are morbidly sensational, and do not reflect the typical standards of Australian business. We would sincerely like to think so. But the harmful practices in question were not unprecedented and, as some of the cases reveal, Australia is by no means free from similar corporate behaviour today.

If anything, our selection of cases reflects a bias in favour of the more visible and better publicised event. It remains to be demonstrated, that other frauds, tax offences, and violations of occupational health and safety standards are qualitatively different

from those reported here.

The presentation of each case has been based on a standard framework. Each chapter begins with a description of the corporate conduct in question, and extent of the harm caused. This includes an assessment of the extent of death, injury or property loss resulting from the incident, whether it occurred through negligence or through premeditation, and whether it was essentially the work of an individual or of a collectivity.

The second part of each chapter discusses the circumstances giving rise to the corporate behaviour under review. We seek first to identify aspects of the company and its economic environment which may have had a bearing on corporate conduct. We then seek to identify any defects in the law or its administration which may have facilitated the commission of harm. Some regulatory regimes with responsibility for oversight of the company's operations may have been moribund or incompetent. Alternatively, the laws may have been inadequate for dealing with the corporate misconduct in question.

The third section of each chapter focuses on governmental response to the incident. A decision to act against a company may be prompt and automatic, or may be taken only in response to political pressure. Here we identify the means by which the harm in question was detected, and how the law was mobilised in consequence. This involves a discussion of those investigative procedures which were used, and the decision to use criminal sanctions, to resort to civil or administrative remedies, or alternatively not to act at all. Impediments inherent in the processes available at law are also accorded attention.

The fourth part of each chapter focuses on the outcome of the legal process. Some cases resulted in criminal prosecution. In such cases we summarise the verdict and penalty imposed. Where action taken was civil or administrative, the outcome of the matter and damages or costs assessed against the company are discussed.

The fifth and final part of each chapter summarises long-term consequences of the case. It reviews any changes in corporate organisation and practice which may have taken place as a result of the matter, as well as any changes to the structure or administrative procedure of the responsible government regulatory

system. Ultimate legislative changes are also summarised, as well as reforms brought about to the civil and criminal justice systems.

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vigorous chairmanship of Victorian QC Frank Costigan, however, the inquiry soon took on its own momentum. From the earliest months, it was clear that there was more to deal with than union corruption.

The Painters and Dockers Commission eventually found itself delving into an immense range of matters. In addition to the tax evasion work—which directly or indirectly resulted in losses of hundreds of millions of dollars in tax revenue—Costigan's (1984) final reports encompass such diverse issues as drug importing and trafficking, SP bookmaking, kidnapping, laundering of funds and social security fraud.

A separate inquiry had meanwhile been undertaken by the Victoria Corporate Affairs Office.¹ Under investigation by inspectors P. McCabe and D. Lafranchi were Navillus Pty Ltd and 922 other companies. But the real target was Brian James Maher, a Gold Coast businessman who allegedly had arranged the buying and selling of corporate structures as tax evasion schemes. According to the inspectors, Maher's activities had involved more than 3,000 companies, and to investigate them all, the inspectors eventually needed special investigators' powers in Queensland and New South Wales. Their final view was that at a conservative estimate, loss to Federal revenue from Maher's activities alone had been over \$200 million. Losses would have been even higher if avoidance from "legitimate" schemes promoted by Maher were taken into account.

How Maher gained control of these massive sums of money and rose from humble beginnings to become a "millionaire gambler and colossus of the tax avoidance industry" is a fascinating tale. It is important, however, not to ignore a less colourful but nonetheless important chain of events—namely the ways the Australian courts established a frame of reference for tax avoidance operators.

Analysis of these legal decisions leads inevitably to the conclusion that rather than being the architects of tax avoidance, people like Brian Maher merely were "middle men" exploiting opportunities that business and the professions had presented them. Before delving into Maher's humble beginnings, a brief glance into the rarefied echelons of High Court and Federal Court decisions is necessary.

Chapter One

BOTTOM OF THE HARBOUR TAX EVASION SCHEMES

Adam Sutton

The 'Underworld' is only too close at hand when Australia's Big Business needs to hoodwink the Taxman. The conventional criminals play a "brokerage" role for the wealthy and influential interests.

Frank Costigan uncovered the link when he began probing the Painters and Dockers Union in the Royal Commission into the Activities of the Federated Ship Painters and Dockers Union. He soon realised as the inquiry got under way in late 1980 that executives and members of the union were being used as "bogus" or "straw" directors of companies involved in tax evasion—companies already stripped of their assets and destined to be dumped.

Painters and dockers were chosen because they were prepared to enter into deals without too many questions being asked. Moreover the promoters of these schemes felt that taxation and other authorities would be reluctant to press reputed "standover men" for details of their commercial affairs.

Nothing could have seemed less likely to cause problems for the Australian business establishment than the 1980 inquiry announced soon after a series of *Bulletin* articles on racketeering on the Victorian waterfront. It was viewed by many as an attempt by conservatives to embarrass their Labor opposition by exposing some of the seamier aspects of the union movement. Under the

**SLUTZKIN, CURRAN, HENNESSY AND MALONE—
THE LEGAL BASIS FOR BOTTOM OF THE HARBOUR**

McCabe and Lafranchi identify four test cases: *Hennessy v Federal Commissioner of Taxation* and *Malone v Federal Commissioner of Taxation* (1975) 24 FLR 241; *Slutzkin v Federal Commissioner of Taxation* (1977) 140 CLR 314 and *Curran v Federal Commissioner of Taxation* (1974) 131 CLR 409 as the foundations upon which Maher's tax schemes, however shakily, were erected.

All were major setbacks for the Taxation Commissioner. In each case, taxpayers had taken part in sophisticated transactions which they claimed entitled them to tax exemption. The Commissioner had argued that the court should set aside these artificial manoeuvres on the ground that they had no substance. In each case, the courts decided in the taxpayer's favour. In essence, they stated that the Commissioner had no right to make substantive judgment on whether or not particular transactions had any "real" basis other than tax avoidance. Instead the Tax Office should confine itself to determining whether the letter of the law had been obeyed.

McCabe and Lafranchi identified these cases as critical for Australian tax law in the 1970s. In essence, they established that:

- If shareholders sold companies which had accumulated large profits and had become liable for taxes, they could not be held personally liable for these taxes—even if the company subsequently evaded them—as long as the sale was at "arms length" and the former shareholders could argue they did not know what was going to happen (*Hennessy; Malone; Slutzkin*), and
- Any taxpayer who could establish that he or she was engaged in share-trading could manipulate company shares virtually at will to generate tax deductible losses (*Curran*).

The decisions also massively restructured the Taxation Commissioner's role. Henceforth the Tax Office could not make substantive judgments about whether an individual or company

had been engaging in tax avoidance, but must confine itself to checking whether the letter of the law had been obeyed. By announcing that laws were to be interpreted in a legalistic, literalist way, the courts seemed to be issuing an open invitation to promoters to “try their luck” on tax avoidance.

Generous judicial interpretation of the tax laws was not the only factor which helped facilitate “bottom of the harbour” practices. Equally important were the demoralised and inept performances of authorities such as the Taxation Office and the Commonwealth Crown Solicitor’s Office, which allowed entrepreneurs like Maher to carry on unchallenged for years. These deficiencies have been well documented in the Costigan report², and by special Commonwealth prosecutors R. Gyles and R. Redlich.^{3,4,5,6&7}

The worst example was the Western Australian branch of the Crown Solicitor’s Office, where Costigan discovered that one legal officer deliberately had delayed acting on a prosecution by concealing documents from a prosecution brief in a bottom drawer for five years. This was after his predecessor had dithered for three years over preparing this key test case—even though the Taxation Department had presented him with a “competent and diligent” report, backed by a QC’s opinion that charges should be laid. Perhaps most amazing of all, however, was the fact that a third lawyer in the same department had consented to his wife’s acting as a secretary, and handling mail, for “straw” companies involved in the very scheme the Crown Solicitor’s Office should have been prosecuting. Also with her husband’s knowledge, this woman had been running an escort agency which understated income to avoid tax, and which was alleged to have provided the Perth telephone number of the Crown Solicitor’s Office in advertisements.

In Costigan’s view, all these activities should have been prevented by relevant supervisors, and the Office had been grossly negligent.² The Australian Taxation Office also came in for strong criticisms⁷ from the Royal Commission⁸ with Redlich and Giles also unhappy with the organisation’s secrecy and lack of co-operation with other investigators and its apparent reluctance to initiate prosecutions or pursue test cases.

To place Maher’s activities in cultural and historical perspective, it is clear that minimising tax is an Australian tradition. Most

established companies have an extensive record of legitimate (but nonetheless substantial) tax avoidance. The outstanding example is the Vestey organisation. At the height of its activities, this privately owned group controlled 30,758 square miles (79,663 km²) of cattle country in the Northern Territory. Despite controlling the largest privately owned multinational in the world, and as Britain's richest family with assets of \$1,000 million⁵, the Vestey Corporation always had been reluctant to pay even minimal tax on their extensive Australian profits. For at least 15 years—between 1937 and 1952—they enjoyed complete exemption from tax on income in the Northern Territory. This was achieved by exploiting a loophole in relevant Federal legislation. To encourage industry, the government had enacted laws declaring that income derived directly from primary production undertaken by a resident of the Northern Territory would not be subject to tax. The term resident was not specifically defined in the legislation, and by taking the matter to the High Court the Vestey Corporation was able to ensure that, although its members did not live in Australia, it nonetheless could enjoy tax-free status.⁵

Of course, "residency" was just one of the aspects of law the Vestey family exploited to minimise tax. The family, with holdings in some 27 countries, has been a pioneer in massive tax avoidance by multinational companies⁹. This raises the second issue: how Maher's alleged activities compared in scale with other forms of tax minimisation in Australia. Recent research on transfer pricing¹⁰, which comprises just one aspect of large-scale tax avoidance, suggests that many multinational firms employ this tactic and that amounts lost in this way to the Australian government far outstrip even the worst excesses of "bottom of the harbour" schemes.

In essence, a transfer price is the amount which one subsidiary of a multinational company demands when "selling" its products to another subsidiary of the same firm in another country.¹¹ An example is the "price" for raw materials set by a mining subsidiary before passing it on for processing in another country.

Multinationals often work in small controlled markets, which render governments both in sending and receiving countries virtually powerless to determine what the real prices of products should be. The result is immense power for multinational

corporations. In effect, they can decide where tax should be paid, and not surprisingly they generally choose the minimum tax countries as the place where it should be surrendered.¹⁰ Losses from just one Australian instance of transfer pricing, well documented because of an (unsuccessful) court challenge, was about \$2.3 million.¹⁰ In 1983 Eric Risstrom, Secretary of the Australian Taxpayers' Association, argued that the Melbourne Branch alone of the Australian Tax Office loses over \$2,000 million each year from transfer pricing (*National Times*, Jan 9-15, 1983). Even more dramatically, Senator Peter Walsh while in Opposition claimed that the total tax loss to Australia through transfer pricing would be up to \$4,000 million a year. In light of such figures, Maher's activities almost seem trifling.

A side effect of such massive and systematic avoidance by the largest companies is, of course, that both the authority of law and the morale of law enforcers can be severely weakened. Moreover, an expectation is created that other sectors of society should be able to become "part of the action". This raises the final important issue to be considered: the social environment surrounding the "bottom of the harbour" activities and the extent to which Maher was responding to, rather than creating it. It is impossible to comprehend the proliferation of tax avoidance activities without reference to authoritative cases such as *Curran*, *Slutzkin*, *Hennessy* and *Malone*, which gave the go-ahead to even the most artificial schemes as long as they stayed within the letter of the legislation.

A direct result of these decisions was immense growth in desire among professionals—and by the small and medium-sized business sectors—to take part in tax avoidance. One indicator was a burgeoning in the number of corporations on state registers. Between 1968 and 1981, the Victorian Corporate Affairs Office alone saw more than three fold growth in companies registered from 48,502 to almost 150,000.

THE CAREER OF BRIAN MAHER

Brian Maher was born in the 1930s, son of North Queensland sugar cane farmers. After education in Cairns, his first job at 16 was as a canecutter. First official documentation of his business

activities is a 1961 record of a conviction for false pretences while working for the *Queensland Police Journal*. However, Maher's initial important experience with commerce came in Sydney. After moving there while still in his 20s, Maher was able to find financial backers and opened a used-car yard.

A run of luck began in 1964, when Maher won \$40,000 in the Opera House Lottery. This enabled him to pay off debts, and within a few years he had four yards selling 500 vehicles a month.

In 1968, Maher returned to Brisbane: first re-establishing himself in the used-car industry, then becoming involved with the stock market. By 1970, after successful trading in Poseidon shares during the mining boom, he established Finance and Guidance Pty Ltd.

Initially, this company specialised in publishing and marketing correspondence courses on the securities industry and the Stock Exchange, and providing tips on shares to purchase. Subsequently it moved into managing share portfolios for the public, and also dealt in shares and options on its own behalf.

In March 1971, after a downturn in the mining boom, Finance and Guidance went into liquidation and in July 1972 a scheme of arrangement was sanctioned by the Queensland Supreme Court. Shortly before these events, a special investigator had been appointed to inquire into the affairs of both Finance and Guidance and other Maher companies. The resulting report was far from complimentary: in the investigator's view, the operation had

... illustrated the ingenuity of the company manipulator and both Maher [and his co-director] were guilty of a conspiracy to defraud the investors.¹

Despite the strong comments, no action was taken by the Queensland Government.

Following Finance and Guidance's failure, Maher continued to diversify—this time into the home loans area. On 4 May 1972, the Federated Housing Fund of Australia Limited was incorporated. This and companies it controlled constituted a mutual home loans group: people were encouraged to pool their investments with the object of eventually receiving a mortgage from this pool at very low rates of interest. Once again, however, it was alleged that the

directors of the company, rather than clients or shareholders, were the main beneficiaries. By December 1972, the investigator's powers had been extended to allow inquiries into the Federated Housing Fund. He found that the group:

... was designed to give substantial interests to the directors and their associates. The directors, their nominees or associates would have netted \$1,300,000.¹

The investigator also argued that formation of the company had been in contravention of the *Building Societies Act*, and that it should be wound up. Efforts by the Crown to implement this recommendation were, however, rejected by the Queensland courts—an outcome which Maher and his associates claimed as vindication for this approach.

Perhaps more important than "vindication", however, was the experience and contacts gained from those ventures. Finance and Guidance's receivership and subsequent scheme of arrangement, organised by one of Brisbane's leading chartered accountants and tax avoidance experts, had been particularly instructive. It demonstrated the value of corporate structures—whether for tax-loss schemes or the distribution of excess profits. By the end of 1972 Maher had decided to re-establish Finance and Guidance in a new field—as a dealer in companies—and to use techniques developed by his former adviser as a model.

Success was not immediate. Maher's first attempts to buy companies, treat them to reduce tax liabilities, then sell them, resulted in losses. Only when he simplified procedures, and began buying and selling companies without the intervening "treatments", did this new business become profitable. The new strategy enabled Maher to offer clients a ready-made "package", whereby they retained almost all of their firms' assets and profits, but were relieved of the corporate shell and associated tax liabilities. For the scheme to succeed, though, buyers for the old company structures had to be found. At this point Lloyd Faint, a former associate of Maher's from the Brisbane used-car industry, entered the scene.

Faint became the key in a recruitment network which extended

as far as Wollongong and Melbourne, and sent a stream of people to Brisbane to sign papers and become the nominal directors of companies. Those used were not confined to painters and dockers and known criminals, but included labourers, debt collector agents and sales people. Many appear to have been chosen on the sole basis that their lifestyle would make them difficult to trace, and at least one states that he was advised to provide false details when signing documents. Nonetheless, a number were located and interviewed. The ensuing transcripts suggest a group with minimal education and income, lured by the prospect of an expenses paid holiday in Brisbane plus cash in hand. With practically no idea of the reasons for what they were doing, these unlikely "directors" tended to treat the whole episode either as "another job to be done" or as pure farce: (all following page references are to McCabe and Lafranchi¹).

"I was offered \$1,000 to do that job, all expenses paid, and I jumped on a plane and that was it. I was paid to do a job."
(p 48)

"If you have not a cent on you and someone offers you \$1,000 you do not say 'no'." (p 171)

". . . He said that everything will be sweet; 'Don't worry about it'. He said, 'Everything is fixed.' He said, 'All you have to do is sign the things and leave everything to me. This bloke is a wizard. You have nothing to worry about. Everything will be sweet'." (p 177)

". . . I don't ask questions. I never ever have. I find that being a painter and docker it was always the healthiest way, so I never ask questions." (p 177)

". . . One [cheque] was for \$74 million. I liked signing that one. That was a good one to sign. I used to play nonchalant. I used to play really nonchalant and cool." (p 154)

For McCabe and Lafranchi, the key question was whether Maher

himself had controlled this system of sham corporate transfers, and had been aware that the people located by Faint lacked the substance to be *bona fide* purchasers. Maher claimed that he had known nothing: it was not his business to be concerned with the backgrounds or finances of buyers. Faint, on the other hand, asserted that Maher had held the reins at all times, and had been under no illusions that the companies were being dumped. For several reasons, the investigators tended to believe the second version.

One reason was that throughout this association with Maher, Faint had lacked separate office accommodation and the other trappings of independence, and all signing of corporate transfers, etc, had been in Maher company offices. Another was that according to corroborated testimony, funds from transferred companies had continued to be channelled back to the Maher organisation even after it had ceased to be the nominal owner. Finally, McCabe and Lafranchi point out that relations between the Maher group and purchasers had not always been at "arms length", as Maher had claimed. A humorous example was when one of the "purchasers" happened to be an attractive woman. After flying to Brisbane and signing "the first cheque of her life"¹ for \$1.6 million, she was shown over a boat and taken to dinner by one of Maher's partners. Despite the close acquaintance, the man still claimed he had found no reason to doubt that she was a genuine buyer. At a more prosaic level, McCabe and Lafranchi provided evidence that at least one of the purported purchasers had been working as a commission agent for the Maher organisation shortly before acquiring companies worth millions of dollars. The man's working history alone should have alerted Maher to the fact that he lacked the financial backing to be involved in such a major transaction.

The Costigan Report itself provides a fascinating description of how an investigation of crime on the waterfront evolved into an inquiry into Australian taxation law and its administration:

"It was in the early months . . . that the extent of the tasks became apparent. Perhaps the first moment of real light occurred one morning in the Fitzroy Court. A witness was giving evidence in relation to the activities of a company said to be engaged

in ship repairing. Subsequent investigations showed that not one dollar had been earned in that activity; nonetheless it was full of interest, involving classic racketeering and on any view right in the centre of my terms of enquiry. The witness had some documents, he said; not in court but back at the office. Would he mind, I politely asked him, if I adjourned for a short time while he returned to his office to collect them and bring them back into court. I offered him the assistance of one of my solicitors and a Federal policeman. He could hardly decline such an offer. The documents were provided just before lunch. I should tell you that prior to that morning I had not seen signs of money exceeding \$5,000 or thereabouts. Imagine my surprise to find in the files a cheque for \$1.5 million. Two or three minutes later I found an application by an associate company to the Reserve Bank to bring into this country from Lebanon, \$4.5 million. It didn't really seem to fit in with ship repairing. I decided to look more carefully at this associated company. It had a bank account in a distant suburb in another State. The bank vouchers were subpoenaed. I found that in the three months some \$250 million passed through that account. It was one of a dozen such accounts throughout Australia.¹²

Publication of the McCabe-Lafranchi and Costigan disclosures provoked a national scandal. The Fraser Government was subjected to withering criticism from the press and from Opposition benches for presiding over such cynical exploitation of Australia's taxation system. Special prosecutors were appointed and criminal charges were heralded. Deputy Crown Solicitors' offices were subject to further investigation, and reform of the taxation system was promised. The election of the Hawke Government in March 1983 increased the momentum of change.

On 4 October 1984 in Brisbane, Maher, Donnelly and Faint were committed for trial on 15 Federal and six State conspiracy charges involving more than \$100 million in tax revenue. Faint, who pleaded guilty and received a two-year sentence, was the main prosecution witness during subsequent proceedings against his former partners. The trial of Maher and Donnelly began on 7 May 1985. Initially, the case seemed to run against the prosecution: after 60 days of

evidence and further weeks of intense legal argument, the judge directed that 15 counts of conspiring to defraud the Commonwealth be heard as one charge, and that three of the State charges be subsumed into one general charge. Several weeks later and a total of 5 months after the trial had begun, Maher and his former colleague were found guilty on one count of conspiracy to defraud the Commonwealth and one count of conspiring to defraud a named company. Maher was sentenced to two years and nine months' imprisonment on the first charge, and five years on the second to be served concurrently. In July 1987 the High Court of Australia set aside the conviction and sentence on the second count. Donnelly, who had undertaken to make restitution of \$1.4 million, received two years and three months on the first charge, and two years nine months on the second, to be served concurrently.¹³

In imposing sentence, a Queensland Supreme Court Judge described Maher as "the dominant figure" and mind of a massive and sophisticated fraud.

In light of this denunciation, the complexity of the trial, and the fact that recoument from "bottom of the harbour" schemes already totals some \$460 million (*National Times*, 16 October 1985), it is easy to fall into the view that Brian James Maher was Australia's first "criminal genius". It is clear, however, that Maher was simply a symptom, rather than a prime cause, of the patterns of tax avoidance that occurred during the 1970s.

Reforms initiated in the aftermath of the "bottom of the harbour" disclosures provide an indication of the extent to which more effective enforcement might have restricted the damage caused. Such measures included the appointment of special prosecutors Gyles and Redlich by the Australian government and the establishment of a Director of Public Prosecutions in both the Commonwealth and Victorian jurisdictions.⁶ Working with a substantial taskforce established within the Taxation Office, these special authorities have made significant inroads both in bringing the main offenders to justice and in recouping at least \$460 million in taxes lost during the 1970s (*Financial Review*, 16 October 1985).

Despite these successes however, it would be naive to conclude that simply ensuring greater efficiency in the enforcement and prosecution arms can provide all the solutions. For all the undoubted

effectiveness of such persons as Gyles and Redlich, they worked in a vastly different environment from the one prevailing when "bottom of the harbour" schemes first appeared. By the time they were appointed, tax evasion had become such a public scandal that governments, and the court system itself, faced a crisis of legitimacy if it were not resolved. This in turn meant they could be supported by far more effective and far-reaching legislation than had been available during the 1970s.

Most important in this respect was the *Taxation (Unpaid Company Tax) Assessment Act*, introduced by the Liberal-National Coalition in 1982 and aimed specifically at recouping tax lost in "bottom of the harbour" schemes. Almost unprecedented in this field, it was retrospective. This meant that even schemes which had obeyed the letter of the law during the 1970s now were rendered invalid.

In passing this Act, Federal government exercised a power with respect to Curran, Slutzkin and other schemes which had been denied to enforcement agencies. It made the substantive decision that even though perfectly legal, such schemes nonetheless were artificial manoeuvres rather than legal commercial transactions and therefore should be disregarded. As pointed out earlier, it is essential that such decisions be made to ensure that legislation outlawing tax avoidance is effective. However, even though the government was acting in a situation where its very existence was under threat, introduction of the *Taxation (Unpaid Company Tax) Assessment Act* was both belated and surrounded in controversy. The Fraser Government had announced as early as 1978 that there would be a crackdown on tax avoidance but not until 1982, with an election looming, did it gather the resolution to act.

Such indecision confirms how deeply entrenched in Australian society is the principle that laws affecting business should be enforced and applied with emphasis on formalism, consistency and predictability. More than anything else, this insistence that the letter of the law should apply, rather than the legislators' substantive intent, has tied the hands of enforcement bureaucracies and helped precipitate decline in morale and efficiency. As long as these beliefs and ways of acting are so deeply ingrained in Australia's social fabric, the capacity for effective regulation of

Australian business will be profoundly compromised.

Brian Maher was exploiting deep-seated biases in Australian society. As long as those persist, there is always the possibility that his spirit will rise again.

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Chapter Two

THE DEMISE OF TRUSTEES EXECUTORS AND AGENCY CO. LTD

Peter Grabosky

Widows, orphans, and quadriplegics were among the victims . . . but it all began from what seemed a good idea to the trustee company. Tempted by the property boom of the '70s, the Trustees Executors and Agency Company started investing tens of millions of clients' dollars in large development projects.

But the good idea turned out to be disastrous. It devastated thousands of people and shook to its foundations an industry based on principles of trust and safe practice.

Trustee companies have a long history in Australia. With the social and economic maturation of the colonies there arose a real need for specialised financial institutions to administer the estates of widows, orphans, and other dependent persons. Before the mid 19th century, the administration of trusts was left to individuals. But persons commanding the requisite competence and integrity to fulfil these responsibilities were not numerous. The cost of negligence or dishonesty on the part of a trustee was inevitably borne by the beneficiary. In the event of a trustee's death, or indisposition, the cost and inconvenience of securing a suitable replacement constituted a further imposition on the estate.

Traditionally, trustee companies were regarded as rock-solid,

enjoying a reputation for stability equal to, if not greater than, banks. They were closely regulated by governments, restricted by law to making only the safest investments, with their fees fixed by regulation. They enjoyed statutory protection from takeovers, to ensure that control of the company could not pass into the hands of those whose motives might not be in the best interests of beneficiaries. Because of the respect and trust placed in trustee companies over the years, they attracted investments from a variety of interests in addition to the traditional widows and orphans. Many solicitors, for example, would place their clients' deposits with a trustee company pending settlement of real estate transactions. Similarly, victims of catastrophic accidents who had received large lump-sum damages or insurance payments would often invest these funds with trustee companies.

The first such institution in Australia was the Trustees Executors and Agency Company (TEA), founded in Melbourne in 1877. It was in every sense an institution. Its directors were pillars of the Melbourne establishment; among them were members of the boards of BHP, Mitsubishi, Westpac, CML, AGC and Uniroyal.¹ They included Sir Thomas Webb, former chairman of the Commercial Bank of Australia, Sir Robert Norman, former chief general manager of the Bank of New South Wales and Maxwell Stanley Mainprize, former general manager of the Colonial Mutual Life Assurance Society. The chairman, Alexander Ogilvy, a former senior partner of Arthur Young and Company, Chartered Accountants, was himself a director of 20 companies. Such accumulated wisdom seemed ideal for the oversight of a trustee company. By 1983, TEA had assets of \$150 million. In addition it was managing under trust approximately \$700 million in estate assets, \$200 million invested in its common funds, and a further \$1.8 billion in corporate trustee funds.² The company's motto was "I Go On Forever".

During the 1970s, the Australian economy entered a period of profound change. Inflation became a crucial consideration in investment decisions, and placed considerable pressure on trustee companies to diversify. Their traditional investment area was in government bonds, safe investments to be sure, but yielding a low rate of return. One alternative was to attract unsecured investments from the general public, and to take greater commercial risks, using

unsecured funds. So it was with TEA, whose management was tempted by the property boom of 1979–81. Tens of millions of dollars of clients' money and other borrowings were invested in large development projects, in anticipation of attractive capital gains.

What seemed like a good idea at the time, however, turned out to be disastrous. The property market began to falter in 1982 and a number of projects in which TEA had invested encountered cost overruns. These pressures compounded, and on Friday, 13 May 1983, TEA went into receivership. Liquidation commenced on 31 May; it was to be the largest liquidation in Australian history to date. The company thereafter carried the name TEA 1983 Limited (in liquidation).

The vast majority of those who had invested in special trustee accounts were protected. All but \$11 million of the \$700 million held in trust was secured. However, some 7,500 other clients of TEA, mostly small depositors, were left as unsecured creditors, their accounts frozen indefinitely. Many of those left hanging, so to speak, had consciously opted for a risky alternative, and had put their money in unsecured funds. Others may have misunderstood company brochures, and believed their investments to have been secured. In any event, some \$93.5 million was owing. Among the creditors were widows, orphans and quadriplegics, who faced an agonising wait until the liquidators would determine how much of their investment might be left. Sixteen million dollars in shareholders' funds were lost. Among the unfortunate was the Fraud Squad Investment Club of the Brisbane CIB, Queensland Police, which held 200 shares. Beyond this, public perceptions of trustee companies and their management were profoundly dampened. The image of financial institutions in general was tarnished.

In going into receivership, the directors:

... opened wounds that will take decades to heal; they damaged their own business careers irreparably, wiped out the jobs and prospects of scores of employees; they devastated thousands of people—widows and orphans—who had placed their trust in a company (which boasted of its permanence) and they shook to its foundations an industry which is based on principles of trust and safe practice.³

The responsibility for managing a trustee company, or any other company, rests with its board of directors. The duties of directors are specified at common law, and are affirmed in the national *Companies Code*. Responsibility for the day-to-day administration of a company rests not with its board of directors, but rather with its chief executive. It is the role of a board of directors to formulate general company strategy, and to oversee its implementations by management. The directors' function is that of a watchdog rather than that of an administrator.

Company directors are held to two basic duties at common law and by the *Companies Code*. Under the "good faith" provisions they are to act in the interests of the company, and to avoid conflicts of interest. Section 229(1) of the Code provides that "an officer of a corporation shall at all times act honestly in the exercise of his powers and the discharge of the duties of his office".

In addition section 229(2) provides: "An officer of a corporation shall at all times exercise a reasonable degree of care and diligence in the exercise of his powers and the discharge of his duties". Penalty for breach of this provision is a fine of \$5,000.

Civil liability also attaches to breaches of either of these two general duties. Whether or not a criminal conviction has resulted, the company may recover an amount equal to any loss occasioned by a director's misconduct. It may also recover an amount equal to any profit made by the director as a result. Because of their special role, directors of trustee companies have a duty at common law to act prudently. The Victorian *Trustee Companies Act*, moreover, made trustee company directors liable for wilfully improper dealings with funds held in trust.

Despite the statutory provisions, the precise standards to which directors are expected to adhere remain vague. In the absence of grounds for suspicion, directors are free to trust company officers to perform their duties honestly.

Nevertheless, directors are liable if a company contracts unpayable debts, or if they make any material omission from statements or reports relating to their company's affairs. The chairman of one of TEA's competitors, in what might be read as an implicit criticism of TEA's governance, said:

When it was a less complicated world it was possible for directors to look upon a directorship as an accolade, a kind of civil award. It's not on these days. I don't believe a fellow should be a director of 10 or 11 companies. I don't believe that that's the thing that should be allowed. Directors should be efficient and hard working when sitting on boards, rather than simply making a habit of it.⁴

The rigour with which boards (most of whose members serve on a part-time basis) oversee the activities of the managing director, or chief executive, will vary from company to company. In some organisations they will be highly deferential, automatically ratifying the managing director's decisions. In others, they will take a more active role in decision making. Although the TEA board were far from novices or amateurs in the world of finance, they appear to have conformed more to the deferential model. This may in part be explained by the fact that the majority were retired and might well have lost some of their business acumen.

The managing director to whom the TEA board deferred was a young, energetic executive named Peter Bunning, a mere 40 years old at the time of the collapse. He joined TEA in the early 1970s, and was appointed to the position of General Manager in 1975 at the age of 32. Bunning became Managing Director in 1979. Among the changes which Bunning introduced was the merging of trust funds with a general operating account, a most unorthodox procedure for a trustee company. It was later alleged that \$11 million had been transferred from personal trusts into an unsecured cash pool.⁵

Just as the distinction between trust funds and general operating funds was blurred internally, so too were the various investment opportunities offered to the public. TEA operated on two levels. On the one hand, it functioned as a regular and proper trustee company, managing estates and settlements, and investing the funds in authorised trustee securities. But it also accepted deposits from the public which it invested in property development. Moreover, it was apparent that TEA placed its trust funds for short terms on its own money market. This stood in direct conflict with the common law principle that a trustee must not profit

personally from the trust under his control.⁶

By virtue of its status as a trustee company, TEA was not required to issue a prospectus. Many investors were under the impression that any and all investments with TEA were trustee-backed. But the fine details of investment conditions were not spelled out by the company's brochures. Overtures were made to solicitors' offices in Victoria and interstate in an effort to attract investment funds from solicitors' trust accounts. One such invitation referred to investments in real estate "which conform in all respects with the requirements of the NSW Trustee Act".⁷ It could be argued that unwitting investors may have incorrectly read this to mean that their accounts would be secured.

The vulnerability of TEA was not apparent to either the public, the trustee industry, or perhaps even to TEA's board. At the most recent general meeting of TEA, the chairman had given a guarded but optimistic report in which it was claimed the company's property involvement had contributed substantially to its profitability. Only weeks before the company went into receivership, the managing director advised the Trustee Companies Association that the company's risk exposure was not significantly affected by the depressed property market, and that strict liquidity requirements were being observed.⁸

There were, nevertheless, a number of decisions taken by or with the knowledge of the board during the months before the collapse which appear in retrospect to have been, at the least, inappropriate. In 1981-82 TEA began to sell its government and semi-government securities, and to invest in real estate. Among the latter were the ill-fated Quay, a luxury apartment building at Sydney Cove which failed to attract sufficient interest on the part of purchasers.

It was alleged that TEA had made a loan to Kelly Power Pty Ltd, a company with which a TEA director was associated. When asked, the board's chairman was unable to recall whether the board had authorised such a loan.⁹

On Monday, 7 March 1983, TEA announced a loss of \$1.1 million for the six months ended 31 December 1982. The accompanying directors' statement read:

... The group has traded profitably since 1 January 1983, and

subject to no further deterioration in economic conditions, the results for the second half of the year should be satisfactory.¹⁰

Later that month, Australian Ratings, a credit rating service, issued a "credit watch" report on TEA. The report suggested that the company appeared to be undercapitalised.

The company's debt-equity ratio, the ratio of borrowing to shareholder's funds, was 900 per cent—far greater than that of any other trustee company.¹¹ The Trustee Companies Association of Australia and New Zealand, an industry body, wrote to TEA's Managing Director on 5 April, expressing concern at the adverse credit report and reported loss, and requesting reassurance that the company's affairs were in order. A week later, he replied:

... It is a fact that outside our trustee operations we have invested part of our shareholders' funds in joint venture real estate ventures. It is true also that some of these have not been as successful in recent times as in the years up to June 30 1982.

The board has acknowledged this in its half-yearly statement but, put in its proper perspective, the loss in that half-year is small indeed.

I assure you also that strict liquidity requirements are laid down by the board and complied with, with a generous margin to spare ... (Correspondence, P Bunning to R L Simmons, 12 April 1983); published in *Australian Financial Review*, 26 May 1983.

On 20 April, the directors of TEA declared a dividend of 10 cents a share.

When asked, after the collapse, when he first had become aware of the company's financial difficulties, the board's chairman replied that the problems only became apparent at the end of April, little more than a fortnight before the company was placed in receivership.¹² Two directors had resigned from the board as the company began to falter—one on 26 April and one on 12 May; their reasons were not made public.

The lack of objective, consistently applied accounting standards

has been recognised for years as a factor which serves to facilitate, if not invite, white-collar crime. In the TEA case as well, "creative accounting" appears to have played a significant role. The company's liquidators disclosed that unrealised profits were brought to account, and that only by virtue of such paper profits did TEA stay in the black as long as it did.¹³

This also raises questions about the performance of the company's auditors. All public companies in Australia must submit to an annual review of their accounts by a registered auditor, independent of the company itself. In the case of TEA, the auditors were Arthur Young and Company, the old firm of board chairman, Alexander Ogilvy.

The function of an audit is to certify the correctness of a company's financial position as shown in its balance sheet, and to determine whether a company's accounts are properly drawn up so as to give a true and fair view of the profit and loss situation. A company audit serves as a safeguard against fraud, as well as against unintentional shortcomings in the company's accounting practices. Registered auditors are required to bring to the attention of corporate affairs authorities all breaches of law which they detect. In the case of TEA, the auditor's reports revealed no irregularities.

By Friday, 6 May 1983, Bunning, the Managing Director, and Ogilvy, the Board Chairman of TEA realised that the company was in serious difficulty. Together, they called on representatives of the merchant bank Hill Samuel for advice. The bankers began their investigation, and very quickly realised the gravity of the situation. The following Thursday, while their formal report was still in preparation, they advised TEA's directors that the company could not continue to borrow without risking breaches of the *Companies Code*. The directors, realising they could become personally liable for any debts incurred by a company of doubtful solvency, promptly opted to go into receivership. The decision was announced at a press conference the following day, Friday the 13th.

In the Victorian Parliament, the Opposition sought to criticise the government for its lack of regulatory vigilance. It was suggested that TEA's declaration of a dividend, after having reported a loss in early March 1983, should have sounded an alarm in the Attorney-General's Office. Premier Cain was chastised for retaining the

Attorney-General's portfolio in addition to his chief executive responsibilities. Implicit in this argument, however, is further criticism of the TEA board for its lack of managerial oversight.

The Hill Samuel report commissioned just prior to the company's collapse was less than flattering. It referred to:

... the extreme complexity of the underlying legal structures in a number of projects and the lack of supporting documentation and uncertainty on the part of TEA management of many aspects of the arrangements entered into.¹⁴

It has thus been suggested that members of the TEA board may have been either deliberately deceived, or negligently inattentive to their managerial functions, or both. It was not immediately apparent what consideration the board had given to the company's heavy borrowing and to its venturing into areas of risk unprecedented for a trustee company. What was apparent was that at the very least, even pillars of the Melbourne establishment were not sufficient to keep the company going.

Laws governing trustee companies were in a sorry state at the time of the TEA collapse. Despite the fact that the economy of Australia had long since become an integrated, national economy, state governments continued to bear responsibility for the regulation of trustee companies, as well as such other significant financial institutions as building societies, friendly societies, and state banks. Despite the fact that clients of TEA were drawn from around Australia, and the company had investments in various states, its operations were governed by the laws of Victoria. Victorian laws were far from adequate. As one commentator remarked, "the legislation is so poorly drafted it contradicts itself".¹⁵ No limits were placed on the borrowing of a trustee company, and common funds (pooled assets of various estates) could be invested with few restrictions.

By contrast, laws relating to sharemarket transactions were relatively sound. Sections 128-130 of the *Securities Industry Code* pertain to "insider trading". In order to maintain public confidence in Australian sharemarkets, persons in possession of non-public, price-sensitive information about a company are forbidden to deal

in the securities of that company. Without such constraints, insiders would be free to buy shares from unwitting vendors prior to the release of information likely to drive up the value of a company's shares, or to sell shares to unwitting purchasers prior to the release of bad news likely to cause the price of a company's shares to tumble.

Since all sharemarket transactions are public, it is relatively easy for the National Companies and Securities Commission or its delegates, the State and Territory corporate affairs commissions, to detect unusual fluctuations in the price of a company's shares, and to determine the identity of a vendor or purchaser. Indeed, under the prevailing system of co-regulation, the monitoring of inexplicable fluctuation in share prices or turnover in shares is also the responsibility of local stock exchanges.

Proving that the transactions entailed *criminal conduct* is another matter, however. Because the legitimacy of Australian sharemarkets is at stake, section 129 of the *Securities Industry Code* prescribes severe penalties for insider trading—a fine of \$20,000 or imprisonment for five years, or both. Moreover, section 130 makes the insider liable to compensate the other party to a transaction for his or her loss, and liable to the company whose shares are traded, for any profit resulting from the transaction.

Despite unusually heavy trading in March 1983, and a drop in the price of TEA's shares from \$4.30 to \$3.50 within a week, the Melbourne Stock Exchange undertook no initial investigation. A further 20 cent drop in early May, combined with even heavier turnover was similarly unsuccessful in inspiring the co-regulatory attentions of the Exchange.¹⁶

When the company's insolvency became starkly apparent to the board, they took immediate steps to appoint a receiver. At the same time, they advised the Victorian Attorney-General's Department of the impending collapse. The Premier and Attorney-General, John Cain, asked the Trustee Companies Association if one or more of its members might be able to bail out or otherwise sustain TEA. It might be recalled that not long before, the Reserve Bank of Australia played a role in facilitating the takeover of the faltering Bank of Adelaide by the ANZ Group. No such rescue could be arranged in this case however.

Meanwhile, the Victorian Government, which had invested \$3 million with TEA shortly before, withdrew the funds immediately. Elders Finance had \$1 million invested with TEA at call, and withdrew it on the day TEA went into receivership. In the week preceding the collapse, more than 16,000 TEA shares changed hands on the stock exchanges of Sydney and Melbourne.

The Victorian Government's response in the immediate aftermath of the collapse was one of criticism. In a ministerial statement made on 31 May 1983, the Premier referred to "incompetent management", "wild investment practices" and "outright negligence". He accused the TEA board of not being frank with the Government, the Trustee Companies Association, or its shareholders, and intimated that breaches of the law had been committed.¹⁷

Later that day he told Parliament:

I have reminded the directors of this company of their obligations under the *Trustee Companies Act* and the *Trustee Act*. I have written to those directors to make clear their obligations. I have indicated to them that in my view it would be improper for them to change their financial position so as in any way to prejudice their obligations under these Acts.¹⁸

When TEA went into receivership, its bank accounts were frozen. Only then did it become apparent that trust funds had been merged with other moneys in a general operating account. Among the first challenges facing the liquidators was to distinguish trust moneys.

One of the Victorian Government's initial responses was to ensure that Victoria's other trustee companies were in good financial health. Records lodged by TEA's counterparts were examined closely. A number of other trustee companies were visited by inspectors, and their accounts analysed. Fortunately, TEA appeared to have been in a class by itself. Liquidators began to unravel the company's accounts and to plan for the payment of creditors. The National Companies and Securities Commission was directed by the Attorney-General of Victoria to investigate the case, but the resources made available for the purpose were criticised as inadequate.¹⁹

Soon after the collapse, the Victorian Government convened a

working party, chaired by John Finemore QC to undertake a review and revision of its law governing trustee companies. Interstate reverberations of the crash prompted a number of other state governments to undertake similar studies.

Directors of TEA were invited to attend a meeting of creditors and shareholders in September 1983 to discuss the company's collapse. None chose to be present, presumably because of the legal advice they had received.

TEA's shareholders, who might have had a cause of action against the company's directors, had not taken any significant civil action at the time of writing. But criminal charges were eventually laid. The company's Managing Director, Peter Bunning, and Leigh Jamieson, a taxation accountant and former consultant to TEA, were convicted of charges under s. 176 of the *Crimes Act* (Victoria) on 24 June 1987 in the Supreme Court of Victoria. Those charges arose out of payments made by Jamieson to Bunning totalling \$27,225 which were alleged by the prosecution to have been paid and received as secret commissions. Bunning was sentenced to nine months imprisonment and ordered to pay \$27,225 to the liquidators of TEA. Jamieson was sentenced to nine months imprisonment and fined \$30,000. Jamieson appealed, without success, to the Victorian Full Supreme Court. An application for special leave to the High Court was refused.

On 2 September 1987, Bunning pleaded guilty to four charges of false accounting under the *Crimes Act* and was sentenced in the Supreme Court to three years imprisonment with a minimum of six months, concurrent with the sentence he was then serving on the secret commission charge. Other charges against Bunning, and his family company Petane Holdings Pty Ltd, were withdrawn.

The sentencing judge described the statutory maximum penalty of two years' imprisonment for offences relating to secret commissions as "totally inadequate" and spoke of "a community revulsion against crimes of this nature committed by businessmen, in positions of trust".

Shortly after, the Attorney-General of Victoria announced his intention to increase the maximum sentence for secret commission offences under the *Crimes Act* from two years to ten years.

In June 1986 Howarth Peterson, CBE, a Queensland lawyer and

former treasurer of the state Liberal Party, became the second director of TEA to face criminal charges. Peterson, after being informed by the Australian Broadcasting Tribunal that he had a conflict of interest, resigned from the TEA board the day before the collapse. He had been associated with a law firm which withdrew \$600,000 of clients' funds from TEA a few days earlier. The summons, issued on instruction by the Queensland Justice Minister, alleged that Peterson made improper use of information acquired by virtue of his position.²⁰

In September 1986 charges were laid against five others, including the former chairman, Mr Ogilvy, and the former company secretary, L M Reid. The former chairman, Alexander Ogilvy, was charged with:

- Ten offences against section 85(1) of the Victorian *Crimes Act*, which deals with the publication of misleading or deceptive statements or accounts;
- Four offences against section 124(1) of the *Companies Act* which deals with a director's failure to act honestly and with reasonable diligence;
- Four offences against section 163(1) of the *Companies Act*, which requires directors to present to each annual general meeting of the company a financial statement which gives a true and fair view of the company's state of affairs;
- Four offences against section 229 of the *Companies (Victoria) Code* which requires an officer of a corporation to act honestly and to exercise a reasonable degree of care and diligence in the exercise of his powers and in the discharge of his duties;
- Four offences against section 276(1) of the *Companies (Victoria) Code*, which requires company directors to cause to be made out profit and loss accounts which give a true and fair view of the profit or loss of the company.

In December, 1988, three former directors of Stirling Properties

Ltd, a joint venturer with TEA in property development projects, were found not guilty of charges relating to the falsification of accounting records.

The most significant legislative outcome of the TEA collapse was a reform of the law relating to trustee companies. The working party convened in the immediate aftermath of the collapse recommended a number of changes which were subsequently adopted later in the year in the *Trustee Companies (Amendment) Act*. Among other things, this placed certain restrictions on borrowing from the public, and required trustee companies to make quarterly statutory declarations disclosing the full and true financial situation of the company. In addition, the Attorney-General of Victoria was empowered to request information from a company, to call for an audit, or to order a review of the company's operations. Trustee companies were henceforth prevented from investing their common funds in highly geared property developments, and certain classes of high risk securities. Whether there remains an inherent conflict of interest between a trustee company's shareholders and the beneficiaries of estates which it administers is still a subject of debate. Shareholders seek higher profits and dividends, while beneficiaries seek security and efficient administration of their estates at least cost. It has been argued that public companies should not act as trustees at all.²¹

A year after the collapse, the Victorian Parliament enacted further measures through the *Trustee Company Act 1984*. These included the creation of a reserve liability fund, to which all trustee companies are required to contribute. Designed to protect vulnerable beneficiaries from future collapses, the fund is to be drawn upon in case of liquidation or receivership. The Act further sought to discourage conflicts of interest by prohibiting the taking of commissions or profits from trust estates in relation to transactions with parties related to the trustee company.

As the sixth anniversary of the TEA collapse passed, the legal process had yet to run its course. Prosecutions against Ogilvy and Reid were set down for 17 July 1989 in Melbourne Magistrate's Court.

The liquidation of TEA continued. The deficit, over and above shareholders' funds, amounted to approximately \$8 million. By

August 1985, liquidators had returned 81 cents in the dollar to TEA's unsecured creditors. It was estimated that the final payout would reach 85 cents. Meanwhile, TEA's trustee business was taken over by the ANZ Bank.

Investigations undertaken by the NCSC took two years to complete, and resulted in five separate reports. By mid-1989 none had yet been made public. It appears to have been the consensus of the Ministerial Council on Companies and Securities—the Attorneys-General of the Commonwealth and States—that disclosure might prejudice court proceedings.

Speculation regarding the motive for continued confidentiality ranged from a desire not to prejudice impending prosecutions, to a desire not to offend the Melbourne establishment. The delay in bringing the matters to trial seemed consistent with the glacial pace of corporate affairs prosecutions in Australia. The tantalising question of whether there is one law for the privileged and another for the common person may be answered in due course. Meanwhile, it might be instructive to rely upon the comment of Mr Justice Beach:

One cannot imagine more shameful behaviour on the part of a trustee company and its directors. I find it difficult to envisage a situation calling for stronger condemnation. (*The Age*, 7 June 1983, 1).

Notes

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18. Ibid, 4710.
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Chapter Three

THE COLLAPSE OF BISHOPSGATE INSURANCE

Peter Grabosky

Andrew Stathis was a high-flier. The son of Greek migrants who grew up in Cowra, Stathis was educated at Sydney's exclusive Cranbrook School where he was chairman of the Cranbrook Adventurers' Club. His greatest adventures—and misadventures—lay ahead.

Stathis made a small fortune from real estate in the boom of the early '70s. He was building a name for himself at high-stake card games and prominent race meetings. In 1979 he was charged under the name of Andreas Stathopolous with conspiracy to cultivate Indian hemp. He was committed for trial in 1980 but remained free on \$20,000 bail.

Within two years he was a member of the elite insurance company owners, buying a company from no lesser firm than the old and proud P&O. Nine months and \$19 million later Stathis had fled both the industry and the country. Banks, brokers, public companies: all had been victims of Andrew Stathis. How could a high-rolling gambler on bail for an alleged drugs offence hoodwink the business establishment?

The early 1980s were not the best years for the general insurance industry in Australia. Among the less satisfactory performers was Bishopsgate Insurance Australia Ltd—a Melbourne company founded in 1965 and owned by P&O Australia.

According to the annual reports of the Commonwealth Insurance Commissioner, Bishopsgate recorded an overall after-tax loss of \$336,905 in the year ended 31 December 1981, and \$660,745 the following year.¹ There is evidence that the parent company, P&O, subsidised the operations of Bishopsgate, at least during 1981-1982. Not surprisingly, P&O decided to divest itself of its ailing subsidiary. The chairman of P&O Australia announced the sale with pleasure at the company's 1982 annual meeting.

Under the economic circumstances prevailing at the time, P&O was fortunate to find a buyer. Indeed, Bishopsgate had been on the market for the previous 18 months. The proud new owners of Bishopsgate were six companies—controlled by or acting for Andrew Stathis.

Why Stathis was tempted to venture into the insurance business at such an inauspicious time was not immediately apparent. He was, to say the least, an unusual entrant to an industry not noted for its flamboyance. P&O had no sentimental attachment to Bishopsgate; the parent company was concerned simply that the prospective purchasers honoured the terms of the negotiations and paid the appropriate money.

To this end, it made inquiries in the banking industry regarding Stathis's financial reputation, and received favourable responses. No inquiries were made about a Mr Stathopolous, however. Control of Bishopsgate passed to Stathis in late January 1983, on payment of \$1,000,000 deposit on a total consideration of \$4,814,000.

During the first six months of 1983, Stathis quietly but progressively shifted about \$12 million of Bishopsgate's assets from Australia to overseas accounts—\$2 million of this was later brought back to Australia to finance an increase in Bishopsgate's capital, while other funds were returned, after a complex chain of transactions, to pay the remaining debt to P&O.

In August 1983, Stathis quietly left Australia and disappeared. The company was placed in liquidation, with approximately \$19 million in funds unaccounted for. And more than one Sydney bookmaker was left holding substantial debts.

At the time of the collapse, there were approximately 5,000 claims outstanding by Bishopsgate policyholders. The extent of their losses were not immediately apparent, but for some, it was potentially

catastrophic. Such uncertainty is, after all, what insurance is supposed to protect against.

In some cases, Bishopsgate had arranged reinsurance policies with overseas reinsurers, in effect insuring itself against losses arising from an excess of claims over premiums. But some of these overseas reinsurers in turn placed the policy with Bishopsgate, thereby negating the benefits of reinsurance. Some 50,000 individual and business policyholders were advised by the provisional liquidator to take out alternative insurance cover as soon as possible. Workers' compensation policy holders were more fortunate—their insurance was guaranteed under various State provisions, at least up to the date on which the company went into liquidation.

When Stathis bought out Bishopsgate, he made significant changes to its operating procedures. From the outset, he assumed personal control of the company's finance and investments. On 27 January 1983 his fellow directors appointed Stathis executive director responsible for these functions. This role had previously been performed by the merchant bank BT Australia. Stathis advised the company secretary and managing director that their responsibilities lay elsewhere than the area of investments, and excluded them from all subsequent decisions.

His apparently secretive nature, combined with this functional rearrangement, concealed his actions initially. Corporate headquarters were shifted from Melbourne to Sydney, and meetings of the board of directors, which had been held regularly on a monthly basis, were no longer convened.

The company's managing director, frustrated by the radically different management style introduced after the change of ownership, and by his exclusion from all matters concerning finance and investment, resigned on 12 April 1983. Resignations of the company secretary and two senior Melbourne staff followed in July. They may have been uneasy about Stathis's management practices, but they registered no formal objections.

There is no evidence of complicity on the part of Bishopsgate staff. Senior officers were shown monthly lists of what were ostensibly the company's security holdings, but these later proved to be false. Management was no longer able to identify independently where the company's assets were invested.

The March quarterly report to the Office of the Insurance Commissioner, based on data prepared by Stathis, was signed by the head office accountant. There were no requirements that the report be independently audited. The Office of the Insurance Commissioner requested corrections and revisions to the report, and an amended version was signed in June by the company secretary.

Stathis acted quickly and unobtrusively, before the reservoir of trust which he had acquired along with the company had evaporated.

If breaches of the *Insurance Act* or the criminal law were apparent to Bishopsgate employees, loyalty to the company and deference to its new owners prevailed. (Whether the company's directors acted with reasonable care and diligence might also be questioned.) Internal safeguards against corporate abuse were thus completely eroded.

The means by which Bishopsgate's funds were transferred overseas were fairly complex. On 4 February 1983, \$2 million were transferred from Bishopsgate through two Stathis companies to a brokerage firm in the United States as a deposit on gold futures trading. This, and additional funds of just under \$3 million were subsequently lost on the futures market.

A further series of transactions between March and July 1983 transferred an additional \$15 million from Bishopsgate to Stathis shelf companies, and to overseas accounts.

In one case \$4.5 million was transferred from Bishopsgate's funds held by a merchant bank, ostensibly for the purpose of acquiring publicly-listed shares in the US. Indeed, liquidators and New South Wales Fraud Squad detectives later identified 37 different transactions over the last seven months of Bishopsgate's existence. Some of the money was refunded from time to time to meet Bishopsgate's cash needs in Australia. The net fraud totalled \$18,550,000.

It appears that Stathis sought either to strip the company of its assets and shift them overseas, or to use Bishopsgate as a bank for gambling in the futures market.²

It might also be recalled that Stathis owed P&O approximately \$3.8 million for the purchase of Bishopsgate. His dealings in gold futures in early February 1983 may have been based on the

expectation of generating sufficient funds to pay P&O for the company.

With the apparently disastrous consequences of his futures trading, Stathis may have seen no alternative but to leave Australia with funds sufficient to provide for a comfortable retirement.

The insurance industry in Australia is fairly clubbish, and the rumours of new management practices at Bishopsgate began to circulate early on. Even though Stathis was an outsider to the industry, the response of his peers was limited to a privately raised eyebrow. To its ultimate embarrassment, the industry took no collective action to "blow the whistle" on Bishopsgate. There was nothing remotely resembling self-regulation within an industry noted for its resistance to government involvement in its affairs.

The basic justification for regulation of the insurance industry is to ensure the solvency of insurance companies. An insurance company which fails, whether by misfortune, incompetence, or design, leaves its customers without coverage and thereby vulnerable to catastrophic loss.

In Australia, there exist two distinct systems for ensuring the solvency of insurers. The *Life Insurance Act* 1945 applies to the life insurance industry, and the *Insurance Act* 1973 applies to the less specialised general (non-life) insurance industry, of which Bishopsgate was a member.

Although no life insurance company has failed in the past 40 years, insolvency in the general insurance industry is much more common. During the decade of the 1970s, 23 general insurance companies went into liquidation. Four of these were firms authorised under the terms of the *Insurance Act* 1973.³ Since 1978, general insurance companies in Australia have failed at the rate of about one a year. At least three of these cases involved alleged misappropriation of funds by company executives.⁴

Responsibility for overseeing of the general insurance industry rested with the Insurance Commissioner and his staff of 43, whose concerns lay almost exclusively with monitoring the solvency of the 197 general insurance companies authorised under the *Insurance Act*. The cost to the Australian taxpayer of this particular regulatory regime approached \$1.5 million in the year of the Bishopsgate collapse.

At the time Bishopsgate was acquired by Stathis's interests, regulation of the general insurance industry in Australia was relatively relaxed. Despite the existence of formidable powers of investigation provided by the *Insurance Act*, internal company procedures lay beyond the scrutiny of the Insurance Commissioner, who remained ignorant of the exclusion of the merchant bank BT Australia from investment decisions, and of the transactions through which Bishopsgate assets were shifted offshore.

Regulation of the general insurance industry in Australia contrasts sharply with overseas models. In the United Kingdom, the Secretary of State may prescribe investments which he regards as "likely to be undesirable in the interests of policyholders". Insurers are required to notify the authorities of any such investment which they make; such information may then be published. Moreover, the Secretary of State may forbid insurers to make certain investments or may require insurers to realise all or part of certain investments.

Even stricter investment controls prevail in the United States. State insurance laws often explicitly forbid certain investments, and authorise others. Those favoured include government bonds and other fixed value, high quality investments. Those prohibited include investments of a speculative nature.

The United Kingdom also imposes strict controls over people who may be directors or managers of insurance companies. Without the consent of the Secretary of State, a person may not become a managing director, chief executive, or controller of an authorised insurer. If the Secretary of State cannot be satisfied that any of these is a fit and proper person, the company's authorisation to conduct business can be denied or withdrawn.

By contrast, there were no barriers (other than financial) to entering the Australian general insurance industry. This contrasts markedly with other domains of prudential regulation, the most restrictive of which is the banking industry. Banking licences are issued only after strict scrutiny of directors and management, and after authorities are satisfied that operational management proposals conform to rigid criteria.

Life insurance companies in Australia were subject to a different regulatory regime from general insurance companies. Despite the

absence of formal restrictions on entry to the life insurance industry, the Life Insurance Commissioner discouraged acquisition of life companies by inappropriate interests. The means employed were informal, and tend to involve fairly intense questioning of prospective purchasers regarding operational plans, with an indication that company operations would be under close observation.

In the absence of similar scrutiny of entrants to the general insurance industry, the Stathis interests were able to acquire Bishopsgate without attracting attention. And so it was that a general insurance company, which had sustained net losses of more than \$1 million over the previous two years, could be taken over by interests with no previous background in the insurance industry, one of whom had briefly been declared bankrupt, and who was at the time awaiting trial for an indictable offence.

The massive transfer of Bishopsgate's funds overseas escaped official scrutiny. Under the exchange control regulations in force at the time, Stathis obtained routine Reserve Bank approval for his transactions. The placement of reinsurance by overseas reinsurers remained outside the jurisdiction of the *Insurance Act*.

Under section 52 of the *Insurance Act*, if it appears to the Insurance Commissioner that an authorised insurer is or is about to become unable to meet its liabilities or has breached a provision of the Act, the Federal Treasurer may formally appoint an inspector to investigate the affairs of the company. Powers of inspectors so appointed are substantial; they may (and even on reasonable grounds without a warrant) enter any premises, examine or take possession of any books on the premises, and may compel representatives of the body corporate to answer questions put to them, even when such answers may tend to incriminate the person. (Such answers would not be admissible in evidence against him or her in criminal proceedings, however.) Failure to co-operate with an inspector can lead to a fine of \$1,000 or imprisonment for three months.

Formidable though they may appear, these special investigative powers are rarely used, and were never invoked in the Bishopsgate matter. The annual report of the Insurance Commissioner for the year ended 30 June 1983 reported that no inspectors had been

appointed under this section of the Act for over three years.⁵

Bishopsgate appears to have first attracted the attention of the Insurance Commissioner following the lodgment of its obligatory quarterly return in March 1983. An amended version of the return was required, and this reached the Office of the Insurance Commissioner in June. The substance of these returns, in light of rumours which had begun to circulate around the industry, invited closer scrutiny.

An inspector from the Office of the Insurance Commissioner contacted Stathis in early July 1983 with a request to review the company's investment records. Even then, the inspector was armed only with general powers, and not the special powers under section 52. An appointment was arranged, but Stathis fled the country. Treasury also acted to stop the movement of funds offshore, but the assets in question had long since been transferred.

The Office of the Insurance Commissioner was not quick to defend its role in the Bishopsgate affair. When asked to comment on the case shortly after the company went into liquidation, it refused, on the grounds of the secrecy provisions of the *Insurance Act*, and the fact that the appointment of a liquidator removed the company from the auspices of the Insurance Commissioner.⁶ Indeed, section 126 of the *Insurance Act* provides for a fine of \$1,000 or imprisonment for three months for disclosing information acquired by reason of employment under the Act. The essential justification for a secrecy provision, however, is not to shield the Office of the Insurance Commissioner from public scrutiny, but rather to protect insurance companies in financial difficulties from a stampede of desertion by policyholders in the event that the companies' financial vulnerability became public knowledge. The implications of such provisions for informed consumer choice should be obvious, but that is another matter.

Subsequently, the Office of the Insurance Commissioner did issue statements, reminding the public that the *Insurance Act* was intended as a precaution, not as a guarantee against insolvency, and that in any event, the Act was not designed to prevent fraud.

It was also stressed that the limitations of the *Insurance Act* had been pointed out by successive Insurance Commissioners in their annual reports, and that neither the common law nor the

Companies Act was successful in preventing the misconduct in question.⁷

Implicit in this is criticism of police and corporate affairs authorities who might have been more attentive to the activities of a person free on bail awaiting trial on drug charges. Further inquiries to the Office of the Insurance Commissioner regarding the adequacy of its regulatory response to the Bishopsgate matter saw the secrecy provisions of the *Insurance Act* invoked yet again.

Andrew Stathis remained at large, and the likelihood of his ever returning to Australia seemed remote. No charges were laid against anyone else associated with the company. The liquidation of Bishopsgate put an end to the company itself and to any question of corporate reform.

Those apparently honest company officials who were present during its demise no doubt, with hindsight, have developed an appreciation of the symptoms of company stripping. But the real lessons to be learned from the Bishopsgate affair are to be learned by regulatory authorities.

Despite the ease with which Stathis transferred funds offshore, exchange control regulations have been even further liberalised since Bishopsgate, as part of the Commonwealth Government's deregulation of the financial industry. A reversal of this policy is out of the question.

The *Insurance (Amendment) Act* 1983, which had been introduced before the collapse, increased the maximum paid-up capital requirements and solvency requirements of insurers. The minimum paid-up share capital was increased from \$200,000 to \$500,000, and the minimum excess of admissible assets over total liabilities was increased from \$100,000 to \$1 million, or from 15 per cent to 20 per cent of premium income, whichever is greater.

Additional amendments provided for an expanded quarterly reporting system, including information relating to insurance and other business carried on in Australia and overseas. The penalty for failure to comply was raised to \$20,000.

Not long after the collapse, the Federal Government indicated that it might consider amendments to the *Insurance Act* designed to minimise the likelihood of future Bishopsgates. One of these would require that prospective insurance executives be "fit and

proper" people to be placed in such a position of public trust. Ironically, the Australian Law Reform Commission had only just recommended *against* such a provision, on grounds of administrative cost and anti-competitive impact.⁸

The Australian Law Reform Commission had, however, foreseen a need for greater solvency protections for the general insurance industry. It recommended that the Insurance Commissioner be empowered to require a general insurer to reduce its level of investment in particular areas. It also recommended the creation of a policyholders' guarantee scheme to protect the insured in the event of an insurance company's insolvency.

The Bishopsgate story would continue, as the company's liquidation was destined to be a drawn-out process. In 1985, it was estimated that the bulk of the dividend would reach creditors by 1990. Final payments would take an additional five years. Those creditors with access to reinsurance proceeds could expect a relatively high dividend, possibly 100 cents in the dollar. Those without such rights could expect a return closer to 29 cents in the dollar.

Proposals to reform the structure and process of insurance regulation in Australia appear to have been overtaken by the spirit of deregulation prevailing in Canberra in the mid 1980s. Despite repeated calls by the Insurance Commissioner for their introduction, greater constraints on investment decision making by insurance companies are regarded as distinctly unfashionable by 1980s governments of the day. More frequent auditing of company records is opposed on grounds of excessive administrative expense. Greater powers of information gathering, including mandatory notification of any change in the company's assets, ownership or directorship have been supported by the Insurance Commissioner, but opposed by industry.

Although the Commonwealth Treasury had conceded in a 1979 submission to the Australian Law Reform Commission that limitations on the public disclosure of financial information by insurance companies made it difficult for an insuring public to make discriminatory choices between insurers, there have been no serious initiatives to widen disclosure provisions.

Treasury maintains that given the ambiguity of accounting

standards, the public might actually be misled by some companies' returns. It has also been suggested that insurance companies, realising that their financial statements would become part of the public record, might not be as willing to make as full and frank a disclosure to the Insurance Commissioner as they would under the cloak of anonymity (not that the cloak of anonymity induced any candour on the part of Bishopsgate and its principals). The industry, of course, remains steadfastly opposed to further disclosure requirements.

So, too, does industry oppose a policyholders' protection fund, which would require companies to share the burdens occasioned by the few rotten apples or incompetents in the insurance industry. After twelve years of resistance, the industry finally dropped its opposition to a "fit and proper person" test, similar to that which had operated in the United Kingdom since 1974. While the Commonwealth Government appeared less resistant to this than to other proposed reforms, such provisions had yet to be implemented by the end of 1987, however.

Effectively, the Government had embraced a policy of deregulation bordering on the principles of *caveat emptor*. Two years after the collapse of Bishopsgate, it argued that total protection of policyholders against those who set out to defraud could never be guaranteed. In the words of the Minister assisting the Treasurer, Mr Hurford, "Insurance policyholders must adopt a critical and questioning approach when insuring". Mr Hurford did not indicate how this was likely to happen given the secrecy provisions of the *Insurance Act*.

What other reforms might serve to prevent future Bishopsgates?

It would be simple enough to require formal approval for the transfer of more than ten per cent of an insurance company's capital. The requirement that, in addition to annual audits, quarterly returns to the Insurance Commissioner be accompanied by an auditor's certificate would add perhaps \$16,000 a year to the costs of a company the size of Bishopsgate. Such a quarterly requirement could perhaps be waived in the case of long-established companies with proven track records, but maintained for newly acquired or marginal operations.

Similarly, insurance companies could be prohibited from

registering their assets in any name other than that of the company.

In addition, greater details could be required to be specified on the face of cheques or other negotiable instruments drawn on behalf of insurance companies regarding the account to which the proceeds are to be credited, or the purpose to which the funds are to be applied.

Despite the inherent merit of these and other counter-measures, their implementation by the Commonwealth Government seems unlikely.

Meanwhile, life in the insurance industry goes on. Four other insurance companies collapsed during 1984.

Beyond the 1983 amendments, there have been no dramatic departures from previous regulatory practice by the Insurance Commissioner. In general, the insurance industry is content with the system of regulation as it exists at present. When asked about his attitudes towards proposed regulatory reforms, a representative of the industry told the author, "You can write regulations 'til you're blue in the face. The best insurance regulation is an honest man".

POSTSCRIPT

Andrew Stathis continued to tempt fate, and without success. In October 1987, he was arrested by Greek authorities while in possession of 23 kilograms of heroin. As a Greek national, Stathis could not be extradited to Australia under the extradition agreement which exists between the two nations. He could, however, be prosecuted in Greece by Greek authorities on behalf of New South Wales or Australian Federal authorities. Given the seriousness of the charges he faced under Greek law, however, parallel prosecution on Australian charges hardly seemed necessary. Whatever the outcome, Stathis appeared likely to remain a prisoner in Greece for many years.

Notes

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Chapter Four

THE RUSSELL ISLAND LAND FRAUD

Adam Sutton

For Hugh Nichols, it seemed the chance of a lifetime. A huge area of land. Cheap at only \$110 an acre. And most important of all, outside local government boundaries.

Nichols, a Brisbane real estate agent, dreamed of building a holiday and retirement resort unhampered by red tape, health and planning approvals.

But that dream was to turn into a legal nightmare—and one of the longest and most expensive criminal cases in Australian history . . . the Russell Island conspiracy trial.

That \$3 million trial in the Queensland District Court collapsed when on Tuesday, 9 March 1983, 14 days after retiring to consider a verdict, one of the jurors fell ill. After medical advice, the judge announced that in view of the key role this juror had played, the trial had to be abandoned.

Its collapse caused considerable misgivings in the media and among the legal profession about the capacity of the justice system to cope with complex "white collar" cases.

Important though these issues are, however, they are not the only ones highlighted by this scandal.

At first assessment Russell Island may seem merely to have been a repetition of an age-old pattern of fraud: purchase, sub-division and resale at exorbitant profit, of poor quality land near a prime

location, using unscrupulous sales techniques and misleading advertising.

Closer analysis of the way the scheme developed, was investigated and prosecuted, however, presents a more complex picture. The fraud could never have assumed the dimensions it did without the compliance, if not co-operation, of key elements of politics and the bureaucracy in Queensland, and of the professional, commercial and financial sectors.

In recounting the Russell Island story, this chapter gives particular attention to the role these institutions played. The intention is not merely to identify how schemes of this type might in future be avoided, but to provide insight into issues central to Queensland—and Australian—society.

A key to putting Russell Island in its social context is to realise that far from being a scam from the start, it had its origins in a *bona fide* attempt at development.

Hugh Nichols began buying large amounts of land in the southern end of the island during 1968. Russell Island is just 25 miles (40 km) south-east of Brisbane and 20 (32 km) north of the Gold Coast. Although relatively close to these centres, the absence of road and rail links to the mainland meant that even in the late 1960s it remained a rural backwater, farmed by a handful of families. Nichols bought 1,340 acres (542 ha) and paid only \$110 an acre (half a hectare) freehold¹. Titles dated back to the only Lands Department survey ever made, in 1872.

Of course, the island also had its drawbacks. Since the original survey much of the land had deteriorated. Folklore has it that in 1901 a sandbar on nearby North Stradbroke Island, which shelters Russell Island from the Pacific, had breached. Tidal levels had risen. And by the time Nichols bought the land, about a third of the area covered by his titles had become outright swamp or was subject to tidal flooding.

As Gold Coast development has shown, however, such land can be “reclaimed”, and in any case there was ample dry land for development. So Nichols commissioned plans for his parkland-type resort.

Proposed allotments were from one-half to one acre each (one-quarter to half a hectare) with the poorer quality land subsumed

in recreation and common areas. A golf course, shops, an esplanade and even a small airport were included, and civil engineers were engaged to develop schemes for draining swamps and constructing a boat harbour.

The scope of these plans leaves little doubt that Nichols wanted to develop a major complex which would exploit and enhance Queensland's growing reputation as a holiday and retirement centre.²

Before doing so, however, he had to persuade the government to provide electricity and other infrastructure. And it was then the scheme went awry. Exploiting contacts with Parliament House staff, Nichols obtained an interview with Mr Wallace Rae, the Minister with the responsibility for electricity authorities, only to be told it would not be possible in the immediate future.

At one stroke, this put an end to Nichols's dreams of becoming a major developer. Without electricity, there was little hope of obtaining the further capital he would need. Having already committed himself to spending \$140,000 on land, Nichols faced severe financial embarrassment. According to accounts put forward in court, however, Nichols did not have to go far from Parliament House to find a way out.

Nichols is alleged to have had a crucial conversation with a backbench MP, who was soon to be travelling overseas on parliamentary business. The prosecution argued that during this contact a substitute plan for the Island was hatched.

Rather than going to the trouble and expense of a *bona fide* development, Nichols simply should subdivide all his holdings, including the waterlogged acres, into suburban-sized plots and sell them. The MP is said to have suggested that if his overseas fares and accommodation were paid, he could help by securing sales in Hong Kong and South-East Asian countries. Buyers in those places had been "brought up in paddy fields" and were clamouring for land in Australia. They could be induced to buy land in or near a swamp, and in any case might never see the plots they had bought. Even the worst quality blocks would seem cheap.

If such allegations are true—and it should be emphasised that although a former MP was charged, he subsequently was found to have "no case to answer"—they add a new perspective to Russell

Island. Rather than simply being a "con scheme" engineered by clever individuals, a picture of partnership between immediate beneficiaries and more reputable institutions seems appropriate.

This interpretation is further strengthened by reviewing what occurred after Nichols's visits to Parliament House. In implementing the ideas outlined above, he needed the help of a range of professional and commercial interests.

Foremost among these was the surveying profession. Early in 1969, Nichols engaged a surveyor, Victor Bromley Nichols, and gave him instructions to sub-divide the land into building blocks. If the surveyor—who, incidentally, was not related to the developer—had rejected the work on the basis of professional ethics, and had been confident that his colleagues would support him, this might have been the end of the Russell Island saga.

Instead Victor Nichols simply drew his client's attention to the poorer quality holdings, and suggested that these remain within parklands (*Courier Mail*, 6 November 1979). Of course, the objections were overruled.

Thereafter the surveyor did his best to carry out orders—although in some locations the swamp was so deep that accurate work was impossible. In all a total of 7,335 allotments were created, of which 2,493 (34 per cent) were subject to fresh or salt-water flooding.³

Success in the next step—registering the new sub-divisions—was dependent not just on professional assistance but on compliance from a government instrumentality. As mentioned earlier, Russell Island was, at this stage, outside local authority boundaries, and this meant that Nichols could deal directly with the Queensland Government's Land Titles Office.

Initially there were some problems. The Titles Office's staff surveyor, Mr Roy Henry, who inspected the island, was far from impressed. He later testified that in some places he could not even find survey pegs because the water was too deep, and that elsewhere there were sheer drops of 20-30 feet (6-9 m) between roads and the allotments to which they provided access.

In his report Henry forcefully put the view that much of the Russell Island land was worthless, and recommended that registration of the new sub-divisions at least be deferred.⁴ Nichols left it to his solicitors to smooth the way and, for reasons which have

never been disclosed, Henry's superiors overrode his objections.

The new sub-divisions were registered at the Titles Office, and Nichols and a sales team began selling Russell Island blocks throughout Australia and overseas.

An extensive advertising campaign, using a variety of media, was used to boost the sales effort. Thousands of households in Queensland, New South Wales, Victoria and South Australia were leafleted, and a video prepared for potential clients in Asia. Newspaper advertisements appeared in Brisbane, Sydney, Perth and Melbourne, real estate agents in those cities carried Russell Island in their books, and an "island estate" also was the subject of a radio campaign on Sydney's 2KY.

The theme of all this publicity was that, at last, the ordinary men and women in the street had a chance to buy their share of the "good life" on a tropical island paradise:

- Just north of Surfers Paradise
- Electricity, phone, shops, school, post office
- Beautiful views of Moreton Bay and other islands
- Reef fish
- Mudcrabs
- Oysters off the rocks
- No legal expenses
- Tropical fruit gardens, avocados, pawpaws, pineapples etc.

DON'T BE A QUEENSLANDER WHO MISSED

(*The Australian*, 4 November 1972)

If court transcripts and statements to police are to be believed, however, these advertisements were muted compared with the verbal claims made to people who were lured to the island by the offer of free inspection tours. They included statements that:

- Submerged blocks would be filled to a level of 3 feet
- Sealed roads and drains, a hotel, hospital, school, shopping complex, a marina and recreational centres were to be built

- Russell Island would soon be connected to the mainland by a causeway, a bridge and even a hovercraft service
- Boat harbours were being dredged.

None of these wishes had a hope of being fulfilled, but promoters made sure that visitors would be presented with ample signs of activity. Workmen were recruited to carry out token sand dredging, road cutting and grading—preferably on weekends when prospective customers would be inspecting. Often this “grading” involved removing up to 50 per cent of the soil from blocks already sold, and using it as filler for land still on the market. Sales people also made sure that the poorer quality swamp land was not “over-exposed”—even if this meant misleading clients about the actual block they would be buying.

The experience of a Randwick couple, Dennis and Patricia Gibbons, is typical. After receiving a leaflet and being impressed by its evocation of:

... magnificent water views, island atmosphere, beautifully undulating ... fishing, water skiing, surf beach 2 miles (3 km), shop, school, electricity, underground water, ferry ...

they took advantage of the free inspection offer and flew to Queensland in mid 1971. At the island they were shown three blocks on which their “dream home” could be built. These were well above the water mark on the side of a hill, and seemed a bargain at \$2,055.

Two years later, after completing payments and applying for a building permit, the Gibbons discovered that the allotments purchased were not the ones they had been shown. Instead they had invested in salt-water swamp, totally unsuitable for housing.

Such accounts leave little doubt that unscrupulous sales tactics—not to mention outright lies—by salesmen were important in making the Russell Island fraud a success.

But this should not obscure the roles played by other elements. If the mass media had required that the Russell Island claims be verified before being advertised, far fewer potential victims would have been attracted. From testimony of other purchasers, moreover,

it is clear that the finance industry and the legal profession also had an influence.

A point stressed to buyers was that the land "must be good" because reputable finance companies such as Custom Credit and Associated Securities (Qld) Ltd were prepared to lend almost all the purchase price. Buyers also were directed to "reliable solicitors" whose "searches" failed to reveal anything about which they should be warned. They were reassured by "valuations"—again by "reputable professionals".

Finally, constant speculation about the possibility of a bridge between Russell Island and the mainland, which the Queensland Government did little to discourage, lent further strength to the profit-making. Most allotments were priced at \$1,000 to \$2,000, and books subsequently seized by the Fraud Squad showed that in the first three years alone (i.e. 1971, 1972 and 1973) companies selling Russell Island land made profits of \$1.7 million. Gains in subsequent years, when the Gold Coast land boom reached its peak, would have been significantly higher.⁵

Police complaints files suggest there were at least two types of customer: young couples wanting eventually to make a home on the island and to work in Brisbane, and old people who saw it as a retirement destination. Few of these purchasers could be described as affluent or commercially sophisticated. Most intended to defer occupancy, and a significant proportion came from interstate or overseas, where consumer protection provisions generally were more stringent than Queensland's.

In light of such factors, perhaps it is understandable that they were easily victimised and took a long time to realise the deception. Fewer excuses can be made for State and local governments. Despite ample warnings they were loath to intervene, and as a result the scheme flourished.

Signs of official misgivings about Russell Island date back at least to 1972. In November of that year, Queensland Minister for Local Government—Mr Henry McKechnie—expressed concern at interstate and overseas advertising of the island.

Several months earlier the chairman of Redland Shire, the nearest local government authority, had protested about the nature and extent of sub-division and the way the island's foreshores were

being alienated.⁶ Perhaps prompted by these warnings, the Queensland Government moved in May 1973 to incorporate Russell Island within Redland's boundaries. This effectively barred further subdivision but it did nothing to inhibit the fraud already rampant.

Sales of swamp continued, and it was not until mid 1974, and publication of a dossier, *Russell Island—a Real Estate Development Rape*, that the extent of the problem became too widely known to be ignored.

The document had been compiled by Dennis and Patricia Gibbons, who after discovering their own predicament had investigated other purchases. It was circulated to politicians, local authorities and relevant government departments in Queensland, and by the end of 1974 had been forwarded to the Commissioner of Police. Confronted with such evidence, the Government authorised a Fraud Squad inquiry.

To Detective Sergeant P ("Vince") Mahony, the man selected for the investigation, Russell Island must have been a particular challenge.

At the time he was assigned to this case he already had a significant workload, and his health was delicate. Indeed, by April 1975, Mahony had been forced to take extended sick leave for a kidney transplant. This, and the pressure of other work, meant that not until October 1976 was he able to give his full attention to the land sales and their implications.

Then Mahony encountered yet another setback. Citing section 8 of the Queensland *Valuation of Land Act*, which safeguards the confidentiality of files, the Valuer General's Office refused to disclose information it had on Russell Island. The refusal, backed by a Crown law opinion that "... nothing learned in the performance of the Valuer-General's duties would be relevant [to a police inquiry]"⁷ meant that Mahony had to spend massive amounts of time in the swamps searching for pegs and identifying the physical nature of blocks. He also had to find and interview at least 150 complainants throughout Australia, and it was not until mid November 1978 that a report on Russell Island was completed.

The report outlined Mahony's reasons for suspecting that major fraud had occurred. It pointed out that there was already ample

evidence to charge salesmen with false pretences and related offences, but argued that it would be ludicrous to proceed against "front men" and ignore key individuals who had put the scheme together.

More work would be needed to sustain charges relating to this initial conspiracy, and not for the first time, Mahony made a plea for additional resources:

Unfortunately, I have not been able always to keep pace with the volume of work involved in this, and other, investigations. I have been involved in many other investigations simultaneous with this investigation, and on many occasions have had to act as officer in charge of this squad in the absence of the officer in charge. I have discussed the problem of keeping up with the volume of work and have requested assistance on numerous occasions, but although requests have been received with a deal of sympathy, the answer has always been the same, that there was no experienced staff available to assist me . . .⁸

Such forthright expressions of opinion are not common in a police force, and shortly after making them, the detective found his work coming in for close scrutiny. After reviewing the case, however, Mahony's inspectors could only endorse his views:

" . . . complaints arising from Russell Island development were so vast that no lone police officer should have ever been permitted or directed to endeavour to carry out an investigation of such magnitude alone. In fact several pairs of detectives should have been allotted to this enquiry".⁹

His superintendent went even further, arguing that in the light of the Valuer-General's lack of co-operation—an approach which could only make one wonder whether there are existent some latent and/or covert facts relating to the matter—the Minister for Police should be urged to request a royal commission. For various reasons, the request was never made. Mahony was left to soldier on alone, with the understanding that he should consult Crown law officers when he reached the stage of preparing a prosecution brief.

By this time, however, he had found a valuable ally outside the force.

For some while Mr Tom Burns, the shadow Minister for Lands in Queensland, had been receiving complaints about Russell Island. He had also begun to gather his own evidence, and to pressure the Government by means of questions and statements in Parliament.

On 23 January 1979, the Opposition foreshadowed an urgency motion, stating that unless legal action had started by the time the House resumed, it would identify a "former Cabinet Minister and former Liberal Parliamentarian" named in the Fraud Squad's report.

When the debate took place on 13 March, Burns was savagely critical of the surveying profession's activities both on Russell Island and elsewhere, and of the registration of the sub-divisions at the Titles Office. His remarks were endorsed unequivocally by the Brisbane *Courier Mail*, which stated in an editorial that "... the Attorney-General (Mr Lickiss), as Minister responsible for the Titles Office must answer Mr Burns's claims" (*Courier Mail*, 15 March 1979).

Despite those comments the Government's reaction still was to "wash its hands". The Premier, Mr Bjelke Petersen's response was that there was "insufficient evidence" for a prosecution, and that aggrieved buyers should take their own action to recover money. Nonetheless, total inaction was becoming too difficult to defend, and on 30 March 1979, the day after the Premier had made his statement, the Minister for Lands announced a Surveyors' Board inquiry.

It was to "investigate the surveying of allotments of Russell Island, particularly those made between 1966 and 1973, determine whether any registered licensed surveyor had been guilty of incompetence or illegal or unprofessional practice, report on any related measures the board felt should be brought to Parliament's attention, and consider what disciplinary action should be taken".¹⁰ As both Burns and the *Courier Mail* pointed out, such terms were far too restrictive to come up with the really important answers:

The inquiry may determine whether some surveyors on Russell

Island were incompetent or culpable but that is not the main issue and the Government knows it . . . the public wants to know how people were sold land which [the Minister] himself has described as “disgraceful”, who gained from the land, and why the development was allowed to proceed (*Courier Mail*, 21 March 1979).

Parliamentary and media calls for Government action did not let up and finally, in October 1979, charges were laid.

In all, 16 individuals were indicted for conspiracy, between 1 January 1968 and 1 October 1979, to defraud the public by inducing people to buy land at Russell Island. Those in court included Hugh Nichols, solicitors and valuers who had acted for him, and salesmen. Full statement of the allegations required almost 70 typed foolscap pages, and from the start, the committal and the trial itself promised to be a war of attrition.

Such expectations were fulfilled. All defendants obtained legal representation, with separate barristers acting on behalf of different groups of accused. Committal proceedings alone took more than 90 days, and by the time they were completed, seven of the accused had been released on the grounds that a *prima facie* case had not been established.

During the trial itself, legal costs for 8 defendants were met by the Public Defender’s Office, and Nichols was represented by Queensland’s leading QC, Mr Des Sturgess.

Counsel exploited every legal avenue to protect their clients’ interests, and hearings were interrupted by several applications to have the jury discharged for technical reasons. One appeal, relating to an accidental contact between police officers and jurors, had to be decided by the High Court of Australia.

An early breakthrough for the defence occurred when one of the accused was discharged on the technical grounds that even if he had been party to a conspiracy, it was distinct from one involving the others.

The remaining 8 accused had longer to wait: the trial lasted 20 months—a total of 316 sitting days—before being brought to an end by the breakdown of a juror.

On 1 April 1983, the Attorney-General, Mr Sam Doumany, issued

a three-paragraph statement that there would be no retrial in the Russell Island case.

The decision, announced after Parliament had risen for its winter break and at a time when newspapers were at minimum strength because of the Easter holiday, was deplored by the Opposition and the media (*Courier Mail*, 2 April 1983). Nonetheless it put an end to any possibility that those behind the scheme would be brought to justice in a Queensland court.

Abandoning the prosecution was not entirely the end of the story. A few days after his much-criticised announcement, the Attorney-General floated the idea of government assistance for Russell Island victims. The concept was taken up by a group of town planners at the Queensland Institute of Technology, who developed a proposal for compulsory reclamation involving all purchasers. Legislative authority, but very little expenditure, by the Queensland Government would be required. Cabinet, however, declined to play a role. It also overruled Mr Doumany's suggestion for financial compensation.

A few buyers took the Queensland Premier's advice and initiated civil actions. One was successful, but the victory was pyrrhic. No sooner were damages awarded than the vendor company went into liquidation.

Burns and Mahony did not relent in their efforts to ensure some justice and prevent a repetition of what had occurred at Russell Island. Queensland Hansard reveals the Member for Lytton (Mr Burns) continued to draw the Government's attention to dubious schemes in Moreton Bay and elsewhere, and to press for action. Also, Burns has tried, without much success, to have relevant professional bodies discipline the surveyors, lawyers and land valuers who played such a critical role in the scheme. So far the only person to have incurred any penalty is surveyor Victor Nichols, who, as a result of the Surveyor's Board inquiry, was fined \$250 each on two charges of unprofessionalism and incompetence. Nichols's practising certificate was not suspended or cancelled however: in the Disciplinary Committee's view the non-intervention of Government, which must have known what was happening on Russell Island, may have led Nichols to believe there was tacit approval for his activities.

Throughout the trial and after it, Vince Mahony continued to try to bring the perpetrators to book, and to keep the victims in the picture:

Dear . . . ,

Thanks for advising your change of address. The trial is still proceeding, and is not expected to finish until February or March. Unfortunately [X] has been discharged . . . He is now calling himself Sir [X], and has continued to trade in land. At . . . he has sold blocks for a couple of million dollars on the promise that all the normal services will be provided . . .

During a break in the trial I went to . . . to make inquiries, and [X] complained that I was harassing him. I no longer have the investigation, but I will be guiding the officer who has the file. The jury went over to inspect the land where your block is situated, but all but one of them refused to go in, as did the Judge and everyone except [X's] Counsel . . . [X's] Counsel said "X is too short" . . .

I will advise you of the result of the trial, although your man is no longer with us.

Yours sincerely,

Vince Mahony¹¹

Mahony died in October 1985 after several years of illness. In a press statement, Tom Burns remarked that his death probably meant the end of the Russell Island story.

Despite Russell Island, property speculation in the Moreton Bay area has continued throughout the 1970s and 80s (see postscript). Undoubtedly, the long-term shift of capital in Australia from manufacturing into the tertiary sector—and particularly into "sun belt" type development¹²—has fuelled this trend. So, too, have repeated government pronouncements concerning the possibility of a bridge linking Stradbroke and other islands with the mainland.

One of the most recent—a May 1984 call by Cabinet for private consortia to tender for construction rights—was, according to the Premier, a direct response to demands by conservationists that a bridge not be built:

The demonstration drew attention to the fact that nothing had happened, so we activated it today . . . I said we should call tenders. (*Courier Mail*, 25 April 1984).

Mr Bjelke-Petersen's worship of private capital and disdain for minority interests provide a fitting end-note for this chapter. More than anything, events outlined above are testimony to the havoc that a philosophy of unrestrained development can wreak, not just on business ethics but on professional, bureaucratic and political standards.

This Queensland case is by no means the only example of the impact speculative capital has had on Australian urban development¹³, but it provides unparalleled illustration of the ways modern entrepreneurs can ensure that others take the penalties for even their most ill-judged gambles.¹⁴

Institutions such as mass-advertising, limited liability and the authority of the professions—which Nichols and his colleagues exploited—are entrenched aspects of Australian society, and only governments can prevent their abuse. Consumer victimisation has no respect for state or even national boundaries, and there are strong moral, if not constitutional, grounds for Federal intervention in jurisdictions where an ideological commitment to the notion that:

the state must impose but the minimum of conditions, regulations and restraints, and beyond these must encourage, yea, demand the greatest freedom¹⁵

means that regulatory agencies are starved of resources.

Unless such steps are taken rip-offs like Russell Island will be a regular occurrence.

POSTSCRIPT

After the abandonment of the conspiracy case, Russell Island continued to provide opportunities for fraudulent land sales based on the classic "bait and switch" technique, as well as on misleading advertising in general. Property was offered for sale at bargain prices. Prospective buyers enticed to the scene were then told that

the block in question had been sold, and were shown more expensive property. Other potential customers, attracted by assurances of a blue-ribbon investment, were shown swamp land of the kind which had made Russell Island famous.

This time, however, the Commonwealth Trade Practices Commission (not a Queensland Government instrumentality) intervened. In October 1986 a Brisbane entrepreneur and his company, East Coast Island Sales, were fined a total of \$201,000 in Federal Court after having entered pleas of guilty to a number of offences under the *Trade Practices Act*.

There are now grounds for optimism that a Federal Government presence may discourage future commercial predators on Russell Island.

ACKNOWLEDGMENTS

The author thanks Inspector Don Plint, of the Queensland Fraud Squad, and Mr Tom Burns, Deputy Leader of the Queensland Opposition, for their generous assistance in allowing access to files on the Russell Island case. Thanks are also due to the South Australian Attorney-General's Department for financial assistance to enable the collection of data in Queensland. Views expressed in this chapter are, of course, those of the author alone.

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5. Committal proceedings, op cit supra note 1, 129-162; Queensland's Deputy Leader of the Opposition, Mr Tom Burns, has estimated that total profits would have been \$10 to \$15 million.

6. Spiers, op cit supra note 5.
7. Mahony, op cit supra note 2.
8. Ibid, 22.
9. Submission, December, 1978.
10. Queensland Parliamentary Papers, 20 March 1979, p 3508.
11. Letter to Russell Island victim, 3 December 1982.
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14. See Sutton, A and Wild, R (1985), "Small Business: White Collar Villains or Victims?", *International Journal of the Sociology of Law*, 13, 3, 247-259, for discussion of the ways the small business sector has exploited incorporation and limited liability, and the implications for understanding its role in advanced capitalism.
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Chapter Five

THE MEAT SUBSTITUTION SCANDAL OF 1981

Peter Grabosky

American comedians began commenting wryly about the content of hamburgers. One big food chain even began a big campaign to let its customers know its product contained no Australian beef.

It was 1981. And The Great Meat Scandal began one July day when an inspector in a meat processing plant in San Diego, California noticed something unusual in a consignment of Australian beef—some of the meat appeared darker than the rest. It proved to be horsemeat. Within hours of the finding being confirmed in August, the word flashed around the world.

One week later, kangaroo meat was found in cartons marked for export as boneless beef.

At the time, the beef export trade was worth approximately \$1,000 million a year to Australia. The international trade was highly competitive, and the United States, which bought over \$600 million worth of Australian beef each year, was a singularly particular importer. The US hardly depended on beef imports from Australia. Indeed, American cattlemen, who constituted a powerful lobby, saw little need for imported beef at all. To ensure the quality of imported Australian beef, the US Department of Agriculture had officers permanently stationed in Australia to inspect export meat facilities. With the substitution discovered in the Californian consignment, the reputation of the Australian meat export industry came under considerable threat.

The difficulties were not limited to the American market. In early September, four consignments of Australian meat were destroyed by the government of Singapore over discrepancies in health documents and labelling. Allegations began to emerge that Australians themselves had been sold meat specified as not for human consumption.

Initial reaction from the Australian meat industry was to curtail production. By 10 September 1981, more than 2,000 Australian meatworkers had been stood down or sacked. Pressure was growing on the Commonwealth Government to explain how the situation could have deteriorated so far. The threat of permanent damage to the Australian meat industry was a major concern for the Fraser Government. The nation's primary producers were already confronted by a severe drought. The Opposition called for a judicial inquiry and for the resignation of the Minister for Primary Industry. After considerable hesitation, a Royal Commission was appointed.

Those companies implicated in the meat substitution scandal were not large, complex organisations. Nor were they immensely profitable. In the world of business, pressure to maximise profit often leads to cutting corners. All else being equal, the lower the cost of raw materials, the higher the profit margin. There were thus no mystical organisational processes which brought on the harmful conduct. The meat substitution scandal arose from a combination of greed and opportunity in relatively small companies.

On the other hand, one former meat inspector alleges that a number of large processing companies were also involved in product substitution and mislabelling.¹ With a shortage of suitable carcasses arising from the drought, pressure to cut corners was felt by large and small firms alike. Large scale processing, moreover, can involve subcontracting to a number of smaller firms. "Hands-on" responsibility is thereby diffused. Also, production pressures may have militated against strict scrutiny of product as it passed through stages from abattoir to loading at the wharf. Inadequate quality control procedures failed to detect product mislabelled by design or negligence.

Collectively, the Australian meat industry appears to have been traditionally tolerant of malpractice, and reluctant to report known or suspected cases. Indeed, Mr Justice Woodward commented on

its reluctance to assist the Royal Commission.²

In mid 1981 the entire system of Australian meat exports appeared to be in a sorry state. The most striking shortcoming existed within the Commonwealth Department of Primary Industry (DPI) itself. An extremely frank and equally critical self-appraisal was incorporated in the DPI submission to the Woodward Royal Commission.

The meat inspection service, the department said, "has proved to be insufficient, costly, poorly managed, overstaffed and . . . in some respects corrupt"³.

The basis for this submission lay in a number of deficiencies. Because US officials had been traditionally concerned about the hygiene and sanitary conditions surrounding the preparation of Australian meat for export, Australian authorities placed great emphasis on the detection of disease and hygienic handling of meat. Responsibility for meat inspection rested with the Bureau of Animal Health (BAH), staffed largely by veterinary officers. They were less concerned about the accuracy of trade descriptions and other forms of industry malpractice, and did not regard themselves as law enforcers.

Control of export approval stamps was lax. They were held by meatworks managers, rather than by DPI officers. Many inspectors routinely received meat free or at low cost from the establishments they oversaw. The practice was longstanding and hardly clandestine—it had been continuing for 40 years.

Organisational problems within the BAH significantly impeded the flow of information from regional offices to headquarters in Canberra. Thus, evidence of industry malpractice often failed to reach BAH headquarters. Fragmentary information which did reach Canberra rarely brought firm action. No directions were given to officers in the field regarding the most appropriate response to future problems.

It was alleged that documents were removed from DPI files and shredded when the Royal Commission was announced. The Royal Commissioner, however, concluded that "filing irregularities" could as easily be explained by the general inadequacies which characterised DPI administration at the time.⁴

Despite the likelihood that adverse publicity could discourage

industry malpractice, officers of the DPI were extremely reluctant to publicise those incidents of misconduct which occasionally came to light. This was in fact attributed to the co-operative, as opposed to the adversary relationship which existed between the agency and the industry. Indeed the DPI exists to serve and to foster primary industry in Australia—not to police it. In addition, there was great concern that any media attention drawn to industry malpractice would tarnish international and domestic reputation of Australian meat, and further jeopardise a billion dollar export trade.

It was no secret in the meat industry that the regulatory regime failed to stop the domestic product being added to export consignments. This reluctance to regulate inspired the more unscrupulous operators in the industry to add kangaroo and horsemeat to export beef.

Another impediment to effective control of misconduct in the meat industry lay with the Australian Federal Police (AFP) and their relations with the DPI.

The AFP, like all police forces, are called to undertake many tasks. The energy which they choose to apply to any particular undertaking tends to be determined by internal decision-making—that is, they set their own priorities. Occasionally, elected governments will dictate priorities—such as the need to provide security for a Commonwealth Heads of Government meeting. But ordinarily, the AFP determine for themselves the quantity and quality of investigative resources they devote to an issue, and the speed with which they will address the tasks at hand.

Police attentiveness to those cases of suspected malpractice in the meat industry brought to their attention by the DPI was something less than zealous. Even the Commissioner himself, Sir Colin Woods, conceded that information about malpractice should have been pursued with more vigour. The fact that free meat was provided by one company to officers of the AFP may well have helped relax the enthusiasm for investigation.⁵

In any event, the lack of energy devoted by the AFP to investigations was hardly challenged by the DPI. In the words of the Royal Commissioner: "Not enough cases were passed to the police for action and those that were handed over were not conveyed

with any sense of urgency, importance, or great interest in their outcome.”⁶ If told that evidence was insufficient to warrant prosecution, DPI officers rarely took alternative regulatory action, such as increased surveillance or the issue of warnings.

Indeed, one team of journalists alleged “the police were discouraged from pursuing their investigation by senior civil servants and politicians in Canberra”.⁷ The Deputy Crown Solicitor’s Office, itself soon to be embroiled in scandals arising from the “Bottom of the Harbour” revelations, seemed disinclined to prosecute, complaining on more than one occasion that evidence was insufficient.

Those matters which did go forward proceeded at a snail’s pace. The fact that the police in one case waited 18 months before they were given permission to prosecute was hardly indicative of enthusiasm on the part of the DPI and Attorney-General’s Department.

Another journalist’s account reported that the commissioner of police threatened to resign unless the government authorised prosecution in one particular case.⁸ Thus one sees a classic example of mutually reinforcing nonchalance, with police taking a cue from unenthusiastic bureaucrats, and the bureaucrats themselves being sufficiently unimpressed with the service provided by the police that they scarcely bothered to use them.

Among the other organisational problems which facilitated illegalities in the Australian meat industry, the Woodward Royal Commission criticised inadequate ministerial oversight. The Minister for Primary Industry admitted that he knew in 1980 of allegations regarding misconduct in the export beef industry. Indeed, the report of a committee advising on the overlapping jurisdiction of Commonwealth and State meat inspection systems drew attention to corruption within the Commonwealth inspectorate and misuse of the “Australia Approved” stamp.⁹

The Royal Commission was highly critical of the flow of information from the Department to the Minister:

I think it is fair to say that not enough of the allegations which came to the attention of the DPI were referred to the Minister and that, accordingly, successive Commonwealth ministers were

not sufficiently informed by DPI of allegedly illegal activities in the industry or of complaints about the efficiency, and in some cases the integrity, of elements of the meat inspection service.¹⁰

In a manner most atypical of ministers under the Westminster system of government, the Hon. Peter Nixon himself criticised the Department. He referred to the DPI as "nowhere as professional as the Transport Department [his previous portfolio]. Its briefings were not as efficient, it did not respond as quickly to ministerial requests, and it was slow to provide information on current public issues relating to primary industry".¹¹

But the Royal Commissioner reserved strong criticism for the Minister himself:

I believe that the Minister, having heard from a responsible source that there had been cases of bribery and abuse of power in his department, should have taken positive steps to investigate the matter. In my view, he did not deal with this allegation in a manner that was adequate and effective.¹²

Another regulatory role was played by the Australian Meat and Livestock Corporation (AMLC). Although a Commonwealth statutory authority, AMLC is generally regarded as an industry body. Its revenue is derived from slaughter levies paid by industry, and its statutory function is to encourage and promote the consumption and sale of Australian meat at home and abroad. In addition to providing a variety of technical and marketing services to industry, the AMLC has a licensing function. The export of meat from Australia was prohibited, except by people licensed by AMLC. The AMLC is empowered to grant, cancel or suspend a licence. Prior to the Woodward Royal Commission, licences were rarely denied or revoked. Penalties for violation of licence conditions were low, and the AMLC had not resorted to prosecution.

The regulatory regime before August 1981 was hardly likely to discourage malpractice. In the ten years preceding the substitution scandal, no more than seven individuals had been convicted of offences relating to the handling of export meat. Only one conviction

had been obtained under the *Export (Meat) Regulations*. The Royal Commissioner referred to the penalties then existing as "ridiculously low", and hardly likely to deter wrongdoing.¹³

Few could argue with the Royal Commissioner's assessment. The maximum penalty available under any of the *Exports (Meat) Regulations* was a fine of \$100. The gains to be made by product substitution far exceeded any penalty. Indeed, the Royal Commissioner himself cited the case of a company which continued substituting product after the principal was fined \$100 for applying false trade descriptions.¹⁴

Yet another problem noted by the Woodward Royal Commission was the fragmentation and overlapping responsibilities for meat inspection throughout Australia. Commonwealth involvement in meat inspection derives from its power to regulate exports. Dual meat inspection began in 1911, when the Commonwealth Government appointed a veterinarian to inspect Queensland meat exports.

At the time of the 1981 scandal, Commonwealth and State inspectors were operating side by side in New South Wales, Victoria, Queensland and Western Australia, with overlapping responsibilities. This contributed to a lack of co-ordination and inhibited the flow of information between inspectorates. Relations between the Commonwealth and the various State inspectorates were described as "dismally bad".¹⁵

Problems inherent in this fragmentation and overlap of Australian meat inspectorates were identified in 1976 by the Royal Commission into Australian Government Administration. A committee of inquiry made similar observations four years later.¹⁶ Further criticism of these arrangements had come from the US Department of Agriculture, as well as from the Australian meat industry. However, the rivalries and jealousies which seem inevitably to characterise Australian federalism impeded any rationalisation of the meat inspectorate systems. Indeed, the Queensland Government initially threatened not to co-operate with any Commonwealth judicial inquiry—although it subsequently did take part.

The US Department of Agriculture—the first to become aware of substituted product in imports from Australia—acted quickly to assess the scope of the problem. All consignments of Australian

meat then in the US (approximately \$20 million worth) were impounded pending systematic testing to determine their content. Meanwhile, US authorities urgently requested their Australian counterparts to implement new and tighter procedures to guard against future attempts at substitution.

The Australian response was swift in some respects, and dilatory in others. Export abattoirs and boning rooms which were found to be the source of mislabelled product were immediately stripped of their US certification, thus effectively excluding them from the export trade. Among the firms sanctioned were the Melbourne based Profreeze, Jason Meats, Steiger's and Jakes Meats. The DPI began systematic, scientific, species testing, to ensure the integrity of export product.

In addition, when it became apparent that the penal provisions of existing regulatory statutes were derisory, steps were quickly taken to increase penalties for false description and substitution. *The Australian Meat and Livestock Corporation Act 1977*, which previously provided for a maximum fine of \$2,000 for breach of export licence conditions, was amended to provide a fine of up to \$100,000 or a maximum term of five years' imprisonment, or both. Work began on new legislation to provide a statutory framework for a new regulatory regime at the DPI.

In contrast to the low level of resource commitment which characterised previous Federal Police approaches to the meat industry, a 40-officer task force was established to investigate allegations of malpractice.

On the other hand, the Commonwealth Government appeared disinclined to embark on any overall investigation of the meat export industry and its regulation; at least any public investigation. On 2 September 1981, an interdepartmental committee was formed. When pressed to hold a judicial inquiry, the Minister contended that he was given *legal* advice against such a course of action.

And while a public inquiry was undesirable because of anticipated further adverse publicity detracting from the overseas reputation of Australian meat, there was also apparently a great desire to avoid further embarrassment to the Fraser Government.

The issue, however, did not blow over. The Opposition and the Australian Democrats continued their attack, threatening to use

their combined power in the Senate to establish an inquiry in that chamber. The major daily newspapers criticised the Government's reluctance, suggesting in one instance that reference to an inter-departmental committee smacked of a "political and administrative cover-up".¹⁷

Unable to withstand the pressure, the Government announced the appointment of a Royal Commission chaired by Mr Justice Woodward. Concurrently, an independent consultant, Price Waterhouse and Associates, was retained to review the effectiveness of interim measures to improve the documentary and physical control of export meat.

Despite the legislative response in the aftermath of the scandal, perpetrators of misconduct could only be prosecuted (and fined) under the law as it stood at the time of the offences alleged. They were thus liable, with few exceptions, to a fine of only \$100. Moreover, persons giving testimony before the Royal Commission did so under the condition that their testimony would not be used against them in criminal proceedings. It was thus decided in the majority of cases to proceed administratively against the offending firms, rather than prosecute.

Without explicit legislative authority, but under the executive power of the Minister for Primary Industry, ten companies were directed to cease preparing meat for export to the United States. Thus excluded from an export market, all but one of the companies ceased operating. Criminal charges were laid against Jason Meats, and a nominal fine was imposed on conviction. A principal of Profreeze, Richard V Hammond, was charged in September 1981 with 20 counts of having forged documents issued by or deliverable to Commonwealth authorities. He was subsequently convicted and sentenced to four years' imprisonment.

Investigations subsequently implicated some 70 meat inspectors around Australia with having received bribes or secret commissions. Three prosecutions were launched in the Northern Territory, and one conviction resulted. The accused was fined \$3,000 and he subsequently resigned from the Australian Public Service. One Victorian inspector was sentenced to seven months' imprisonment and he resigned from the Public Service. Because the outcome of jury trials was by no means certain, it was decided to deal with

the remaining officers by means of disciplinary proceedings under the *Public Service Act*.

Meat substitution and mislabelling also prompted complaints to the Trade Practices Commission (TPC), a Commonwealth body with responsibilities in the areas of consumer protection and restrictive trade practices.

Despite initial reluctance on the part of the DPI and the Federal Police to co-operate with the TPC in the immediate aftermath of the 1981 substitution disclosures, it was recognised that the *Trade Practices Act* contained effective penalties in contrast to what were, at the time, the derisory provisions of other statutes then in the process of amendment. Moreover, the TPC enjoyed the luxury of freedom from ongoing relationships with the meat industry, and was able to take a more adversarial approach to those under investigation.

At one time or another in the immediate aftermath of the meat substitution scandal, the TPC had most of Australia's major meat processing firms under investigation. Evidence sufficient to justify prosecution was lacking in all but two cases, however.

In one, since the company had gone into liquidation and the principals were already facing State charges in Victoria, TPC involvement was deemed inappropriate. The other involved Riverstone Meats, a company fined \$30,000 for misrepresentation of product.

The meat substitution scandal brought widespread changes to law and administration. Perhaps the most significant was the replacement of the Bureau of Animal Health with a new Export Inspection Service (EIS) within the Department of Primary Industry in 1982.

The EIS, whose staff of over 2,000 inspectors make it one of Australia's largest regulatory bureaucracies, bears responsibility for all export primary commodity inspection. It was created in 1982, as part of a reorganisation of export inspection activities within the Department of Primary Industry. It was later to become (October 1986) the Australian Quarantine and Inspection Service (AQIS) following amalgamation with the plant, animal and human quarantine function of the Australian Agricultural Health and Quarantine Service (AAHQS).

With its founding, the EIS embarked upon a programme of revising product descriptions, inspection standards and export documentation procedures. Physical security systems, based on official seals, were introduced to ensure the integrity of export consignments. Moreover, a personnel integrity programme was introduced with explicit instructions laid down as a safeguard against corrupt practices. In addition, the EIS established a compliance section, whose officers have a role beyond that of normal operational inspectors. They continue to work closely with police and other agencies to maintain an intelligence network as well as undertaking special investigative tasks.

Basic regulatory techniques employed by the AQIS include, *inter alia*, the systematic inspection of every carcass produced at export registered slaughtering establishments, and the monitoring of production at export registered boning, processing and storing establishments, regardless of whether the product is destined for an overseas market or not. In addition, the AQIS is now also regulating the activity of domestic meat establishments in those states which have come "on-line" within the framework of a National Inspection Service.

Some of the measures implemented in the immediate aftermath of the 1981 scandal have since been wound back. No longer, for example, are seals required on each individual carton of export meat. But AQIS officers continue to make random checks of packaged product to ensure that product descriptions are correct, and that documentation is free from tampering. It was through such random species testing that the offences were detected which gave rise to the successful prosecution of Riverstone Meats, Comgroup Supplies Pty Ltd, and Steiger's Meat Supply (Aust) Pty Ltd.

Beyond that, the European Economic Community continues to leave an officer permanently stationed in Australia to conduct inspections of export registered premises. In January 1989, the US Department of Agriculture replaced its two permanent officers stationed in Australia with review teams which visit Australia at least four times a year to conduct system reviews. The presence of foreign inspectors on Australian soil is the price one pays for access to a lucrative export market. Australian exports, moreover,

are subject to additional scrutiny at their destination.

The legislative framework for the newly organised Export Inspection Service was provided by a new *Export Control Act*, 1982, which came into operation on 1 January 1983. By 1985, subsidiary regulations were in place. The Act gives DPI officers extensive powers of search and seizure including the power to enter registered premises without warrant; the power to secure any premises, vehicle, ship and aircraft; and the power to seize any thing believed on reasonable grounds to afford evidence of an offence.¹⁸

The *Export Control Act* also defines a number of offences including altering or interfering with an official mark possessing a mark resembling an official mark; and applying a false trade description to goods. Each of these offences carries a maximum penalty of a \$100,000 fine and/or imprisonment for 5 years. Under subsidiary regulations, the Department of Primary Industry may exclude from the export meat industry any person or firm failing to meet standards of fitness and propriety.¹⁹

The *Australian Meat and Livestock Corporation Act* was further amended in 1982 to provide for considerably greater detail in licensing provisions. Among these were a "fit and proper" test to apply to both individuals and corporations. All existing licence holders were required to reapply for their licences.

Holders of meat export licences now have to have integrity, be competent, and be of sound financial standing in the eyes of the AMLC. Applicants for an export licence must demonstrate that their staff are appropriately trained and accredited, and that the company implements an adequate quality control programme. To this end the AMLC since 1983 has offered training courses and has accredited 1,300 people in the meat industry.

Additional provisions of the new legislation vest authorised officers of the AMLC with considerable powers of inspection, search and seizure. Eight compliance officers around Australia visit licensees on an irregular basis to monitor quality control procedure. While the AMLC had yet to use its powers of prosecution by the end of 1985, it had rejected ten licence applications on various grounds, including the personal integrity of the applicant. A number of firms have been reprimanded or placed on official notice by the AMLC to improve their quality control methods.

All firms in the export meat industry maintain that they have instituted special procedures to ensure accuracy in the labelling and checking of product. Nevertheless, some problems which contributed to the scandal originally, and which were subsequently identified by the Woodward Royal Commission, persisted in the short term. Despite a significant improvement in co-operation between the two agencies, the priorities of the Australian Federal Police still appeared to diverge somewhat from those of the DPI. As the author was told in 1984 when he visited the EIS in conjunction with another research project:

We were taking a lot of time of the police in the Northern Territory, and the Pine Gap incident came along. Of course, the Department of Primary Industry priorities just dropped out the window. The police went away to pursue the problems of Pine Gap . . .

I sometimes get the distinct impression that the AFP are rather reluctant to pursue some of our particular types of cases that we think would warrant prosecution, because they think it is such a minor issue in their overall context.²⁰

By the end of 1988, however, senior AQIS officers observed that their agency's relationship with the AFP had improved substantially, and characterised it as "generally excellent".

Although the vast majority of the Royal Commissioner's recommendations have been implemented, the issue of excessive decentralisation was only gradually addressed. As recently as 1985, there existed no standard enforcement manual to provide guidance to inspectors with regard to those circumstances in which it is appropriate to use criminal sanctions, as opposed to informal alternatives. By the end of 1988, however, the AQIS had developed strong regional management teams. Three manuals had been produced to give detailed guidance in the enforcement of regulations, and a training package, *Dealing With Breaches* had been delivered to nearly all field staff.

Senior officers of the DPI were unable to advise on how frequently inspectors in the field resort to such lesser sanctions as short term suspension of operations. On the other hand, a programme review

section was established early in 1984 to undertake periodic visits to regional directorates. One goal of the section is to encourage greater uniformity in the implementation of departmental policy within and between regions.

The practice of inspectors accepting gifts of meat, or meat at a nominal charge, implicitly tolerated in the period before the scandal, is now officially forbidden. The DPI set guidelines for inspectors. An official Code of Conduct booklet was first issued to all inspection staff in May 1984 as part of an overall integrity package. Officers are now formally forbidden to accept payments in cash or in any kind from industry. They may engage in outside employment only with the approval of the regional director. The requirements of service as an AQIS inspector are now incorporated in a departmental training programme.

The DPI, for strategic reasons as well as for fear of defamation actions, appeared reluctant to draw public attention to its regulatory efforts. In 1984 one of Australia's largest meat exporters, Tancred Brothers, sued it over a press release referring to the discovery of rams' legs in a quantity of goat meat destined for South-East Asia. Nevertheless, charges were laid. The firm subsequently pleaded guilty, and was fined \$30,000. The defamation action was withdrawn.

The problem of jurisdictional fragmentation and overlap has improved, but the goal of establishing a single national meat inspection service under the operational control of AQIS has yet to be attained. By the end of 1988 transfers of the domestic meat inspection function had been effected in New South Wales, Victoria, Tasmania, South Australia, and the Australian Capital Territory. Negotiations were continuing with Western Australia, but Queensland and the Northern Territory retained responsibility for their domestic works.

Despite the absence to date of any further embarrassing overseas discoveries, meat substitution, or at least mislabelling, would appear to persist in product for domestic consumption.

An analysis of 32 samples of mince by the Australian Consumers' Association revealed meat other than beef in 41 per cent of them (*Choice*, May 1984, 5). Responsibility for such practices rests with State inspectorates and health authorities, not the federal

Department of Primary Industries and Energy (DPIE), as the new agency was called after the 1987 amalgamation. In most instances, State requirements are less than the National Health and Medical Research Council's recommendations. It is ironic that export meat is held to higher standards than is meat for Australian consumption.

And the freewheeling attitude which brought about the 1981 scandal may still be alive and well, at least with regard to the fringe participants in the meat industry—game meat processors and knackery operators. In the course of another research study in 1984, an interviewee with an authoritative perspective on the Australian meat industry and its regulation stated:

We are confronted with a well-organised industry in terms of its criminal attitude. There is no doubt about that. It makes the Painters and Dockers look like a Sunday school picnic . . .

They are quite serious activities—quite criminal activities . . . They are a very rough and tumble group of people . . .

They get lost in the corporate structure—we are concerned that certain individuals who've got poor reputations, who we believe we have put out of the industry are in fact not out of it . . .

You've got to think beyond the local abattoir; to the mobile abattoirs in the Northern Territory for example. The pet food and knackery operators and the game meat operators. Those people are, we believe, quite prone to use any method to achieve their ends. I would say there have been cases in recent times where people have disappeared . . .²¹

But by 1985, the revised regulatory vigilance along with the depressed economies of the export meat industry had significantly curtailed the worst forms of malpractice. The fly-by-night and fringe operators were all but eliminated. As far as export control is concerned, the days of de facto laissez faire appear to be over. By September 1988, nine companies had been successfully prosecuted, and a further six briefs of evidence were awaiting action by the Australian Federal Police or the Director of Public Prosecutions.

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Chapter Six

MEDICAL FRAUD AND ABUSE IN MEDICAL BENEFIT PROGRAMMES

Paul Wilson

In 1982, doctors ripped off the medical benefits programme to the tune of \$100 million. Two years later, the annual swindle had jumped to \$200 million. And although the medical world strenuously denies the figures, many government officials believe that is only the "tip of the iceberg".

Most medical fraud is committed by individuals rather than networks of physicians working in unison. But the medical profession as a whole is not blameless for the actions of individual criminal doctors.

The use of the corporate structure by medical practitioners for the more efficient management of their practices (or for tax minimisation) is of less concern to us here. Indeed, the approach taken in this chapter is that much fraud and abuse of government-run medical programmes results directly from three main areas: the structure of organised medicine; the socialisation and training of student physicians; and the economics of the medical marketplace which create conditions conducive to criminal behaviour.

These issues have been discussed in detail elsewhere.¹

In David Gordon's classic analysis of the political economy of crime, he suggested that both ghetto and white-collar crime are

MEDICAL FRAUD AND ABUSE IN MEDICAL BENEFIT PROGRAMMES

rationally based behaviours within the capitalist profit orientation.² Each form of crime, according to Gordon, has a relatively low probability of detection, apprehension and subsequent conviction while providing a good financial return on invested labour. Those most subject to detection, apprehension, conviction and negative sanction tend to be "small fry" who represent only the tip of the iceberg.

How big the "iceberg" is in medical fraud and abuse is a matter of opinion. Government estimates, initially based on computer profiles of physician billing practices and official figures in 1982, gave conservative figures of fraud and abuse totalling between \$100 million and \$130 million a year.³ This estimate was confirmed and accepted by the Australian Medical Association.⁴ These estimates later rose to \$200 million a year in 1984⁵, although some physicians and statisticians strenuously denounced the large government-based figures.

Dr Denis Mackay, past-president of the General Practitioners Society of Australia, believes that Federal authorities are wrong in their estimates and that they "collate data, arrange the so-called facts and then make estimates to fit into their preconceived fraud pattern".⁶

While it is conceivable that the official figures overestimate the amount of physician fraud and abuse, it is also possible that the figures are underestimates. As we will see, only a small amount of fraud is actually detected, and an even smaller proportion prosecuted. In addition, inadequate staff resources in the Fraud and Overservicing Detection Scheme (FODS) and bureaucratic difficulties in co-ordinating inquiries into fraud and abuse produced figures which, in David Gordon's phrase, represent the "tip of the iceberg".⁷

Financial damage aside, medifraud and overservicing have devastating effects on the health system generally and on patients specifically. Unnecessary surgery, for example, performed only because a government or private insurance programme will pay the cost, can result in maiming or death.⁸ It is apparent that those doctors defrauding the system in less dramatic ways—for example, by giving quick or non-existent consultations—are also providing sub-standard medical services to their patients.⁹ It is also clear that

ordering superfluous laboratory tests and encouraging unnecessary office visits and minor surgery are hardly in the patient's best interests.

Already escalating health costs are further increased by medical fraud. In a submission to the Public Accounts Committee (PAC), the Hospital Contribution Fund (HCF) medical insurance body claimed that overservicing has become so widespread that doctors accept it as "a style of practice management in Australia rather than as a dimension of anti-social behaviour".¹⁰ It can reach the level which the manager of Medibank Private described as "fraud and overservicing like mad . . . any way you can make a quid".¹¹ It is relevant to note that medical tribunals dealt with 3,774 cases of doctors who were "counselled" with respect to possible overservicing between 1 April 1977 and 30 September 1983.¹²

Just how big the "quid" is depends on the estimate of medical fraud and overservicing accepted. The federal Department of Health suggests that somewhere between 900 and 2,500 doctors are defrauding Medibank.¹³ Depending on which of these extremes is accepted, and whether the total cost of medifraud is \$100 or \$200 million, each doctor would be reaping at worst \$40,000 and at best \$222,222 from fraudulent practice. This income is an annual amount in addition to the large sums that doctors earn in their medical practice. Clearly, it is most unlikely that the average defrauding doctor is obtaining the upper limit of these figures but the sums are nevertheless significant.

VARIETIES OF MEDICAL FRAUD

Elsewhere I have categorised the types of fraud and overservicing practised by the medical profession.¹⁴ What follows here is a brief description of some illegal practices most clearly the result of "corporate" or organised activities among two or more medical or paramedical practitioners.

Losses in fraud and overservicing are possibly highest in the pathology area. Interviews I have conducted with Federal Police investigators suggest that cases in this specialty are almost impossible to prove. Initial tests are generated by the referring doctor but the pathologist has the power to generate further tests

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if so desired. No tests, other than the initial collection of specimens, are conducted in the presence of patients, so there is no opportunity for even rudimentary patient monitoring. Ineligible health screening and orthomolecular pathology are also often claimed for by using allowable item numbers for claiming reimbursement.¹⁵

In 1984, it was revealed by Mrs Helen Mayer, a member of the Public Accounts Committee, that the top 25 private pathologists collected \$36 million in medical benefits in three months. At least one specialist lent his name and qualifications to obtain a higher fee and was not physically able to perform the services. The top provider in Australia received \$4.6 million in benefits during the three month period.¹⁶ While these figures are, in themselves, no indication of massive fraud and overservicing, it is clear that pathology is increasingly a highly concentrated industry that is basically unregulated by the Commonwealth.

That large amounts of money are illegally obtained for pathology tests is admitted by the Royal College of Pathologists itself. The Vice-President of the College, Dr Llew Davis, in giving evidence to a Parliamentary Public Accounts Committee, estimated that at least \$20 million a year in overservicing arose from "fast-photo" style laboratories. Dr Davis pointed out that under current legislation, doctors and laboratories could easily split fees for such work so there was a motive for both parties to overservice.¹⁷

Nursing homes are another source of corporate medical crime. Not uncommonly, groups of patients are signed up in a health fund, then placed in a nursing home in which the referring doctor has a financial interest. The same doctor then visits them daily or even several times a day, often over a period of years. These visits are often as perfunctory as saying "hello" in the hallway, but are still claimable as a brief visit.¹⁸

One Federal Police investigator recounts the case of a Brisbane physician who, in partnership with other practitioners, owned a private hospital and hired a bus to collect patients and bring them to the hospital. They then would be seen for a short period of time and taken back home again by bus.

Psycho-fraud, or the exploitation of the schedule of medical benefits by psychiatrists, is a common form of medical crime. Gadiel and Opit examined the payouts by the HCF in New South Wales

for the years 1977-79.¹⁹ They found that the top ten earners among psychiatrists in New South Wales constituted only 2.5 per cent of the psychiatrists in private practice, but accounted for 10 per cent of the dollar value of psychiatric services.

Of particular relevance in the context of corporate medical crime was Gadiel and Opit's finding that a significant portion of the excess was finding its way to a relatively small number of psychiatrists who taught psychotherapy and psychoanalysis.

The costs were generated when these practitioners psychoanalysed psychiatrists and other health professionals who were studying under them, as part of a training programme. The fees for this intensive therapy exceed \$1,000 a month for each student. With, for example, six students training four days a week, a psychoanalyst could obtain an income of more than \$70,000 a year, in addition to any other salary or income.

While both government regulation and the College of Psychiatry disallow psychiatrists claiming benefits for training sessions, no action has been taken against the offending doctors.²⁰

A third example of "organised" medical fraud involves the purchase of expensive medical equipment by group practices. Spirometers, electro-cardiographs and X-ray machines are common items. The Public Accounts Committee reports that installation of expensive X-ray equipment in a general or group practice, at a cost of \$20,000, is almost invariably followed by prolific use of the machine with the attendant dangers inherent in its use by inexpert hands.²¹

These examples of corporate medical fraud are clearly only some of the possible forms of abuse. Most fraud and overservicing is undoubtedly conducted by individual practitioners working in isolation from other physicians and engaging in one or more of the following:

Time-shuffling (where the patients are deliberately treated after-hours);

Upgrading (billing for services more extensive than those actually provided);

Injury enlargement (overstating the nature of an injury treated);

Ping-ponging (referring the patient to another physician where there is no need for additional care);

Phantom treatment (claiming for operations or procedures never performed);

Assembly-line production (having patients pass through surgeries at a rate that makes adequate medical treatment impossible); and other variations of these practices.²²

Whether fraud and abuse is "organised" or conducted individually, certain structural features of fee-for-service medicine, enshrined in government and private health insurance schemes, provide what has been called a "crime-facilitative environment" for medical crime and deviance.²³

STRUCTURAL ASPECTS OF MEDICAL FRAUD

The fee-for-service nature of medicine in Australia and the oversupply of doctors are two factors which contribute substantially towards medifraud, although the incentives for illegality built into fee-for-service do not, in themselves, explain fraud.

Undoubtedly the over-production of medical graduates and the competitive nature of medical practice does contribute. In 1972, 878 graduates were produced from Australian medical schools. For 1982 the figure had risen to 1,305. Between that year and the year 2001, the supply of doctors in Australia will have doubled and the doctor-population ratio will decrease from 1:521 to 1:405.²⁴

Opit has pointed out that one result in this growth of medical manpower is increased competition for patients, reflecting, in surgery at least, a massive increase in acute episodic care especially associated with operative and investigative procedures requiring hospital admission. When it is realised that the rate of tonsillectomy, for example, has declined markedly in England and Sweden, but is still at a high level in Australia, especially for privately insured contributors or their dependants, then quite critical questions are raised on the motivation for these operations.

In terms of general practice, Najman and Western report that during the 1970s there was a steady increase in private medical services given per head of population. This increase began well before the introduction of Medibank and has continued ever since though, as Najman and Western note, "It is curious that the average doctor's workload has not increased during this time".²⁵

It is not only the competitive marketplace but also the training and aspirations of doctors which contribute to those forces propelling some doctors towards fraud and abuse. Anderson, Western and Williams, in an extensive longitudinal study of medical students, note that student doctors become much more conservative and professionally oriented during their training, a socialisation process which increasingly makes realists out of idealists.²⁶

Trainee doctors overwhelmingly come from high-status homes and develop narrower pragmatic and self-interested concerns as well as expectations of affluent life-styles. These expectations are fuelled by commercial enterprises which bombard doctors with brochures and by salesmen touting the wares of the consumer society—expensive foreign cars, real estate and investment opportunities. Professional organisations also contribute to the view that medicine is as much a business as a caring or “helping” profession.

A number of writers have documented the opposition that both the Australian Medical Association (AMA) and the General Practitioners Society (GPS) have shown towards Medibank and Medicare, and their promulgation of the view that the doctor is a small businessman with the inalienable right to preserve unfettered fee-for-service practice and autonomy from government review.²⁷ The emergence of such medical pressure groups as the New South Wales procedural specialists, determined to ensure that members' incomes are maintained, suggests that financial remuneration will continue to dominate the politics of medical organisations.

GOVERNMENT RESPONSE TO MEDIFRAUD

As a public or government issue, medifraud held a low priority until December 1977. In that month an investigating officer of Medibank Private examined a US report of medical fraud and prepared an estimate of medical fraud in Australia on the basis of the US figures and his own investigations. His superior rejected the report so the officer left Medibank Private and subsequently talked to the media.

However, despite sporadic media attention to the event, politicians ignored the issue until in 1982, a federal Department of Health

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officer, overcome by his frustration at inaction against defrauding doctors, listed 41 files on doctors where his investigations showed presumptive evidence of fraud or overservicing ignored by his superior. In defiance of the public service tradition and the Commonwealth *Crimes Act*, he sent that list to the Public Accounts Committee.²⁸

A formal Public Accounts Committee inquiry was begun on 25 May 1982 leading to a series of reports. At this time the federal Department of Health had 200 doctors on its active file and 210 more files were in the hands of the Australian Federal Police. Gadiel points out that at the rate these cases were being handled it would have taken 68 years to bring the doctors before the courts.²⁹

In the first empirical study of the investigation of medical fraud, Cashman obtained tentative figures on the investigation, prosecution and conviction of doctors. Between 1 November 1978 and 30 September 1981 there were 646 investigations of doctors throughout the country. However, only 7 per cent of the number investigated were prosecuted, but a high proportion of these prosecutions (84 per cent) resulted in a conviction.³⁰

Overservicing figures are not available on a year by year basis, although between 1979 and the beginning of 1984, 64 doctors were referred to the Medical Services Commission of Inquiry resulting in \$404,949.11 being ordered to be paid back to the government following the hearing of appeals.³¹

However, according to the Department of Health, "so far, not too much has actually been recovered".³² When the amount recovered from doctors convicted of fraud is considered, Cashman calculates that between 1975-76 and 1982-83, a total of \$166,116 was recouped from all doctors prosecuted over that period.³³

More recent figures provided by the Minister for Health show that as at 1 October 1983, 382 suspected provider fraud matters were listed for or under active investigation with the Department of Health; 53 cases were referred by the Department to the Australian Federal Police for further investigation; 31 were referred to the Deputy Crown Solicitor for institution of proceedings, and 30 fraud matters were before the courts, awaiting hearing or appeal.

Between 1 July 1980 and 30 September 1983, there were 62 prosecutions for medical fraud offences, 28 of which led to

convictions, 24 led to charges being proven but no convictions were recorded and 10 prosecutions were unsuccessful.³⁴

Cashman reports that in just over half of all cases where a conviction was obtained a fine resulted and 30 per cent of convictions led to an order for defendants to pay restitution together with a fine. In short, it is apparent that not only are relatively few doctors prosecuted for fraud but the acquittal rate is very high and the penalties imposed are light.

In comparison with social security beneficiaries, where approximately 900 cases a year are prosecuted, only 20 doctors a year are charged, and the acquittal rate for doctors, again in comparison with social security beneficiaries, is far higher.³⁵

RESOURCES AND REGULATIONS

Even where it is apparent that a doctor is unlawfully receiving funds it is difficult to differentiate fraud from overservicing. Excessive services are defined in section 79(1B) of the Commonwealth *Health Insurance Act* to mean "professional services . . . in respect of which medical benefit has become or may become payable, that are not reasonably necessary for the adequate medical care of the patient". However, it is obvious that whether or not a doctor is aware that the service is not reasonably necessary is known only to the doctor. But if such services are considered by the doctor to be "not reasonably necessary", then it is clear that any medical benefits received will have been received fraudulently.³⁶

Fraud is a great deal more difficult to prove than overservicing and many investigators decide to refer cases to medical tribunals (which deal with excessive services) rather than to the Federal police.

In fraud cases there is the problem of ascertaining and identifying the total number of offences and the total amount of money obtained by fraud. Documentary proof has to be obtained, patients—most of whom are unwilling to testify against their doctors—have to be willing to act as witnesses, and evidence restricted to services which are the subject of the current proceedings.

Because intent has to be proved with each offence, prosecutors are usually limited to a small number of alleged offences. But if

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the total amount of offences is not large in dollar terms then the police and federal health authorities can be accused of prosecuting doctors for trivial amounts.³⁷

These evidentiary and legal problems involved in prosecuting doctors deter even the most committed investigator from pursuing a fraudulent practitioner. If no support from superiors for problematic investigations is forthcoming, then it is apparent that there will be little motivation for investigating specific cases. It is noticeable that the Public Accounts Committee was critical of doctors within the federal Department of Health who were responsible for controlling medifraud and overservicing.³⁸

The Committee described the response of senior medical administrators to the problem as "grossly inadequate . . . too little has been done too late . . . and . . . the senior management structure and personnel of the Department must be comprehensively reviewed".³⁹ It is significant that the Director-General and Director in Victoria have now been replaced by non-doctors and it is possible that other states may follow this precedent.

These difficulties become apparent when the length of time taken in investigation and prosecution processes is considered. Field reports that the Auditor-General calculated that the average time taken by the department in referring a medical fraud matter to the Australian Federal Police was 4 months. The average time the Federal Police took to refer the matter to the Director of Public Prosecutions (DPP) was 14 months and, even worse, the average time taken by the DPP to process a matter through the courts was 12 months.⁴⁰

At the end of 1983, the Federal Government indicated that serious attempts were being made to combat fraud and overservicing by medical practitioners. The administrative structure of the Department of Health was reorganised, and resources devoted to the control of fraud and overservicing were doubled. By the 1984-85 financial year, 206 officers were assigned to the task, at an annual cost of \$8.1 million. In addition, a dozen officers of the Director of Public Prosecutions and about 20 Australian Federal Police officers were assigned to work full time on medical benefits fraud.

In line with recommendations of the Public Accounts Committee, other initiatives were taken which, on the surface at least, appeared

to indicate a government commitment to tackling medifraud. The Department of Health, the Crown Solicitor's Office, and the Australian Federal Police established a joint Canberra-based, central co-ordinating committee. Special training programmes for medifraud investigators were established, provision enacted for the inspection of records of private hospitals (including nursing homes) and assurances gained from the Federal Police that extra money budgeted for them would be allocated, in part at least, towards the investigation of medical illegalities. The department set a target number of prosecutions, with a goal of 100 successful prosecutions each year, leading to 80 disqualifications from the medical benefits programme.⁴¹

Despite these initiatives, there are still major weaknesses in policies and practices designed to control medifraud and over-servicing.

Although, since 1 February 1984, a brief description of the service rendered is required on bulk-billing forms, this is usually put in only two to four words hardly sufficient detail to be understood by the patient. When the patient signs these forms (which include both consultation numbers and the brief description of the service rendered) they may have no idea of what they are signing. There is considerable room still for a practitioner to charge for a higher priced consultation and/or service than the one which actually occurred.

The Public Accounts Committee recommended sending a random sample of assignment forms to patients for verification, in line with the practice of some Canadian provinces. No such system has yet been devised for Australia, despite the strong deterrent possibilities inherent in such a practice. Far greater patient accountability is needed both by demanding that detailed service and consultation descriptions are provided on forms that patients sign and by using a system of verifying services claimed with samples of patients.

Penalties actually imposed for medical fraud, as we have seen, are usually minimal despite legislation which provides for hefty fines and imprisonment. Consideration should be given to providing mandatory sentences in this area so that both the public and medical practitioners themselves see fraudulent doctors as "real" criminals rather than as simply truculent children.

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Finally, despite the verbal commitment made by the Minister for Health to control fraud and overservicing, it is reasonably clear that resources provided by the government are still minimal compared to the magnitude of the problem.

On the Federal level, many more trained investigators and counsellors are still needed. Medical services committees still require streamlined procedures, full-time members, and persons on them not associated with medical organisations. As it is, the backlog of cases waiting for referral to a medical services committee of inquiry in New South Wales is 13 years.⁴²

Teams of qualified medical practitioners, specially trained as investigators, have not as yet been formed and the emphasis by the federal Department of Health still seems to be on "counselling" doctors rather than investigating them. In addition, the decision in May 1985 to relocate the medifraud investigators within the Health Insurance Commission, and essentially leave the Department of Health responsible for educating and advising doctors (counselling), is evidence of capitulation in the face of pressure from the organised medical profession.

The rationale for these changes is essentially that by placing medical investigators within the Health Insurance Commission the Department of Health will be able to retain medical contact with the medical profession whilst transferring the 'bad guys' role to the HIC. No doubt there are some advantages in the federal Department of Health maintaining good relations with the profession. However, it could be concluded that this approach to the problem of medical fraud and abuse is not conducive to determined prosecution of medical fraud and abuse.

State governments also have shown a reluctance to tackle criminal doctors head-on. Authorities have not yet legislated to provide automatic deregistration of medical practitioners convicted of medical fraud. As the Public Accounts Committee point out, only nine doctors out of thirty-nine referred to State medical registration boards, after at least two convictions for fraud, had been deregistered as at August 1982.⁴³

MEDIFRAUD AND THE FUTURE

A political-economy analysis on fraud and overservicing by medical practitioners would suggest that, because of the power and dominance of the profession in Australian society, illegal activities by practitioners would be dealt with less seriously than is the case with "blue-collar" crime.

Although there is considerable evidence of the endemic nature of medical fraud and overservicing, the record of prosecutions, convictions and penalties would confirm Gordon's observation that white-collar crime provides a large financial return on invested labour. Though individual practitioners have been prosecuted and convicted for abuses of the health insurance system it is clear that they are only minor figures on the medifraud stage. Pathology laboratories, nursing homes and private hospitals have not yet been the subjects of sustained parliamentary or law enforcement investigation despite general community unease about their operations.

There is no doubt that we are a lot more informed about the nature of fraud and abuse by doctors as a result of investigations undertaken by the Public Accounts Committee, private researchers and by journalists. What is in doubt, however, is the ability of any government, no matter of what political persuasion, to effectively tackle the problem, given the political and social power of the medical profession.

The weakening of Medicare as a result of compromises worked out between New South Wales surgeons and Federal authorities, the failure to implement many of the recommendations of the Public Accounts Committee and the continuing dominance of medical associations in health politics generally suggests that fraud and overservicing will long be with us.

The remuneration of private medical practitioners in Australia will, in all probability, continue to be fee-for-service payment. Though there are good grounds to suspect that the rate of fraud and abuse would sharply decline if physicians and surgeons were paid by salary⁴⁴, this procedure is unlikely to be introduced in the near future. In the meantime the extent to which control and regulation of fraud and abuse occurs will depend, to a considerable extent, on the resolve of the Federal Government to confront

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organised medicine on issues relating to criminal behaviour by doctors. Only time will tell whether such resolve is forthcoming.

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Chapter Seven

THE DALKON SHIELD

Peter Cashman

It was safe, cheap and efficient, said the manufacturers—but it proved to be a medical disaster for thousands of women around the world. In Australia, at least one woman has died, and many have suffered life-threatening illnesses and complications.

The “safe” device was the Dalkon Shield, brought on to the market by an American pharmaceutical manufacturer A H Robins S.O. because of side effects of the contraceptive pill.

But the Dalkon Shield also had its “side effects”—gynaecological disorders leading in many cases to infertility and hysterectomies. At present, more than 7,000 Australians are suing the company, seeking damages for pregnancy, perforated uteri, pelvic inflammatory disease, spontaneous septic abortions, and ectopic pregnancies.

Work on the development of the Dalkon Shield began in the United States during the early 1960s. This was primarily carried out by Dr Hugh Davis, Associate Professor of Obstetrics and Gynaecology at the John Hopkins School of Medicine.

Subsequent collaboration between Davis, a bio-engineer, and a lawyer led to the first version of the product and clinical testing in the late 1960s. The Dalkon Shield corporation was eventually incorporated in 1968. The product ultimately became an enormous commercial success in the light of claims made about its safety and efficacy at a time of increased public and professional concern about the adverse side effects of the contraceptive pill. The Dalkon

Shield became the focus of attention in the press, at Senate subcommittee hearings, at conferences and in the professional literature. This led the A H Robins Company to purchase the product and engage Davis on a consultancy agreement in June 1970.

At the beginning of 1970, Robins, a pharmaceutical manufacturer based in Richmond, Virginia, started marketing the product. It was subsequently marketed in approximately 80 countries throughout the world. More than 4 million devices were sold, more than half of these in the United States between June 1970 and June 1974.

Between 100,000 and 160,000 of the devices were distributed in Australia. Now Australia has the highest number of claimants of any country except the United States even though relatively few devices were inserted in this country. This is in part due to the work of and the publicity generated by the Public Interest Advocacy Centre in Sydney.

It is alleged that there have been 17-18 deaths in the United States arising out of use of the device.

The Dalkon Shield continued to be marketed and sold in overseas countries, including Australia, after the suspension of sales and subsequent withdrawal from the market in the United States. Robins's executives, however, continued to maintain that the product was safe and effective when properly used and that its performance had been satisfactory. It was not until the end of 1984—10 years later—that Robins mounted a public campaign recommending that women still wearing the product have it removed.

It has been alleged that company executives, employees, lawyers, and others associated with the device, have been responsible for an astonishing array of misdeeds ranging from the failure to test the product properly through to the fraudulent concealment of pecuniary interests, product attributes, professional reports and research findings, consumer complaints and to the destruction of damaging documents.

Litigation arising out of the defects in the product has focused on allegations concerning, *inter alia*:

- (a) Lack of adequate testing before and during marketing, and the absence of further testing following changes in the composition and design of the product.

- (b) Faulty design of the product including the defective string which allegedly degrades *in situ* and has a wicking effect allowing bacteria into the normally sterile uterus; the barbed head which allegedly exacerbates uterine irritation, promotes perforation and causes difficulties on insertion and removal; and the composition of the Shield.
- (c) Defective manufacturing process, lack of quality control and inadequate sterilisation.
- (d) Concealment of defects, complaints and research findings.
- (e) Failure to warn of the dangers and risks associated with the use of the product.
- (f) Misrepresentation in advertising and promotional material and product labelling.
- (g) Failure to recall the device.¹

Experts who gave evidence before numerous investigative and regulatory bodies received payments from the company. Also, a number of "favourable" research findings arose out of company-funded investigations. According to one author, numerous approaches by independent researchers for assistance or funding for research into the efficacy and safety of the product were rejected by the company.² The company also sought to present selective data from its own research. In one instance, raw data were re-analysed and it was found that the actual rate of infection was 15 to 20 times higher than the originally reported rate of 0.6 per cent.³ Crucial data concerning pregnancy rates and the incidence of pelvic inflammatory disease were misinterpreted, misrepresented and, in some instances, actually concealed. With the active involvement of in-house counsel and externally engaged lawyers, the company sought to fund and promote favourable data in major professional journals and at scientific meetings.

A further element of deception of the US Food and Drug Administration (FDA), the medical profession and the public,

concerns the presence of copper in the device.

Documents relating to the patenting of the device make it clear that coating with metallic material was intended to enhance its effectiveness. Early company documents confirm that the copper was added to enhance the contraceptive effect of the device. Sales representatives were instructed that this was confidential and were told to answer questions from doctors concerning the components to the effect that it comprised a "confidential blending of ingredients to achieve engineering objectives" or some such statement.⁴ Subsequently, salesmen were instructed to say that the copper related to certain physical and mechanical properties, such as improved radio-opacity, rather than efficacy.

It is perhaps not without significance that a rival company, G D Searle, sought FDA approval for its "Copper 7" IUD on the basis that the copper content increased its efficacy. The FDA resolved that the presence of a non-inert substance took it into the category of a new drug, rather than a device, thus subjecting it to the (then) more onerous pre-marketing and other testing requirements. In legal proceedings in 1984 a former Robins in-house lawyer, Roger Tuttle, gave evidence that Robins had lied to the FDA about this matter.

Given the allegations of large-scale harm, important questions arise concerning the role of governmental and regulatory bodies: (a) when the device was developed and marketed and (b) when the defects became increasingly apparent.

Responsibility for ensuring the safety and effectiveness of the Dalkon Shield in the United States rested with the US Food and Drug Administration. What was described as a de facto recall of the product was not undertaken for ten years. The FDA, moreover, failed to conduct on-site investigations of the company in order to determine whether the product or the manufacturing processes were defective until 1983. In its "citizens' petition" of April 1983, the National Women's Health Network formally requested the Commissioner of the FDA to: initiate judicial proceedings for injunctive relief, criminal penalties, and condemnation and seizure on the grounds that the product was defective in design and method of manufacture and on the basis of false and misleading labelling; order public notification of the risk of harm; order Robins to carry

out, and meet the costs of, a total recall; declare the device banned as of 2 March 1972; and declare export of the product unlawful, as of 2 March 1972.

An earlier legal action against Robins by the network was dismissed in 1982 on the basis that section 521 of the Federal *Food, Drug and Cosmetic Act*, 1938 precluded the application of State law to injunctive remedies. While the FDA had been actively involved in the Dalkon Shield saga it did not respond in the matter proposed by the National Women's Health Network in their "citizens' petition". The petition itself was ultimately denied by the US Department of Health and Human Services in late 1986.

Although the FDA has extensive powers, its failure to take more drastic action arose out of a combination of a lack of power before the introduction of legislation governing medical devices; a lack of jurisdiction in relation to foreign activities of United States corporations; a tendency to rely on "voluntary" corporate activity rather than mandatory regulatory action; an alleged failure on the part of Robins to notify it of various matters crucial to the FDA's deliberative processes; and inadequate independent investigation and reliance on company data. The limitations of United States laws in relation to the export of hazardous products have been the subject of increasing attention and recent legislative reform.⁵

Whatever the limits of the FDA's jurisdiction and powers, its regulatory role stands in marked contrast to that of Australian health authorities. Part of the problem in Australia arises out of the separation of powers between the Commonwealth and the States. In general, the Commonwealth has responsibility only for regulating imports of "therapeutic" goods whereas the States are responsible for the application of standards to domestically produced therapeutic goods and substances.

COMMONWEALTH LEGISLATION

The *Therapeutic Goods Act* 1966 confers powers on the Minister for Health to obtain information concerning the composition of goods, to prescribe standards, to determine requirements in relation to labelling, packaging and containers, and to prohibit the import

of goods which do not meet prescribed standards or labelling and packaging requirements.

Although the Act covers IUDs, no standards have been prescribed and thus no degree of regulatory control has been exercised over the Dalkon Shield under this legislation. Although the Act provides for regulations which may make provision for the examination, testing and analysis of imported therapeutic goods, the Dalkon Shield was not subjected to any such scrutiny.

The *Customs Act* 1901 provides that regulations may be made prohibiting the importing of goods into Australia, unless specified conditions or restrictions are complied with. In 1970, legislation was passed to bring imported therapeutic substances, including certain IUDs, within the ambit of the *Customs (Prohibited Imports) Regulations* 1956. Those drugs and devices falling within the regulatory scheme are evaluated by the Australian Drug Evaluation Committee (ADEC) to ensure that only goods of adequate safety, efficacy and quality are allowed to be imported. The committee requires the manufacturer to provide evidence of previous clinical trials and toxicology testing and the regulatory scrutiny extends to both the conditions of use and the promotional material and prescribing information prepared by the manufacturer.⁶

Apart from that, there are provisions in the *Trade Practices Act* for statutory product safety standards. However, there are no prescribed standards in relation to contraceptive products or devices.⁷

Notwithstanding the existence of this legislative scheme, it would appear that the Dalkon Shield was not subjected to detailed scrutiny. Presumably, this was on the basis that it was classified or represented as being an inert device. As noted above, the device contained copper and evidence indicates that the copper was included because of its contraceptive effect and not merely for non-therapeutic reasons (e.g. to enhance its radio-opacity).

In this respect, it is interesting to note that in the early 1970s an Australian doctor was seeking Federal Government support for research and development in connection with a locally developed IUD. The doctor was advised of the legislative controls exercised by the Federal Department of Health, and in particular the requirements concerning research studies. According to the assistant

director-general of the Therapeutic Substances Branch of the Federal Department of Health:

“These studies are required because Dr (x)’s IUD contains zinc and copper which is incorporated into (the device). The efficacy of this product and similar devices is to a large extent dependent on the metals being slowly released from the rubber or plastic whilst in the uterus. The metals concentrate to some extent in the local tissues and some quantity is absorbed into the blood stream and distributed elsewhere in the body. As these devices may be used by women continuously for many years it is important to assess possible long term effects before marketing”.⁸

In later correspondence with the Federal Minister for Health and the Director-General of Health, reference was made to reported problems with the Dalkon Shield, to the requirement imposed on the Searle Company to have the “Copper 7” IUD tested at Hawthorn Park Research Facility in Mittagong, NSW, and to independent tests carried out on the Dalkon Shield and other IUDs in the United States. In respect of the latter tests, it was pointed out that:

“They found that there was copper acetate put in the Dalkon Shield which leaked out and had a contraceptive effect. However, the manufacturer’s claim that it was put there only as an anti-fungal thing. Whichever way it went, the Robins Co. were in a very difficult situation as they had an FDA certification as an inert device.”

One of the public servants who processed this letter within the Federal Department of Health made a cryptic and somewhat prophetic marginal note: “This has broader implications . . .”

Although the assistant-director of the Therapeutic Goods Branch of the Federal Department of Health acknowledged in 1981 that imported intra-uterine devices whose effect is attributed in part to the release of copper in the uterus had been classified as therapeutic substances and evaluated prior to their approval for marketing in Australia, it would appear that the Dalkon Shield escaped such scrutiny.

It was not until the problems with the device had become manifest that the device was voluntarily withdrawn from the market.

STATE LEGISLATION

Only one Australian State (Victoria) requires the regulation of contraceptives. However, even this degree of regulatory control can be bypassed, as happened with the "Anderson Leaf" IUD, when the product is manufactured in that State but used in another State.

While some degree of control over manufacturing processes can be exercised under State legislation, pursuant to the provisions of the *Therapeutic Goods and Cosmetics Act 1972*, NSW (and similar regulations in some other States), it is clear that this has failed. The NSW legislation provides for an advisory committee (without consumer representation), licensing, the promulgation of standards, control of advertising, the inspection and seizure of goods, and prescribed offences. One of the difficulties is that "generally the States do not have the resources to carry out their own evaluation and rely on the advice of the ADEC . . .".⁹

By 1985, there had been approximately 15,000 claims against A H Robins in the United States. The company had by then paid out approximately \$400 million in compensatory damages, \$25 million in punitive damages, and \$100 million for its own legal costs in connection with the 10,000 claims which had been either settled or half determined following a trial on the merits.

An additional accounting reserve of \$700 million had been established for the payment of outstanding and projected claims. This was considered to be inadequate to meet future claims which were then estimated to be worth in excess of \$1 billion. There has been a plethora of other legal proceedings, most of which have been brought in the United States.

Proceedings have been brought: against doctors and hospitals, alleging medical negligence¹⁰; against Robins by shareholders; against officers and directors of Robins alleging personal responsibility and liability on the basis of breach of fiduciary trust, authorisation of tortious misconduct and fraud; by Robins against its insurer Aetna; by claimants against Aetna alleging conspiracy

and a cover up, together with deliberate obstruction, delay and improper denials of liability in relation to meritorious claims; against lawyers for professional negligence, criminal conspiracy, and professional misconduct; against insurance company loss adjusters alleging a conspiracy with certain lawyers to settle claims for less than their worth; against a trial court judge, Miles Lord, for alleged judicial misconduct arising out of his court room address to corporate officers; against the judge presently presiding over the bankruptcy proceedings, Judge Merhige, for alleged bias and improper conduct; against a former in-house lawyer employed by Robins, seeking to restrain him from giving evidence about the destruction of damaging documents; against Robins in connection with the alleged suppression and destruction of documents; and against the German manufacturer of the tailstring which was attached to the IUD, and other third party defendants.

There have also been additional proceedings, disputes within proceedings, and appeals in connection with defamation; the proposed establishment of an emergency fund to meet the medical expenses of Dalkon Shield victims; the most appropriate forum for the resolution of cases; the question of whether Robins is estopped from constantly re-litigating the issues of negligence and breach of warranty; advertising by lawyers seeking to attract Dalkon Shield clients; fee arrangements; and numerous class actions arising out of claims for both compensatory and punitive damages. This litigation has been in progress for over ten years and the Dalkon Shield has now become the most litigated product in history.

Following substantial awards of compensatory damages and large punitive damages awards, Robins filed for voluntary bankruptcy in August 1985 under chapter 11 of the United States *Bankruptcy Code*. It had previously failed in a further attempt to have a class action certified.

Lest it be thought that this was the final stage, there were of course the inevitable legal challenges to the *bona fides* of the bankruptcy application and also a challenge to the judge presently presiding over the bankruptcy proceedings following his dismissal of the original claimants' committee.

Further proceedings have arisen out of allegedly improper

payments made by Robins to corporate officers and the sale of foreign assets after the bankruptcy proceedings had been initiated. Also, in view of the bankruptcy, it is likely that many foreign plaintiffs will now seek to pursue proceedings against foreign subsidiaries in their domestic courts. Many have already started actions.

After the bankruptcy proceedings were instituted, a deadline was set for the lodging of claims by both North American and foreign claimants. By April 1986 more than 300,000 people had lodged claims with the Bankruptcy Court in the United States. Australian claimants comprise almost a quarter of all foreign (i.e. non-United States) claimants in the bankruptcy proceedings. Notwithstanding the large number of people who filed claims, many missed out. An application for an extension of time for the lodging of claims by foreign women was rejected and this was the subject of an appeal. The decision of the appeal court is yet to be handed down.

At the time of writing (April 1987), the company had just filed its own reorganisation plan with the court. The plan provides for setting up a \$US1.75 billion trust to provide payments to Dalkon Shield claimants. The plan is yet to be adopted by the claimants of the court and no doubt disputation, and litigation, over compensation arrangements will continue for some time.

There is also on-going litigation over whether the bankruptcy proceedings were appropriate or justified as a mechanism for seeking relief from tort liability.¹¹

Those women who are contemplating or currently involved in litigation have encountered a multitude of problems. Many have found it difficult to get adequate legal assistance and some have been deterred from taking action on the basis of erroneous advice. The problem has been compounded by the fact that most of the Australian lawyers have simply not been in possession of relevant information and documentary evidence. In part this has been because of the suppression and destruction of information and documents by the company, but the tyranny of distance has exacerbated the problem.

CHOICE OF JURISDICTION

Having resolved to take action, Australian claimants need to consider whether to bring proceedings in Australia and/or in the United States. The limitations of the Australian legal system are evident from the fact that almost all Australian plaintiffs (and other foreign claimants) have chosen to bring proceedings in United States courts. Although the evidence and witnesses relating to the company's actions are primarily located in the United States, this is counteracted by the presence of evidence in Australia concerning the insertion, identification of the device and the subsequent damage and the possible necessity for claimants and witnesses to travel to the United States, at their expense—if the proceedings result in a hearing. Moreover, there is the expense of United States lawyers having to come to Australia for the purpose of obtaining evidence in the pre-trial stages.

However, these competing considerations are outweighed by the substantive and procedural advantages of litigating in the United States. In particular:

- (a) The doctrine of strict liability makes it easier to recover compared with jurisdictions like Australia which require proof of negligence.
- (b) Compensatory damages are higher and the possibility of a large award of punitive damages is an added incentive.
- (c) United States lawyers will handle the cases on a contingent fee basis and thus no legal fees will be charged unless a successful recovery results.
- (d) Costs do not follow the event and thus unsuccessful claimants will not be ordered to pay the other side's legal costs.
- (e) There are more liberal laws governing the time period in which legal proceedings must be started and the limitation period stops running on the filing of a class action or bankruptcy application.

- (f) A number of United States law firms have invested substantial amounts of money in investigation/research and have commissioned experts to obtain evidence giving rise to economies of scale and defraying the expense involved.
- (g) Many United States law firms have been involved as specialists in Dalkon Shield litigation for up to 10 years and during this period have amassed voluminous documentation and evidence and acquired considerable expertise.

A number of these factors—together with the fact that the United States legal system has evolved a mechanism for the resolution of large scale litigation of this sort (the class action)—serve to highlight the limitations of Anglo-Australian law. Yet there are further problems, particularly those relating to traditional tort-based litigation strategies.

MEDICAL RECORDS

Claimants have been disadvantaged, and in some instances cases prejudiced, because of the lack of a clearly defined legal right of access to medical records in Australia.

Practices and policies vary between States, within States between private and public hospitals, and between different medical practitioners. In many instances, patients have been denied access to their records; told that the records had been deliberately destroyed; asked to pay inordinate fees, or told that the records would only be produced on subpoena.

The move toward freedom of information and legal rights of access to documents in the public sector, particularly at a Commonwealth level, has not extended to the States (with the exception of Victoria) or the private and professional sectors. The equivocation about policy in relation to patients' access to their own medical records is matched by a pervasive uncertainty or confusion about legal rights of access. It is likely that the abovementioned barrage of litigation arising out of the Dalkon Shield saga will soon be added to with the initiation of legal proceedings against doctors and hospitals denying access to records.

LIMITATION PERIODS

Legislative limitation periods vary between States, between the States and Commonwealth and between different causes of action. Moreover there is much scope for argument, and much litigation, about the interpretation of time limit provisions. The problem is of course compounded in the absence of judicial discretion to temper the obvious injustice arising out of the extinction of legal rights before a latent injury becomes apparent or before plaintiffs become aware of the fact that they have a cause of action.¹²

In some jurisdictions a "discovery rule" has developed which provides that the cause of action accrues not at the time of the injury, but when the injured person discovers the injury and its cause. As one commentator has observed:

Largely, this development has been the work of judges, occasionally aided and sometimes hindered by . . . legislatures.¹³

However, even in jurisdictions—such as a number of those in the United States—which have adopted a discovery rule, difficult legal questions arise concerning whether foreign courts will still apply Australian law; whether the limitation period legislation serves to bar the remedy or extinguish the legal right; and whether limitation periods can be waived or apply only if specifically pleaded.

The answers to such questions are outside our scope here, but the questions themselves highlight some of the legal problems to be overcome. Although restrictive limitation periods may deny plaintiffs a remedy for certain injuries, ongoing problems and separate injuries may give rise to additional causes of action. However, normally a plaintiff may not postpone bringing proceedings until the full extent of the damage is ascertained. In many instances, Dalkon Shield victims have been disadvantaged by the operation of restrictive limitation period provisions.

LIMITS OF THE TRADE PRACTICES ACT

The *Trade Practices Act* provides for certain remedies of relevance to Dalkon Shield claimants. Sections 52 and 53 related to misleading and deceptive conduct, and the manufacturer's liability provisions

create a form of strict liability if the injured consumer can establish that the goods are not fit for the purpose; fail to correspond with the description; are not of merchantable quality; don't correspond with samples; and don't comply with express warranties which are broadly defined and extend to promotional or advertising materials.

However, the latter provisions were only inserted into the Act in 1978 and actions may only be sought within 3 years after the cause of action accrues.

As noted earlier, the *Trade Practices Act* also provides for statutory product standards, but no relevant standards have been prescribed.¹⁴

FOREIGN COMPANIES AND AUSTRALIAN SUBSIDIARIES

The Australian assets of A H Robins Pty Ltd are limited. The assets of the parent American company are under siege from hundreds of thousands of American and foreign plaintiffs and, at this stage, protected pursuant to bankruptcy proceedings.

Moreover, the insurance cover of the American corporation has been largely exhausted and there are a large number of unanswered questions concerning the insurance cover for its Australian subsidiary. The product was manufactured by the United States parent and the local activities of the Australian subsidiary were carefully controlled from the United States. Moreover, most of the shares in the Australian company are held by members of the parent company.

Given that the claims of Australian (and other) women were being frustrated by the United States bankruptcy proceedings (while the parent company and its foreign subsidiaries continue to trade profitably) some important policy questions arise as to:

- (a) Whether multi-national corporations should be allowed to trade in Australia only if they can demonstrate sufficient assets to meet claims against them by injured consumers;
- (b) Whether some form of financial bond should be required;

- (c) Whether separate product liability insurance should be compulsory;
- (d) Whether product liability insurers should be able to avoid paying claims under the policy on the basis of non-disclosure of relevant information by the company.¹⁵

A UNITED STATES SOLUTION?

Given the limitations of the Australian legal system and the procedural and substantive advantages of bringing legal proceedings in the United States, it is hardly surprising that most Australian plaintiffs have chosen this option. Thus, the United States corporation, and the United States courts, are bearing the burden arising out of the failure to regulate or control the export of hazardous products.

However, the volume of litigation has led to protracted delays and, as noted above, almost exhausted the insurance cover and has now raised questions about the ability of even a large profitable multi-national company like A H Robins to meet its legal liabilities.

Earlier procedural battles over class actions, multi-district litigation, forum shopping and limitation periods have been superseded by a new wave of wrangling arising out of the bankruptcy proceedings. The Bankruptcy Court is now seeking to balance the interest of the claimants with those of the corporation and its shareholders. All parties have a vested interest in the survival and profitability of the company.

Positive effects of the bankruptcy proceedings are that the limitation period has stopped running (in the United States in so far as the A H Robins Company is concerned); all claims will be considered equally and the interests of potential or future claimants will be taken into consideration (provided that the user lodged notification with the court before the end of April 1986); controls will be exercised over legal fees thus encroaching on the market forces which determined the pre-existing contingent fee arrangements; and a simple claims procedure is likely to be instituted which will hopefully serve the interests of both represented and unrepresented claimants.

The regulation of legal fees will itself have some far-reaching implications given that almost \$250 million of the funds paid out by the company to date have gone to lawyers. During the course of the litigation there has been considerable abuse of the contingent fee system. Many lawyers have attracted clients, negotiated a contingent fee deal, taken a percentage of what could only be described as a "finder's fee", and transferred the files to other firms to carry out the work. Fees based on a third to 40 per cent of gross damages recovered are usual and there are a number of firms with an excess of 1,000 clients.

The bankruptcy proceedings also bring to an end the large awards of punitive damages in individual cases. These awards were beginning to have some disturbing implications given that the company was being repeatedly punished; the diminishing funds available for the payment of compensatory damages; and the spectacular variation of awards between different juries.

Negative consequences of the bankruptcy include the ongoing delay, the endless procedural disputation, the mind-boggling problems of trying to evaluate questions of liability and quantum in connection with 300,000 claims from all over the world, and the prospect that many claimants will not receive adequate compensation.

Initial reports of adverse reactions to the Dalkon Shield in Australia led to the establishment of a working party of the National Health and Medical Research Council to review IUDs. In its 1977 report, the Committee recommended that women who were using the device successfully at the time, and who were not pregnant, need not have it removed although it had been withdrawn from the American market in September 1975 and from the Australian market some time later.

In the process of reviewing the regulatory system in force in relation to contraceptive devices, several bodies expressed concern at the absence of screening and evaluation for devices marketed in Australia.¹⁶

The 1981 amendments to the *Therapeutic Goods Act* provided for the establishment of a National Register of Therapeutic Goods which will encompass pharmaceuticals, contraceptives and devices. In 1984, the Federal Minister for Health announced proposals for

the evaluation and regulation of high risk medical devices, following heart valve failures leading to deaths.¹⁷

It is of course possible to control the import of all IUDs by including them in Schedule 8 of the *Customs (Prohibited Imports) Regulations*. This would require the establishment of standards or guidelines and prohibit import without the permission of the Minister for Health.

This regulatory approach has in fact been adopted for condoms and diaphragms. It seems somewhat incongruous that devices which are less of a health risk and less intrusive than IUDs should be subjected to greater regulatory control.

However, a working party has now been established by the National Biological Standards Laboratory to look at guidelines for IUDs which will cover physical properties of the devices.

Notwithstanding important developments in recent years, it is submitted that the Federal regulatory system remains manifestly inadequate. Problems include:

- (a) Lack of control over locally manufactured products;
- (b) Limited scrutiny of some imported products;
- (c) Lack of investigative staff and the shortage of technical expertise and testing facilities;
- (d) Absence of prescribed standards;
- (e) Limited reporting of adverse reactions and the lack of mandatory reporting requirements;
- (f) Absence of a legislatively prescribed mandatory recall scheme for defective products¹⁸;
- (g) Limited statutory penalties for regulatory offences.

These and other problem areas are referred to in a submission by the Australian Federation of Consumer Organisations to the Federal Minister for Health¹⁹, and in submissions to the Minister

by the Public Interest Advocacy Centre in relation to the Dalkon Shield. In his recent response to the PIAC submission, the Minister:

- (a) Refers to the difficulty in drawing up product standards;
- (b) Points out that all contraceptive devices imported and marketed in Australia since around 1978 have been subject to full evaluation;
- (c) Expresses opposition to legislatively prescribed mandatory reporting of adverse reactions given that, for the first three years of marketing of any new IUD approved by the department, there is a requirement for the company to notify all reports of suspected reactions and to provide post-marketing reports which must include details of any on-going studies or reports relating to the product's safety and efficacy.

It would thus appear that some of the implications of the Dalkon Shield saga are yet to make an appreciable impact on departmental and ministerial thinking.

Although the Australian company and the Australian Drug Evaluation Committee both undertook a publicity campaign in 1974 to alert the public and the medical profession to problems associated with the device and calling on the medical profession to provide details of problems encountered, only 74 reports were received. The inadequacies of such a reporting system are revealed by the fact that the number of Australian claimants in the US litigation now exceeds 7,000.

According to the Minister for Health, there had been no reports of any problems occurring in Australia up to 1974 and thereafter the reported problems represent an incidence of only 0.05 per cent based on an estimate of 147,000 devices sold in Australia. The fallacy is, of course, to infer that the incidence of reported problems bears any relationship to the incidence of actual problems. Significant numbers of women in fact suffered problems before 1974 at a time when there were, according to the Minister for Health, no adverse reports. According to a recently published book:

By Robins's own conservative estimate in April 1985, 4 per cent of the wearers were injured—that is, nearly 90,000 women in the United States alone.²⁰

Notwithstanding the 1974 publicity in Australia, and the 1975 withdrawal of the product from the market, it is clear that devices were subsequently inserted, that many women continued to wear the device and suffer personal injuries, in some instances, up to 10 years later, that consumers themselves did not receive adequate notification of the problems with the device and that the overwhelming majority of doctors and health care professionals who became aware of problems experienced by their patients failed to notify health authorities, and, in some instances, were themselves negligent in relation to insertion and/or failure to advise on adverse effects or the need for removal of the device.

It was not until 1980 that health care professionals were formally notified by the company that any devices still *in situ* should be removed. Moreover, it was not until the end of 1984, some 10 years after the problems with the product were known to corporate and government officials, that a comprehensive public education and publicity campaign was undertaken by the company.

This was to be repeated in early 1986 in Australia and in other foreign companies where the product was sold, by order of the Bankruptcy Court in the United States in a decision handed down in late 1985.

THE LONG ROAD TO REFORM

As long ago as the mid 1970s the ACT House of Assembly Standing Committee on Education and Health recommended complementary State and Federal legislation governing the production and evaluation of all contraceptive devices. Although the recommendation was limited to those devices manufactured in Australia, it is clear, as the Federal Minister for Health has recently acknowledged, that there are:

“Some limitations in the Federal Acts over the importation and/or marketing of contraceptive products in Australia.”²¹

At the International Conference on Population in Mexico in 1984, Australia formally moved an amendment to the international declaration under consideration to the effect that countries should ensure that contraceptive methods conform to adequate standards of quality, efficacy and safety.²²

THE LIMITS OF THE LEGAL SYSTEM

The Dalkon Shield case has highlighted the limitations of the Australian legal system and placed severe strains on United States courts. Mass product liability of this sort, and on this scale, raises a number of important legal and policy questions:

- (a) Should the courts and the regulatory system be more concerned with preventive rather than remedial measures?

The early implementation of legislatively prescribed or judicially created mandatory recall procedures would have prevented or substantially lessened the problem. Apart from proposals for legislative reform, it is of interest to note that there has been some recent judicial creativity. Courts in the United States have used punitive damages as a mechanism for inducing corporate defendants to take products off the market (as in the case of tampons alleged to cause toxic shock) or make good the damage they have caused (e.g. by cleaning up an area where groundwater had become polluted). Large punitive damages awards were imposed but suspended or reduced on condition that corporations carried out such measures. This raises a variety of interesting and important issues concerning the overlap between civil and criminal or quasi-criminal penalties.

- (b) Would preventive and regulatory goals be better achieved by uniform federal legislative action and the setting up of a National Consumer Product Safety Commission? Should governments take affirmative action on behalf of individual victims or should they be left to take individual action through the courts? It is interesting to note that following Bhopal, the Indian Government itself took action to help claimants

file a class action in the United States. By way of contrast, the Australian Government has left Dalkon Shield victims to fend for themselves. The onus of publicising the deadline for the filing of claims in the United States was left with the company and the majority of advertising and expenditure on advertising was confined to the United States. Not surprisingly, therefore, after the expiration of the deadline it was found that more than 90 per cent of claimants were residents of the United States whereas only 60 per cent of the products were distributed in the United States. Moreover, the overwhelming majority of the claims settled before the bankruptcy proceedings were instituted involved American women.

- (c) Has the traditional mechanism for the award of "once and for all" damages been in the interests of claimants?

The delay in resolving litigation and the limits on the award of interim damages have in many instances served to disadvantage both plaintiffs and defendants. As noted above, there have been proceedings seeking the establishment of an emergency fund to meet medical expenses (e.g. in relation to payment for in-vitro fertilisation, repair of damaged fallopian tubes, evaluation of fertility, and psychiatric counselling).

Lawyers seeking the establishment of such a fund contend that it is not only in the interests of the clients for medical services to be provided before they get beyond child-bearing age, but also in the company's interests given that the value of a claim based on infertility would be reduced from \$350,000 to \$100,000 if medical efforts to restore a woman's fertility are successful.

Other obvious problems in assessing damages arise in trying to assess loss which may or may not arise (e.g. in cases of partial infertility where it is not known whether a child or further children will be conceived).

Recent legislative reform in the United Kingdom has conferred on courts the power to award provisional damages for personal injury.²³

- (d) Should the existing principles relating to exemplary and aggravated damages be extended to encompass punitive damages in the United States sense? If so, how should this be regulated to ensure that defendants are not unduly punished and that some plaintiff do not receive awards of punitive damages at the expense of awards of compensatory damages to other plaintiffs. (where limited funds are available)?

The issue of punitive damages raises important questions about the purpose of law. Is it merely to provide for individualised forms of compensation or is it intended to serve a broader social purpose?

- (e) Are "class actions" or compensation funds a preferable and more equitable, expeditious and less costly alternative than a multitude of individual awards of compensatory and punitive damages?

The question of class actions was recently considered by the Australian Law Reform Commission.²⁴ Recent problems with large-scale asbestos litigation have led to the establishment of compensation funds in the United States and similar proposals in Australia.²⁵ Problems with various pharmaceuticals which are alleged to have caused large-scale injuries have led to proposals for voluntary compensation schemes in the UK.²⁶

- (f) Are alternative dispute resolution mechanisms a better method of determining questions of fact and liability than court-based litigation?

If so, should developments in this area extend to large-scale complex product liability issues rather than continue to be confined primarily to minor individual "backyard" disputes and commercial disputes?

- (g) Should presently restrictive limitation-period legislation be liberalised and should there be uniformity between Australian jurisdictions?

- (h) Should Australia follow the United States and recent European proposals and adopt some form of strict liability for compensating persons injured by hazardous products in lieu of the principles of negligence and the limited "no fault" remedies available under the *Trade Practices Act*?

These are just some of the important legal and policy issues which the Dalkon Shield product liability litigation has served to highlight. The lessons to be learnt from this saga extend far beyond the interests of the particular claimants and the one company.

The case raises important questions concerning the conduct of national and multi national corporations and the legal culpability of corporate officers; the role and ethical responsibilities of both corporate and plaintiffs' lawyers; the ambit of governmental and regulatory control; the substantive and procedural legal rights of consumers, corporations and shareholders. In short, the case highlights a multitude of fundamental legal and policy questions concerning the role of law in society.

In conclusion, it should be noted that to date almost all legal claims have been by white women from English-speaking common law countries (the United Kingdom, Canada, the United States, Australia and New Zealand). The product was of course distributed on a large scale in 80 countries, including many third world countries through international aid organisations. Large numbers of the devices, many sold at a discount without sterilisation, were dumped abroad after the product was taken off the market in the United States. Whatever one may think of the plight of women claimants in their struggle with the company and the legal system, one should not lose sight of the fact that unknown numbers of women are still wearing the device and untold others have suffered illness and injury without ever becoming aware of the fact that legal redress is available.

It is a long way from the villages of Bangladesh to the courtrooms of the United States.

POSTSCRIPT

On 7 October 1988, a trust fund set up to handle claims against

A.H. Robins began making payments to some of the injured women. There were at the time some 196,000 active claims pending against the company from women around the world.

On 19 January 1989, A.H. Robins announced acceptance of a U.S. \$700 million takeover bid from American Home Products, a large American pharmaceutical manufacturer. The bid was endorsed by Dalkon Shield claimants after American Home proposed to pay court ordered compensation in the amount of U.S. \$2.475 billion into the trust fund at the conclusion of bankruptcy proceedings. By mid 1989, these had yet to be consummated. The interest forgone pending final determination of proceedings exceeded millions of dollars per week.

Claimants' and corporate legal fees arising from the litigation are estimated to exceed U.S. \$1 billion. Before the device was withdrawn from sale, A.H. Robins' total profit on the Dalkon Shield was U.S. \$500,000.

Notes

1. See generally, Mintz, M (1985), *At Any Cost: Corporate Greed, Women and the Dalkon Shield*, New York, Pantheon Books; Engelmayer, S and Wagman, R (1985), *Lords Justice: One Judge's Battle to Expose the Deadly Dalkon Shield IUD*, New York, Anchor Press/Doubleday; Perry, S and Dawson, J (1985), *Nightmare: Women and the Dalkon Shield*, New York, Macmillan.
2. Mintz, op cit, 116 ff.
3. Ibid, 121.
4. Ibid, 124.
5. Harland, D (1985), "Legal Aspects of the Export of Hazardous Products", 8 *Journal of Consumer Policy* 209.
6. Siedlecky, S (1985), "Commonwealth Department of Health Regulations" in *Contraception and Consumer Protection: Conference Papers*, Public Interest Advocacy Centre, 104-109.

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7. Nagarajan, R (1985), *Product Liability Law and Statutory Product Standards: A New Approach to Product Safety in Australia*, Draft manuscript (unpublished).
8. Letter to Assistant Secretary, Department of Foreign Affairs, Canberra, 27 June 1973.
9. Siedlecky, op cit supra note 6.
10. Thornton, G R (1986), "Intrauterine Devices: Malpractice and Product Liability", 14 *Law, Medicine and Health Care* 1, 4; Thornton, G R (1986a), "Intrauterine Devices" *Trial*, (November) p 44.
11. Note: University of Pennsylvania Law Review (1983), "Relief From Tort Liability Through Re-Organisation", 131 *University of Pennsylvania Law Review* 1227.
12. See the Report of the WA Law Reform Commission and, in the UK, section 33 of the *Limitation Act* 1980. See also, *Do Como v Ford Excavations* (1984) 52 ALR 231: The recent report of the NSW Law Reform Commission on the *Limitation Act* 1969 (NSW).
13. Owles, D (1985), "The Dilatory Plaintiff", *Product Liability International*, July, 111-112.
14. Nagarajan, op cit supra note 7.
15. See, e.g. the recent battle in NSW between a local asbestos producer and its insurers: *James Hardie Industries Limited*. Decision of Rogers, J, 19 November 1984. See Goldring, J, "Asbestos—Who Pays?" *Legal Service Bulletin*, February 1985, and the letter by Justice Andrew Rogers in the October 1985 edition.
16. National Health and Medical Research Council (1977), *Report of the Working Party on Intrauterine Contraceptive Devices*, Canberra, AGPS; The Standing Committee on Education and Health of the ACT Legislative Assembly referred to anomalies arising out of separate State and Federal legislation. Moreover, although one State (Victoria) requires registration of all contraceptives, including devices, this did not cover those manufactured in that State and sold elsewhere. One particular device (the Anderson Leaf) was not registered, although manufactured in Victoria, because it was used principally in New South Wales. Moreover, those in whom the devices were inserted would appear not to have been informed that the device was on trial.
17. There is currently a considerable amount of litigation in the United States against the manufacturers of heart valves.
18. See generally, Office of Consumer Affairs, Recall of Unsafe Products, Canberra, AGPS, 1985. Recent amendments to the *Trade Practices Act*, 1974 make provision for the mandatory recall of unsafe products in circumstances where the safety of the public is threatened and the situation cannot be handled adequately by voluntary recall schemes or other means. (Section 65F.)
19. AFCO (1984), *Deadly Neglect: Regulation of the Manufacture of Therapeutic Goods*, Submission to Federal Minister for Health.

20. Mintz, *op cit supra* note 1, 7.
21. Letter to Public Interest Advocacy Centre, November 1985. Recent proposals for legislative reform in Victoria are incorporated in the *Therapeutic Goods and Cosmetics Bill* 1984. The proposed legislation represents a substantial improvement within the constraints of unilateral State action to deal with what is obviously a national and international problem.
22. Siedlecky, *op cit supra* note 6.
23. Section 32A, *Supreme Court Act* (UK), in force from 1 July 1985. See generally *Product Liability International*, August 1985, p. 121 and the New Order 37 of the *Supreme Court Rules* (UK).
24. Australian Law Reform Commission (1985) *Standing in Public Interest Litigation*, (Report No. 27), Australian Government Publishing Service, Canberra. Recent amendments to the *Trade Practices Act* 1974 enable the Trade Practices Commission to bring proceedings on behalf of named consumers seeking damages or other relief (Section 87).

Recent procedural reforms have also been introduced in both South Australia and Victoria to enable representative or "class" actions to be brought on behalf of groups, including where damages are sought.

See: Rule 33 *Supreme Court Rules*, South Australia, 1987; Sections 34 and 35, *Supreme Court Act* 1986 (Vic.), Order 18, *General Rules of Procedure in Civil Proceedings*, 1986 (Vic).
25. See *Product Liability International*, August 1985, 125; July 1985, 109.
26. McIntosh, D (1985), "Litigation Against Pharmaceutical Companies in the United Kingdom", *Product Liability International*, December 1985 (Part 1), January 1986 (Part 2).

Chapter Eight

THE MEDIA, TOBACCO AND PUBLIC HEALTH

Peter Grabosky*

For many it's fun. For many others it means profit. But the pleasure and the profit from smoking come at a hideous price.

The use of tobacco became a habit in Western societies long before the European colonisation of Australia. Over the past two centuries, millions of Australians have derived genuine satisfaction from inhaling tobacco smoke. Cigarettes were part of every digger's rations, and indeed were even included in Red Cross packages for prisoners of war. While the number of Australian smokers has declined slightly in recent years, nearly one in three Australians, almost four million people, are smokers today.

In addition to any physical pleasures, the benefits from tobacco consumption are widespread.

- Tobacco farmers in Queensland, New South Wales and Victoria derive their livelihood from the crop.
- Thousands of people are employed in the manufacture and sale of tobacco products, a \$2,000 million a year industry.
- The advertising industry and the media derive some \$60 million

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a year from the promotion of tobacco products, whether through direct advertising in newspapers, magazines and on billboards, or indirectly through widely publicised sporting and cultural events.

- Australian governments obtain enormous financial benefit from the tobacco industry—Commonwealth and State governments receive tax revenues in excess of \$1,200 million a year.

Yet nicotine, an essential ingredient of tobacco, is addictive. It may also contribute to atherosclerosis and cardiovascular disease. Tobacco smoke contains tars—organic particulates—which are carcinogenic; it contains a variety of pathogenic substances, including phenols, nitrosamines, and hydrogen cyanide, some of the substances emitted from coke ovens; it also contains carbon monoxide, the inhalation of which is harmful to the respiratory and circulatory systems. Cigarette smoking during pregnancy is associated with prenatal death, retarded foetal growth and birth defects.

The major cause of death in Australia is heart disease. Some 25 per cent of deaths from heart diseases are attributable to smoking. The second largest cause of death in Australia is lung cancer. An estimated 90 per cent of lung cancers are attributable to smoking. Health authorities estimate that tobacco is the major causative factor in the deaths of 16,000 Australians each year.¹

In addition to the human tragedy which these statistics reflect, smoking in Australia entails other costs. Smoking-related illnesses impose burdens on the economy, in the form of absenteeism and lost productivity. Of the major tobacco companies active in Australia today, all but one are subsidiaries of British and US multinationals—the profits which these firms repatriate are lost to the Australian economy. Those Australian firms with subsidiaries or sales outlets in Papua New Guinea or other Pacific nations themselves repatriate valuable foreign exchange and divert funds which might otherwise be spent on nutrition or other productive domestic investment.² In many parts of the world, tobacco growing competes with food production, and requires intensive use of potentially hazardous pesticides. Tobacco curing also requires large quantities

of wood fuel, which can be scarce in some developing economies.

There seems little doubt that cigarette manufacturers, with the assistance of the advertising industry and the media, are aggressively marketing an extremely hazardous drug of addiction, which significantly increases the risk of death or disease in those who use it.

There are no mysterious explanations couched in organisational theory to account for the behaviour of cigarette manufacturers, the advertising industry or the media in contributing to such a massive health problem. The simple answer is the pursuit of profit. As noted above, the promotion and sale of cigarettes are extremely lucrative enterprises. Advertising enhances sales. Tobacco accounts are extremely valuable to agencies in the highly competitive advertising industry. Tobacco advertisements make a significant contribution to sustaining the profitability of the print media.

Some may be tempted to accuse executives in the cigarette industry of knowingly condemning thousands of Australians to their deaths each year. In the course of their work, industry executives rarely have contact with cancer patients. In a psychological sense, they are thus able to distance themselves from those who are harmed by their product.

Moreover, those who profit from the manufacture and promotion of tobacco products tend not to accept evidence which suggests the hazardous consequences of smoking. The official industry position is to acknowledge the existence of scientific controversy on the issue, but to maintain that definitive conclusions may not be reached from the evidence accumulated thus far. The work of Eysenck, funded in part by the tobacco industry, has challenged the conventional wisdom regarding the health consequences of smoking by suggesting that it is not smoking, but rather personality factors and genetic disposition, which lead to illness.³

There is no question that those with a stake in, or with a commitment to, the tobacco industry demand a higher standard of proof than do their adversaries. Human cognitive processes are such that dissonant information is less readily accepted than are data consistent with one's existing beliefs.

There exists, moreover, a strategic incentive for such a public

position. Under the common law of product liability, to manufacture a product which one *knows* to be hazardous places one at fault in the event that the product causes death or injury. Publicly to concede that cigarettes are dangerous would render manufacturers vulnerable to a tidal wave of damage claims. To deny outright the possibility of hazard would be ludicrous in light of accumulating evidence to the contrary. To maintain that the precise causal processes which determine why some smokers become ill and others do not remain unclear, and that further evidence is necessary to reach a definitive determination, is the safest legal course of action for the cigarette manufacturers. To this end, they even seek to demonstrate their concern for the truth by sponsoring medical research on the consequences of smoking.

The failure of Australian governments effectively to protect the health of the citizens from the hazards of tobacco lies primarily in the diverse coalition of interests which they would confront. As noted above, smoking became a way of life in Australia before its risks became fully apparent. A sizeable and intense minority of Australians, whether fatalistic, defiantly independent, or addicted to nicotine, would prefer to be left to their own devices. Tobacco farmers stand ready to challenge any threat to their livelihood. Cigarette manufacturers wield considerable economic power. Advertising and media interests play an extremely influential role in shaping the consciousness of the Australian public. No Australian government, State or Federal, has been secure enough to undertake a significant challenge to such intense vested interests.

Moreover, smoking and its consequences for public health are not perceived as a serious problem by the Australian public. It is ironic, but not surprising, that so much media attention and concomitant public indignation have been focused on illicit drugs, when the costs which they impose on Australian society pale in comparison to those inflicted by tobacco.

As the health risks associated with tobacco smoking became apparent in the 1960s, Australian governments were slow to respond. At no time has outright prohibition of the product been under serious consideration. Most of the measures taken have been superficial.

More forceful action, such as the prohibition of some forms of advertising or the requirement of warning messages on packaging or advertisements, followed overseas precedents, usually after a number of years had passed. For example, television advertisements for cigarettes were banned in Britain in 1965, in the US in 1970, and Australia in 1976. The requirement that cigarette packs include a health warning label was introduced by the US in 1965, by Britain in 1971 and by Australia in 1973.⁴ In any event, many of these initiatives have been easily circumvented by the tobacco industry.

Smoking control initiatives by state governments have taken three basic forms. All states derive some revenue from cigarette excises, and these have been increased from time to time. In addition, States have introduced restrictions on the sale of tobacco to children. Since the late 1970s considerable State resources have been invested in anti-smoking campaigns. These have been directed at children through school health curricula, and at the public in general through advertising campaigns which underscore the health risks associated with smoking.

The first significant Federal Government initiative to restrict the advertising of cigarettes was the *Broadcasting and Television Amendment Act 1976*. Section 100(5A) prohibited commercial radio and television stations from broadcasting "an advertisement for, or for the smoking of, cigarettes tobacco". Thus excluded from the electronic media, the cigarette industry increased its reliance on newspaper and magazine advertisements, outdoor advertising (billboards), and cinema advertising.

Use of the electronic media was not entirely precluded, however. As a concession to the industry, the legislation permitted what is called "perimeter advertising"—the presentation of content for which the radio or television station receives no remuneration. Because of this loophole, it became all but impossible to view a televised sporting event which did not have cigarette advertising in the background to the course or playing field.

In 1977, the Senate Standing Committee on Social Welfare recommended a complete prohibition of cigarette advertising,⁵ but the proposal was rejected by the Fraser Government. No similar proposals have since been given serious consideration.

Realising that continued aggressive advertising of cigarettes

through alternative media was soon likely to invite a hostile response from governments, the tobacco and advertising industries proposed a scheme of self-regulation.

The Voluntary Advertising Code for Cigarettes in Australia (VACC), drafted by the industry and authorised by the Trade Practices Commission in 1977, is subject to annual review by State and Federal health authorities, the tobacco industry and the Australian Publishers' Bureau. It operates under the auspices of the Media Council of Australia (MCA), which represents press, radio, magazine, television, cinema and outdoor media interests.

The Code consists of ten provisions:

1. Cigarette advertising shall be directed only to adult smokers and intended to effect a change of brand.
2. Except in a crowd or other scenes, where the background is not under the control of the advertiser, no characters shall be employed in cigarette advertisements who are under 25 years of age.
3. No family scenes of father and/or mother handling cigarettes in front of children may be included.
4. No advertising for cigarettes may include persons who have major appeal for children or adolescents under 18 years of age.
5. Where a cigarette pack is included in advertising it will bear the health warning.
6. Advertisements shall not include well-known past or present athletes or sportsmen smoking cigarettes nor anyone smoking cigarettes who is participating or has just participated in physical activity requiring stamina or athletic conditioning beyond that of normal recreation.
7. When an advertisement depicts success or distinction it shall not be implied that this is due to cigarette smoking. Adver-

tising may use attractive models or illustrations thereof, provided there is no suggestion that the attractiveness is due to cigarette smoking.

8. Cigarette advertising must be aimed only at smokers, but must not be intended to imply or convey that all persons are smokers. In practice, where there is a group of at least four people featured in an advertisement, at least one shall be shown as a non-smoker.
9. Cigarette advertising must not show exaggerated satisfaction from the act of smoking.
10. No advertisement may claim health properties from any cigarette.⁶

The first challenge to an advertisement under this code was made in 1978 by an anti-smoking activist who claimed that a series of advertisements for Winfield cigarettes featuring Paul Hogan contravened that provision of the code which forbade advertisements including persons having major appeal for those under the defined age.

One year later, after three separate follow-up requests, and no communication from the MCA, the complainant was advised that his communication did not constitute a formal complaint, as it referred to an advertising campaign in general rather than to a specific advertisement. A formal complaint was duly lodged, and held to be without merit by a sub-committee of the MCA. Six months later, an appeal against this decision was upheld by the Chairman of the Advertising Standards Council, Sir Richard Kirby. The Hogan advertisements were finally withdrawn six weeks later.

One of the virtues of deregulation, according to the advertising industry, is the facility of registering a complaint, and the speed with which complaints may be adjudicated. While this may not have characterised the response to the Hogan complaints, the regulatory apparatus responded much more quickly to complaints lodged by *industry* representatives against government-produced anti-smoking advertisements. A "Quit for Life" campaign sponsored

by the NSW Health Commission featured a photograph of twins, one of whom was holding a cigarette. The caption read "Which twin will die first?" In contrast to the delay which characterised the Hogan matter, this advertisement was suspended immediately. It was required that the caption be changed to "Which twin is more likely to die first?"⁷

Numerous submissions to the Trade Practices Commission which are critical of advertising industry self-regulation have met with less than sympathetic response. Cynics have pointed out that a recent chairman of the TPC was previously a director of Amatil, the Australian cigarette and snack food conglomerate.⁸

The year 1983 saw activity on the part of four State and Territory legislative bodies to place greater restrictions on cigarette advertising.⁹ In South Australia, a private member's bill was defeated. In Tasmania and the ACT, legislation was referred to committees. By far the most ambitious initiative was that of the Western Australian Government's Smoking and Tobacco Products Advertisements Bill. The proposed legislation had three basic thrusts—a significant increase in the State cigarette excise, a public anti-smoking information campaign, and a ban on the advertising and promotion of tobacco products. It was supported by the Australian Medical Association, various Royal Medical Colleges, and the Heart and Cancer Societies.

Needless to say, the tobacco industry lobbied strongly against the bill. A special team of lobbyists was sent to Perth for that purpose, and cigarette advertising in the Western Australian press increased during the period.¹⁰ Perhaps coincidentally, editorials in the local press criticised the proposed legislation. In the event, the measure was defeated by two votes in the opposition-controlled upper house.¹¹

In late 1985, the Commonwealth Government announced that it would require larger and more assertive warnings on cigarette packets. It originally intended that the warning message take up no less than 20 per cent of the packet and include, among other statements, the messages "SMOKING KILLS" and "SMOKING IS ADDICTIVE". Vigorous lobbying by the tobacco industry, however, succeeded in reducing the size of the warning to 15 per cent of the packet, and limiting the messages to "SMOKING

REDUCES YOUR FITNESS", "SMOKING DAMAGES YOUR LUNGS", "SMOKING CAUSES HEART DISEASE" and "SMOKING CAUSES LUNG CANCER".

In the absence of firm governmental response to the tobacco-related health issue, some of the more forceful action against the cigarette industry has been taken by private citizens. Damage claims against tobacco manufacturers are being filed with increasing frequency in the United States by terminally ill smokers or their estates.¹² By late 1985 about 75 product liability lawsuits were pending against cigarette companies. In addition to disputing the causal connection between smoking and disease, cigarette companies argue that smoking is an act of choice. Plaintiffs contend, on the other hand, that tobacco companies were for many years aware of the addictive and carcinogenic properties of chemicals contained in tobacco smoke, but failed to warn consumers. While no such action had yet succeeded, similar suits are being brought in Australia. In August 1986, a terminal cancer patient in Melbourne began an action against the manufacturer of Peter Stuyvesant cigarettes. She withdrew, however, as her health deteriorated further, and died in December 1986.

A number of claims for workers' compensation for disabilities caused by tobacco smoke have also been lodged in recent years in the US and in Australia. In October 1985 the Commonwealth Administrative Appeals Tribunal upheld the claim of a public servant who maintained that he had been incapacitated because of the presence of tobacco smoke in his workplace. *Re Bishop v Commonwealth of Australia* (No. 2) (1985) 8 ALN N 219.

Under the *Veterans' Entitlements Act* 1986, ex-service personnel or their surviving dependants are entitled to a pension for disability or death arising from a smoking habit begun or intensified as a result of war service. The Repatriation Commission may not refuse such a claim unless it is satisfied beyond reasonable doubt that there is no sufficient ground for linking the disability or death to that smoking habit. The Repatriation Commission is subject to a mandatory legislative presumption that requires it to find that such a link does not exist if all the material before it does not raise a reasonable hypothesis establishing that link.

In 1988, a non-smoking former Melbourne bus driver won a

\$65,000 out-of-court settlement after he contracted cancer which he blamed on passengers' cigarette smoke. The settlement heralded an increased number of damages claims by passive smokers against their employers, and an increased pressure on employers to ban workplace smoking.

In May 1985, United Telecasters, owner of Channel 10 in Sydney and at the time a subsidiary of the Murdoch News Corporation empire, was committed for trial in the New South Wales District Court under the *Broadcasting and Television Act*. The station was charged with a violation of Section 100 (5A) for having televised an entertainment sequence, the "Winfield Spectacular", which allegedly constituted an advertisement for cigarettes. The event occurred during the 1983 NSW Rugby League Grand Final, at which the Prime Minister of Australia was in attendance. The charges were brought not by the Commonwealth Government nor by the Australian Broadcasting Tribunal, but by a private individual, an anti-smoking activist who was president of the Non Smokers' Movement of Australia. With the committal, further responsibility for conduct of the prosecution rested with the Commonwealth Director of Public Prosecutions. The case came to trial in September 1987, four years after the alleged offence. On 16 September 1987, after more than eight hours of deliberations, the jury brought in a verdict of guilty. On 9 October 1987, Channel 10 was fined \$2,000. Following an appeal to the NSW Court of Criminal Appeal the conviction was quashed and a re-trial was ordered on the basis that inadmissible evidence was presented to the jury during the trial. It was uncertain whether the Crown would receive special leave to appeal to the High Court of Australia or whether a re-trial would occur.

Some of the more extreme actions by private citizens have taken the form of defacing outdoor advertising of tobacco products. A group based in Sydney called Billboard Utilising Graffitists Against Unhealthy Promotions (BUGA UP) has transformed a number of cigarette advertisements into embarrassing editorial commentary. Among the changes wrought have been the transformation of "Anyhow, Have a Winfield" to "Anyhow, it's a Minefield" or "Man how I hate Winfield". Such actions, of course, are quite illegal. When, from time to time, members of BUGA UP are charged with

an offence, they offer the defence of necessity, arguing that their actions were essential to prevent a greater harm from occurring. Regardless of the legal propriety of the BUGA UP campaign, postcard depictions of some of their more imaginative creations have been displayed for sale at the Art Gallery of New South Wales.

The private sector, too, has begun to recognise and to respond to the deleterious consequences of smoking. About 30 life insurance offices in Australia offer discounts to non-smokers.¹³

By the end of 1988, the power of the tobacco, advertising and media industries in Australia, while still formidable, could be seen to waver. Governments continued public information campaigns and imposed further restrictions on cigarette advertising. In 1988, the Victorian Parliament prohibited such promotional strategies as the distribution of free samples of cigarettes and unsolicited leaflets. Cinema advertisements of cigarettes were banned and all outdoor advertising of cigarettes was to be phased out by 1991. The South Australian Parliament imposed restrictions on sporting and other sponsorships, with the exception of certain major events such as the Grand Prix. Smoking was prohibited on domestic air flights from December 1987. Tobacco taxes may be expected to increase gradually, except in Queensland, where government pride in low taxes and concern for the local tobacco industry have prevailed. In a year when an estimated \$23 million were spent by Australian children on cigarettes, the 1986 Federal Budget imposed a 10 per cent excise on fruit juice, but left existing tobacco excise unchanged.¹⁴

In the interim, the cigarette industry seems likely to continue a three-pronged strategy. First is diversification. Cigarette companies are part of multinational conglomerates which have already begun to insure against the eventual decline of the cigarette industry by investing in other areas. Amatil, the Australian cigarette conglomerate, also produces Nobby's Nuts and Smith's Crisps, and bottles Coca-Cola. Philip Morris (Australia) Ltd has extensive holdings in the wine industry, including Lindeman's, Leo Buring, and Rouge Homme. In 1985, R J Reynolds Industries paid US\$4,900 million for Nabisco Brands Inc. Later that year Philip Morris, already the owner of massive brewing and soft drink manufacturing operations in the United States, announced that

it would buy General Foods Corporation for US\$5,800 million. Such diversification is a logical step on the path to an eventual winding down of the cigarette industry. Consumer groups are nevertheless concerned that former cigarette manufacturers will apply the ethics of tobacco marketing to the marketing of junk food and alcoholic beverages.

The eventual decline of the cigarette industry is years away, however, and meanwhile, there are thousands of millions of dollars to be made in selling cigarettes. Faced with fairly static markets in western industrial societies, and at best, a maintenance of the regulatory *status quo* in Australia, cigarette companies are looking increasingly to the third world as a source of new markets. And potentially lucrative markets they are indeed, with hundreds of millions of new smokers in Asia, Africa and Latin America.¹⁵

There remains in addition the lingering hope that scientific research can produce a "safe cigarette". To this end, cigarette companies continue to invest in research to identify and reduce harmful substances in their products.

While the story continues to unfold, an estimated 16,000 Australians will die of smoking related illnesses next year.

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STAINS ON A WHITE COLLAR

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Chapter Nine

SEX DISCRIMINATION: WARDLEY v ANSETT

Peter Grabosky

Deborah Lawrie had one all-consuming passion—flying. And her one dream was to make it a full-time career. She applied to be a trainee pilot with Ansett Airlines. Deborah passed all the tests with flying colours, but there was one thing against her. She was a woman. And that began a long and painful fight through the courts.

This story really began in the mid 1970s when Deborah Jane Lawrie was a teacher at Chandler High School in Victoria. Introduced to flying by her father at the age of 16, she pursued it with diligence and skill. By 1975, in addition to her full-time teaching duties, she held a commercial pilot's licence and worked part-time as a flying instructor at Moorabbin Airport.

Then Lawrie decided to make flying a full-time career. The holder of a Class 1 instrument flying classification, having already logged more than 500 hours total flying time, and having acquired a morse code rating and additional theory qualifications necessary for a senior commercial pilot's licence, she applied for a position as a trainee pilot with Ansett Airlines.

In addition to gender, Deborah Lawrie differed from most prospective commercial pilots in that her qualifications and flight time were all acquired at personal expense. By contrast, most Australian airline pilots learned to fly as members of the Defence

Forces (an opportunity then denied to women) at a cost to the Australian taxpayer approaching \$1 million each.

The process of gaining employment as an airline pilot is a slow one. For Lawrie it was to be considerably slower than usual. When an airline requires an augmentation of its pilot strength, a senior pilot conducts screening interviews with those candidates whose applications are pending.

Deborah Lawrie was interviewed on 24 October 1977, and was advised that her interview had been successful. In accordance with standard airline procedure, Lawrie attended a second interview with a panel of senior pilots in June 1978, and underwent a battery of psychological tests. The panel reconvened shortly thereafter to select from the pool of candidates the required number to be accepted as trainee pilots on that particular intake.

In a letter dated 20 July 1978, Lawrie was advised that her second interview was unsuccessful. Although resigned at first, she learned informally that based on the results of her psychological tests she had been highly recommended, and that no candidate receiving such an endorsement had ever been refused before. Confident of her ability and aware that her competence and potential were no less than that of many successful candidates, Lawrie knew that the only reason she was not accepted as a trainee pilot was because she was a woman.

Since the proclamation of the *Equal Opportunity Act 1977* (Vic.), it had been unlawful in Victoria to discriminate against a person, with regard to employment, on the basis of sex. On 2 August 1978, more determined than ever to embark on a career as an airline pilot, Lawrie lodged a written complaint with the Registrar of the Equal Opportunity Board (EOB).

At stake for Lawrie was more than a matter of principle. Her earning power in the aviation industry would be more than double that of an educator. And the issue of equal opportunity had profound economic implications, not only for Lawrie, but for millions of Australian women.

Despite the fact that South Australia was the first jurisdiction in the common law world to extend the franchise to women, Australia's record of discrimination in general was a poor one. This was, after all, the land of the White Australia Policy, which excluded

non-caucasian immigrants for most of the 20th century. It was, in addition, the land that denied its Aboriginal people the right to vote in Commonwealth elections until 1962 and excluded them from census enumerations for five years thereafter. Married women were prohibited from permanent employment in the Commonwealth Public Service until 1966.¹

At the time of Lawrie's encounters with Ansett, women throughout Australia were denied equal employment opportunities and equal pay for work of equal value. Over and above the affront to emerging standards of fairness and justice, the lack of equal employment opportunity for Australian women often compounded their economic dependence.

A great proportion of government funds allocated to welfare services and to income maintenance programmes in Australia today have been necessitated by this history of discrimination against women. Australia as a society continues to bear significant costs for failing fully to utilise the skills of many of its most talented people.

The difficulties which Lawrie experienced at the hands of her prospective employer were symptomatic of attitudes which were deeply entrenched in Australian culture—attitudes which had only just begun to erode. The structure of the Australian workforce reflected traditional conceptions of women's roles—women were over-represented in subordinate service-oriented positions, and rare indeed in executive or managerial jobs.

In 1979, there was no Federal anti-discrimination law. Only three States had anti-discrimination statutes—South Australia, Victoria and New South Wales. The legislation which was in place in these jurisdictions reflected the caution with which male-dominated parliaments might have been expected to address the issue. Coverage of the Victorian act was relatively narrow, and it provided for many exemptions. Penal provisions were mild, and applied not to discrimination *per se*, but to failure to comply with an order of the EOB, and knowingly to publish an advertisement indicating an intent to breach the act, e.g. Help Wanted: Men Only. Implementation of anti-discrimination policy was based largely on the mediation of disputes between complainants and respondents. It was up to the individual to come forward with the complaint. This

process often pitted lone, disadvantaged individuals against large and powerful interests. Thus, traditional Australian values of male dominance, espoused at the highest levels of Ansett management, were but meekly challenged by the laws of Victoria.

The reluctance of Ansett Airlines to recruit female pilots was reinforced by the attitudes of its founder and chairman, Sir Reginald Ansett. A pioneer of Australian aviation (he held pilot's licence number 419), Ansett built the largest private enterprise transport system in the southern hemisphere from a second hand Studebaker which transported passengers and goods between Hamilton and Melbourne in 1931.

The quintessential self-made entrepreneur, Ansett had long resented government regulation of business, except where such regulation benefited his own business interests. When the Victorian Government refused him a licence to continue his road transport service between Hamilton and Melbourne because it competed with Victorian Railways, he obtained a fruit vendor's licence, sold each of his prospective passengers an orange for what would ordinarily have been the price of a fare, and gave them a "free" ride. Ironically, Sir Reginald later became a staunch defender of the two airline policy, which prevented smaller firms from competing with Ansett Airlines.

As a man of his generation and predisposition, Sir Reginald resented the suggestion that an airline might be required to hire a female pilot. Despite his status as a knight of the realm, his attitude toward actual or potential female employees was occasionally lacking in chivalry and civility. He gained notoriety on one occasion for referring to striking flight attendants as a "pack of old boilers".² Sir Reginald's dominance of the company's board of directors made it less likely that the values of equal employment opportunity for women would prevail without some external pressure.

Under the laws of Victoria prevailing at the time, it was the responsibility of an aggrieved party to seek redress with the Commissioner for Equal Opportunity. This Lawrie had done. Ansett Airlines applied for an exemption from having to employ women pilots and this was denied. To address the possibility of industrial resistance to Lawrie's prospective employment, the Commissioner

for Equal Opportunity approached the Airline Pilots' Federation to determine its attitude toward the matter. The Federation advised that it already had a number of female members, who presumably were employed by charter and transport companies. Attempts by the Commissioner for Equal Opportunity to conciliate the dispute between Lawrie and the defiantly intransigent Sir Reginald were unsuccessful, as he continued to rail publicly about "a woman's place". The case was set down for hearing by the Equal Opportunity Board.

Meanwhile, Lawrie had married a Mr Wardley and had begun to identify herself by her husband's name. The case would thereafter be known as *Wardley v Ansett Transport Industries (Operations) Pty Ltd*. On 12 January 1979, before Mrs Wardley's case had been heard by the Board, Ansett Airlines contacted her and invited her to apply for a pilot intake to start on 21 May 1979. This she did. Wardley was invited to attend a further "second interview" but this was deferred indefinitely by Ansett.

The hearings before the Equal Opportunity Board started on 31 January 1979, and it became apparent from evidence introduced in the proceedings that Wardley had indeed impressed her interviewers. The average score she was given was higher than that attained by half the applicants who were accepted into Ansett's training programme at that intake. The EOB noted that one of the successful candidates performed less well than Wardley on each of the standard interview and test criteria except for his age—which was the same as hers.

Ansett argued that Wardley had failed to make out a *prima facie* case, and there was thus no case to answer. The EOB found that Ansett had unlawfully discriminated against Wardley, and ordered that she be the next trainee pilot hired by the company. Mrs Wardley's battle was far from over, however. The following day Ansett contended that the board had prejudged the matter in Wardley's favour, having ruled prematurely, precluding Ansett from presenting material in rebuttal of Wardley's case.³ The company formally applied to the board to disqualify itself from further involvement in the matter. On 9 February, Ansett applied to the Supreme Court of Victoria for a writ of prohibition against the Board. The matter was heard by Mr Justice Beach, who found

that the Board had prejudged the matter, and was to be prevented from proceeding. The matter was reheard by a new Board, appointed under section 7(1) of the Equal Opportunity Act, and Ansett was given the opportunity to introduce evidence.

Ansett's case rested on the argument that the prospect of pregnancies would inevitably entail absences during the early years of a flying career, which would impose additional costs on the employer. Lawrie (as she then was) had informed the interviewing panel that she was engaged to be married, that she intended to have children, and that she intended to maintain her profession whether she had children or not. It was stated that the interview panel had recommended rejection because of the likely interruptions to her career. Ansett argued the likelihood of future pregnancies placed her in a situation which was materially different from that of the successful candidates.

It was submitted that "such a propensity relative to a male applicant would have told against that applicant no less . . . than it weighed in the minds of the selection panel against Mrs Wardley" (*Wardley v. Ansett Transport Industries (Operations) Pty Ltd*, reported in CCH Australia, 1984, 75, 261).

The Board nevertheless held that to discriminate against Wardley on the grounds of child-bearing potential was to discriminate against her on grounds of sex. Child-bearing potential was, after all, the very essence of the distinction between the sexes, and the legislation prohibiting sex discrimination did so without limitations. On 19 June 1979, the Board ordered that Ansett employ Wardley as a trainee pilot not later than its next intake of pilots and that it pay her the sum of \$40 a day until her first payday. In addition, the board awarded Wardley damages totalling \$14,500.

Sir Reginald Ansett would still not accept defeat gracefully, however. A battler by nature, he was that year confronted by some formidable challenges in addition to that posed by Mrs Wardley. Earlier in the year, Ansett's finance subsidiary, Associated Securities Limited, had collapsed.

Moreover, no less than four different giants of Australian industry, among them Peter Abeles, Rupert Murdoch and Robert Holmes à Court, were contemplating takeover raids on Ansett's shares. Under the circumstances, Sir Reginald Ansett was in

something less than a conciliatory mood.

As the Wardley case and the intransigence of Ansett received increasing public visibility, a boycott grew among individuals and organisations opposed to the airline's discriminatory practices. Among those organisations leading the boycott were the Women's Electoral Lobby, the Australian Federation of Business and Professional Women, and the Victorian branch of the Australian Labor Party. While Ansett management denied the boycott was having any economic effect, it was reported that the airline's passenger growth ran to only about one third of anticipated levels during the 1978-79 financial year.⁴

Within one week of the Victorian Equal Opportunity Board's order in favour of Wardley, the company gave notice of appeal to the Victorian Supreme Court. Ansett argued that it was not subject to the *Equal Opportunity Act*, since the Act was inconsistent with the Airline Pilots Agreement 1979, which had been reached with the Airline Pilots' Federation under the *Commonwealth Conciliation and Arbitration Act*. On 10 October 1979, Ansett had still not hired Wardley, and applied to the Victorian Supreme Court for a stay on the order of the EOB until the appeal had been heard. The application was refused and Wardley joined Ansett Airlines on 5 November 1979.

The various takeover attempts resulted in Sir Reginald's losing control of the company at the end of October 1979 to Murdoch and Abeles. For the time being, Ansett and Abeles were co-managing directors. The appeal went ahead, however. Under section 109 of the Constitution, Commonwealth law prevails in the event of inconsistency between Commonwealth and State law. Since determination of such an issue is ultimately a question for the High Court of Australia, the Attorney-General of Victoria applied for the removal of the case to the High Court. In addition to counsel for Wardley, the Attorneys-General of Victoria, New South Wales and South Australia each argued there was no inconsistency between the Victorian Act and the law of the Commonwealth.

Ansett's originating summons was dismissed, with costs, on 4 March 1980. The airline had exhausted its last available avenue of appeal, and Deborah Jane Wardley's career as an airline pilot was no longer threatened by discriminatory practices.

Not long after Sir Reginald Ansett was forced to yield to the Abeles-Murdoch takeover forces, he became ill. He died on 23 December 1981. The Wardley case became a milestone in Australian equal opportunity law. The image of a determined and very capable woman prevailing over the defiance of one of Australia's leading businessmen, and over the legal resources of one of Australia's largest public companies, was an inspiration to many. The extensive publicity which the Wardley case attracted was to have a profound impact on equal employment opportunity law and policy in Australia. The very principle of equal employment opportunity gained greater public acceptance. Respect for the capability of Australian women was significantly enhanced. Australian business leaders, realising that Sir Reginald Ansett had presided over a public relations disaster, learned that discriminatory practices may be costly indeed. Organisations such as the Women's Electoral Lobby and the Australian Federation of Business and Professional Women were strengthened and inspired to seek further gains. Equal opportunity offices in Victoria and New South Wales, previously denigrated as "paper tigers" and "Mickey Mouse" organisations, acquired a new legitimacy.

The Commonwealth Government enacted sex discrimination legislation in 1984, albeit in a form somewhat watered down by parliamentary opposition. The following year, it introduced an affirmative action plan designed to enhance economic opportunity for women by first encouraging, then requiring, self-regulatory initiatives on the part of employers. Ansett Airlines was a willing participant in the pilot programme.

Later in 1985, the Commonwealth Government moved to place affirmative action in women's employment on a statutory basis. The scheme envisaged would not require the attainment of quotas, but rather would involve a firm of supervised self-regulation. Companies would be required to report regularly to a special statutory authority on their employment policy and objectives, recruitment and promotion practices; and would need to consult with trade unions and employees. In the face of considerable resistance from employer groups, a compromise was reached whereby the scheme would be delayed, penalties for non-compliance would be minimal, and companies with fewer than 100 employees

would be exempt. A firm not in compliance could be named in parliament, but no other sanctions imposed. Firms with more than 1,000 employees would be required to comply by 1988, those with between 500 and 1,000 employees by 1989, and those with between 100 and 500 employees by 1990.

Western Australia joined the ranks of States with anti-discrimination legislation, leaving only Queensland, Tasmania and the Northern Territory without even a symbolic statement of women's rights. Ironically, Commonwealth Government policy continued to deny women equal opportunity in aviation careers within the Defence Forces. A significant breakthrough did occur in mid 1988, however, with the graduation of the first two female pilots in the Royal Australian Air Force.

As more and more complaints were lodged with the various anti-discrimination bodies around Australia, the concept of sex discrimination was to expand. In 1983 the New South Wales Equal Opportunity Tribunal held that sexual harassment was a form of sex discrimination. Soon thereafter, the legislation in South Australia, Victoria and Western Australia explicitly defined it as such, as did the Commonwealth *Sex Discrimination Act* 1984.

In 1984, Victoria enacted a new *Equal Opportunity Act*, combining in one statute provisions relating to discrimination on grounds of sex, race, political or religious beliefs, marital status or physical impairment. The legislative passage was not a smooth one, however. The Opposition objected to omnibus anti-discrimination legislation, preferring a multiplicity of statutes. It succeeded in blocking a provision which would prohibit discrimination on grounds of sexual preference. Moreover, there remained a basic philosophical objection to government intervention in business practices. One could almost hear Sir Reginald Ansett speaking from the grave when the National Party Leader said during debate on the bill:

I fail to see why an employer should not be able to set his or her standards of what is wanted of an employee. Race should not be a factor. Sex in some cases is a legitimate factor, in my view, because in some jobs there is no doubt that women are more suitable than men and in other jobs men are more suitable than women. If a person, for obvious good reasons, wants to

employ a man rather than a woman or a woman rather than a man, I can see no objection.

The point is that a private employer should have the right to choose the staff he or she wants. A private employer should be able to choose someone who fits in with the employer's work standards. A private employer should have the right to set his or her own standards for those he or she wishes to employ (*Victoria Parliamentary Debates, Assembly, Session 1983-84, v. 371, 17 August 1983, 400-401*).

In discussing the section relating to sexual harassment, he added:

There are going to be some dull Christmas parties after this (*Victoria Parliamentary Debates, Assembly, Session 1983-84, v. 371, 17 August 1983, 405*).

Because the basic framework of anti-discrimination policy in Victoria—as elsewhere in Australia—is complaint-based conciliation, some victims of discrimination may lack the psychological or financial resources to come forward. That government services and legal remedies are generally more accessible to the more assertive appears to be reflected in Victorian statistics which show that 26 per cent of those complaining of discrimination on grounds of sex or marital status in 1983-84 were male.⁵ People employed in relatively junior positions within an organisation may find themselves in a particularly vulnerable situation when confronted by discriminatory practices.

The year 1985 saw further developments in the law of sex discrimination. Until 1983, Qantas Airways, Australia's flag carrier, had denied women the opportunity to obtain promotion to certain senior cabin crew positions.

After this practice had been discontinued, female flight attendants nonetheless remained at a disadvantage with regard to subsequent promotional opportunities because their seniority in grade was less than it might have been were it not for previous barriers to promotion.

In August 1985, the NSW Equal Opportunity Tribunal held that

such adverse consequences of previous discriminatory practice themselves constituted unlawful discrimination. One flight attendant was awarded \$20,500 in compensatory damages following a successful challenge (*Squires v Qantas Airways Limited*, NSW Equal Opportunity Tribunal (1985), 12 IR 21, 30).

A second important case was decided the following month, when the New South Wales Equal Opportunity Tribunal upheld claims of indirect discrimination by 34 female iron workers who had been retrenched or threatened with retrenchment by Australian Iron and Steel Pty Ltd, a subsidiary of BHP. The women, whose initial hiring by the company in the late 1970s was impeded by discriminatory practices which then prevailed, were among the first to be threatened with retrenchment under the "last hired, first fired" principle when the steel industry began to falter in the early 1980s. Thus, employment practices, which might on their face appear non-discriminatory, are nevertheless unlawful if they fail to neutralise the effects of earlier discriminatory practices (*Nadjovska v Australian Iron and Steel Pty Ltd*, NSW Equal Opportunity Tribunal (1985), 12 IR 250).

Australian Iron and Steel argued that its recruitment of women was impeded by section 36 of the New South Wales *Factories, Shops and Industries Act*, which prevented women from being employed in jobs requiring the lifting of weights in excess of 16 kilograms. Under NSW law, this took precedence over the *Anti-Discrimination Act*. It was, however, established that the company had, in fact, employed women in such "weight barred" positions, and that company officials were at the time unaware of which positions were indeed covered by section 36.

Meanwhile an Ansett pilot now flying under the name of Deborah Lawrie quietly pursues her career. In September 1985, Ansett proudly announced that as first officer on a Boeing 737 bound from Sydney to Port Vila, Vanuatu via Brisbane, she became the first Australian woman to take the controls of an international commercial flight. When asked to comment on the achievement, Deborah Lawrie replied with nonchalance, "It's no big deal." (*Sunday Telegraph*, 29 September 1985.)

Notes

1. Scutt, J (1983), "Legislating for the Right to be Equal: Women, the Law and Social Policy", in Baldock and Cass (eds), *Women, Social Welfare and the State*, George Allen and Unwin, Sydney, 223-245.
2. Monks, J (1981), "The Aussie Battler who Built an Empire", *The Australian*, 24 December, 7.
3. Hann, D (1979), "Wardley's Long Battle", *Legal Service Bulletin*, 184-186.
4. Chubb, P (1979), "Boycott Cuts into Ansett", *The National Times*, 19-25 August, 5.
5. Victoria, Commissioner for Equal Opportunity (1984), *Seventh Annual Report*, Government Printer, Melbourne.

Chapter Ten

LEAD POLLUTION AND THE CHILDREN OF PORT PIRIE*

Rob Fowler and Peter Grabosky

Port Pirie claims with pride to have the world's largest lead smelter. But pride has its price.

Over the years since smelting first began in the South Australian town in 1889, thousands of tonnes of lead have been deposited in the surrounding environment. And the real victims are today's children.

Port Pirie on the Spencer Gulf has 15,000 residents. It refines the ores being extracted from the century-old mines at Broken Hill. The Port Pirie smelter is operated by Broken Hill Associated Smelters Pty Ltd (BHAS), 70 per cent of which is owned by the mining conglomerate CRA, whose principal shareholder is the multinational Rio Tinto-Zinc Corporation Ltd. The remaining 30 per cent of BHAS is owned by the mining company North Broken Hill Holdings. The plant has the capacity to smelt 300,000 tonnes of ore concentrate and to produce 230,000 tonnes of refined lead each year.

The process of refining lead is complex, and the escape of lead in fume or dust is characteristic of smelting operations. Lead is a toxic substance, and those who work in a lead-processing plant

* An earlier version of this chapter was presented at the Third Australian Law and Society Conference "Power, Regulation and Resistance", Canberra College of Advanced Education, December, 1985.

are at risk of damage to kidneys, red blood cells, and the nervous system.

Lead poisoning, or "plumbism" as it was called in the old days, was not uncommon among Port Pirie smelter workers earlier this century. In 1910, the chairman of the Central Board of Health estimated that 150-200 cases of lead poisoning were detected among workers in the three years since 1907.¹

But it is not only lead which has escaped as a by-product of the smelting operations. Other metals such as arsenic, cadmium and zinc have been emitted from the smelter. In addition, the emission of significant quantities of sulphur oxides has been regarded by authorities during most of the existence of the smelter as the most pressing environmental problem associated with its operation.

The health problems associated with lead were the source of considerable attention earlier this century, but were thought to have been redressed until new concern arose during the 1970s about the impact of low-level exposure to lead.

Fume abatement measures were introduced in the smelter as early as 1902, but a significant increase in the reported incidence of lead poisoning in smelter workers during the early 1920s gave rise to the appointment of a royal commission.¹ Following the commission, growing awareness of the hazards of lead exposure inspired BHAS to make improvements in working conditions, in industrial hygiene and in engineering to reduce the risks faced by lead workers.

Lead smelting, however, has its deleterious effects beyond the workplace. It is estimated that during the history of smelting operations at Port Pirie, some 160,000 tonnes of lead have been deposited in the surrounding environment. In the early days of operations, lead emissions reached 5,000 tonnes a year, nearly all of which was deposited on the township itself. Throughout the 20th century, there have been significant reductions in lead emissions from the smelter. Current yearly emissions amount to less than 20 tonnes, and are much more widely dispersed. A further 40 tons of effluent (including lead) are discharged into Spencer Gulf each year.

Such long-term improvements have arisen from technological

improvements in the efficiency of smelting operations, and because of the introduction of emission controls through clean air regulations in the 1970s. While technological advances elsewhere during the first half of this century gave rise to new control techniques—such as the electrostatic precipitator for particulate emissions—BHAS has preferred to retain the more traditional technology of baghouses to control fume, on the basis that it is considered more effective. During the 1970s, BHAS spent upwards of \$40 million on pollution control measures, including the construction of a 205 metre stack.

Despite growing environmental awareness on the part of both BHAS and the South Australian Government, the citizens of Port Pirie still suffered the legacy of the early days of lead smelting. Environmental monitoring at various locations in Port Pirie began in the 1960s. In the mid 1970s, a team from the CSIRO Division of Soils documented considerable heavy metal pollution in the soil of Port Pirie and environs.² In the early 1980s, considerable traces of lead could be found in household dust, rainwater tanks, and in gardens and public open spaces. Readings from sections of one public park in the city reached 40 times the recommended maximum levels.

Children are most vulnerable to the toxic effects of lead because of their physiology. Because of their developing metabolism, children suffer adverse effects of lead at lower body burdens than adults. In addition, the maturational changes which occur during the ageing process reduce the absorption of ingested lead. While the average adult will absorb less than 20 per cent of the lead which he or she ingests, children may absorb more than 50 per cent. Children, moreover, because of their characteristic hand-to-mouth behaviour and play habits, are more likely to ingest environmental lead than are adults.

The effects on children of low-level exposure to lead are still open to debate. Nevertheless, some evidence of the possible risks posed by environmental lead, specifically in the vicinity of lead smelters, was available as early as 1975.³ Overseas research findings published in the mid to late 1970s reported a strong suggestion of an association between blood lead levels in excess of 35-40 micrograms per 100 ml and neuropsychological impairment.⁴ This

was alleged to manifest itself in a lower IQ, impaired motor development, and general behavioural problems. An accumulating body of evidence from Port Pirie and elsewhere suggests that even at levels below 40 micrograms per 100 millilitres (ug/dl) there may be a subtle but irreversible reduction in children's intelligence.⁵

The general thrust of these findings has been disputed by those who maintain that the alleged relationship between lead levels and intellectual impairment has not been definitively established, or has been confounded by socio-economic factors.⁶ Children exposed to lead tend also to live in disadvantaged social circumstances, and disentangling the effects of lead from those of social deprivation is a difficult methodological task.

Clearly, the debate on adverse effects of low blood lead levels has yet to be resolved. Workers at the Port Pirie smelter have undergone regular blood tests since 1972. While trade unions and the company were involved during the 1970s in discussions with the government concerning systematic community blood testing, this was not pursued by the government on grounds of resource limitations and lack of interest.⁷ Want of governmental concern is reflected in the fact that in the city which boasted the world's largest lead smelter, health authorities did not initially possess the equipment for testing blood lead levels.

In the late 1970s, an apparent increase in the incidence of stillbirths finally prompted a monitoring of blood levels among pregnant women and babies. Toward the end of 1981, four Port Pirie children who were tested for blood lead levels showed readings of 60 micrograms per 100 ml of blood, twice the "level of concern" specified by the National Health and Medical Research Council.

Late in 1981, concern in one school district was sufficient to move a school council to request blood-lead testing of all children. A testing programme was implemented involving nearly half the eligible children in Port Pirie of the 1,239 children tested, 87 (or 7 per cent) had blood lead levels above the National Health and Medical Research Council level of concern. It was thus estimated that up to 200 children in Port Pirie may have been suffering from elevated blood lead levels.

A consultant retained subsequently by the South Australian Health Commission was to state the problem bluntly:

Can Port Pirie afford the permanent, albeit invisible loss, from the group of children with blood lead levels of greater than 40 ug/dl of the one child in 20 with truly superior intelligence; and can Port Pirie afford, for the group of children with blood lead levels of greater than 40 ug/dl, a concomitant quadrupling in the number of children with intellectual impairment?⁸

It would be difficult to characterise the elevated blood lead levels in the children of Port Pirie as having resulted from incompetence, much less intent, on the part of the company. At worst, company management was overly tolerant of conditions which had characterised the city of Port Pirie for nearly a century, and was disinclined to accept responsibility for the alleged consequences.

Much of the history of efforts by the company to reduce plant emissions reflected a desire to avoid the loss of marketable product rather than environmental concern. The substantial expenditure by BHAS within the smelter in recent years to ensure the health and safety of its workers and on pollution abatement technology follows the introduction of tighter worker safety and clean air requirements. Other sources of lead pollution outside the smelter received less immediate attention.

Uncovered piles of slag remained exposed on smelter premises, vulnerable to wind and rain. Ore concentrates transported from Broken Hill were similarly exposed. These conditions persisted until the 1980s. While their contribution to overall environmental lead levels was minor, preventive measures could have been taken at relatively negligible costs. Furthermore, it is reasonable to assume the company understood this problem for some years, given that the impact of insufficient control of lead impregnated dust was observed at the RTZ smelting works at Avonmouth, UK, in 1972.⁹

But it is primarily past practices which have contributed to environmental lead levels in Port Pirie. As the city developed, entire suburbs were built on land reclaimed from the marshes adjoining Spencer Gulf. Slag and ash waste products from the smelting process were used as landfill. Smelter workers were able to buy salvaged bricks and materials—some of which contained high concentrations of lead—from the smelter at a nominal fee. These practices have long since been discontinued, but Port Pirie residents

continue to live with their consequences.

The South Australian Government historically was inattentive to environmental lead levels in Port Pirie for a number of reasons. First, it was quite rightly assumed that the greatest health hazards arising from exposure to lead were faced by workers in the smelting process. Only in the mid to late 1970s did the possible risks of low-level exposure become gradually apparent. Hence, government and company concern for many years was directed principally at sulphur oxide and arsenic emissions rather than lead. Second, its regulatory orientation to pollution control has been characterised by negotiation and compromise, rather than by strict enforcement. Criminal prosecution is regarded as a last resort, and governments of both political persuasions have been generally reluctant to antagonise business through informal requests, much less through the threat or reality of court action.

The desire not to offend business interests is particularly discernible with regard to air emission standards, including lead, in South Australia. While New South Wales, Victoria and Queensland set emission standards for lead and many other substances during the 1960s, standards were not introduced in South Australia, home of the world's largest smelter, until 1973—ten years after the enabling act was proclaimed. According to South Australian Government sources, the delay was attributable to industry resistance and to antagonism on the part of government medical officers to the concept of emission standards.

Some particular deference appears to have occurred with respect to lead. The standard eventually set in 1973, 20 milligrams of lead per cubic metre of air, was twice that specified in 1972 by the National Health and Medical Research Council for new smelting facilities. The South Australian standard was not brought into conformity with the recommended NH&MRC level until 1984, two years after government responsibility for air quality had been transferred from the health authorities to the Department of Environment and Planning. However, the tighter standard is of no relevance to the Port Pirie smelter, since the 1984 legislation allowed existing sources to continue to emit in accordance with the standards imposed in 1973.

Given the age of the Port Pirie smelter, even the 20 milligrams

per cubic metre (mg/m^3) standard for existing plant was well beyond its immediate capabilities. Pursuant to a ten year emissions-reduction programme negotiated between the company and the government during 1973, exemptions were granted and renewed regularly for various parts of the smelter.¹⁰ Although most of these no longer apply, some minor exemptions continue to operate with respect to particular discharge points within the smelter.

The overall level of emissions has been reduced substantially under the agreed programme, to the extent that the SA Department of Environment and Planning reported in 1983 that it doubted whether any further control measures which it could force on BHAS would be of major benefit to the community. Monitoring indicates that lead in air levels at Port Pirie are generally within the NH&MRC recommended ambient levels, although such levels are currently under review.

The history of lead pollution at Port Pirie illustrates an increasingly familiar defect in the law. Companies may engage in lawful conduct, not perceived to be harmful in the light of knowledge available at the time, only to cause significant and unforeseen damage to health, property and environment at some later date. The Port Pirie experience is analogous in some respects to the Love Canal affair in the United States. There, the leaching of toxic wastes from a long abandoned but legally operated storage facility caused considerable ill-health and necessitated the evacuation of an entire neighbourhood. Of course, in the Port Pirie case, the existence of harm remains open to debate. Such situations nevertheless pose difficult moral and legal issues, with respect to corporate and governmental responsibility, to those affected by the particular activity.

The legal remedies available under such circumstances are severely limited. To succeed in a private civil action for negligence, a Port Pirie plaintiff would be required to prove, on the balance of probabilities, the existence of personal injury directly attributable to acts or omissions on the part of smelter management. This causal link is tenuous, given that controversy surrounds the effects of low lead-levels in blood, and that there are other sources of lead in the environment of Port Pirie quite independent of smelter operations (e.g. lead enters the environment directly from the

combustion of petrol and from lead-based paint). A negligence action would be particularly difficult, given the requirement that the injury or harm must have been reasonably foreseeable by the company at the time of the emissions. These considerations substantially reduce the chances of successful civil action against the company. An action against the government (e.g. on the basis of its failure to regulate adequately) would be even more speculative. Hence, relief is essentially dependent on recognition by the company and the government respectively of a moral duty and a political need to assist the affected parties. Such relief is directed at attenuation of the problem rather than compensation of individuals.

Governmental response to evidence of widespread elevated blood lead levels in the children of Port Pirie was extremely cautious. The South Australian health and environmental authorities were most reluctant to suggest that the conduct of BHAS in any way may have amounted to misconduct. After all, the harm in question had resulted from the insidious accumulation of toxic materials over the best part of a century, and BHAS itself had taken demonstrable and costly abatement measures over the previous decade.

Moreover, the Labor Government was elected in 1982 with a narrow majority in the lower house and lacked control of the Legislative Council. Brought into office on a pledge to revitalise the state's economy, the government was disinclined to antagonise one of the state's largest employers.

Governmental response was also constrained by public opinion. While some residents of Port Pirie were deeply concerned about the health hazards posed by environmental lead, most were less so. Many had spent their entire lives in the shadow of the smelter, with no apparent adverse consequences. Many owed their livelihoods to BHAS, and would be hard pressed to find alternative employment in a depressed economy, whether in Port Pirie or elsewhere in the state, should the smelter be forced to curtail operations. Others expressed a certain fatalism, resigned to accept what they had come to regard as a fact of life in an industrial city. Home owners were also resentful at declining property values occasioned by the adverse publicity. Some residents of the provincial city were concerned about intrusive interference in local affairs by outsiders from Adelaide and beyond. Thus, in the face of

considerable *opposition* from within the community to a firm regulatory response, a powerful lobby which might have goaded the government to act aggressively was conspicuous in its absence.

In light of these constraints, the government proceeded with the utmost caution. Following a case-control study of Port Pirie school children by the South Australian Health Commission during 1982, a task force was appointed in May 1983 to examine the results of the study and to better define the nature of the problem.

In August 1983, the task force presented an interim report which concluded that environmental lead contamination was a personal and public health problem for the residents of Port Pirie. It recommended a remedial programme involving housing decontamination, treatment of public parks and open space areas, road and footpath sealing and educational and promotional campaigns.¹¹

Such action did not follow immediately, however. The state Minister of Health, who had viewed the health risks attending lead pollution more seriously than had State Cabinet or even the residents of Port Pirie themselves, sought to obtain a second opinion from an independent outside consultant. The individual recruited for the task was a world renowned expert, Dr Philip Landrigan, Director of Surveillance, Hazard Evaluations and Field Studies at the US National Institute for Occupational Safety and Health.

The Landrigan assessment differed in a number of important respects from that of the task force. First, in contrast to the low-key approach of the South Australians, Landrigan perceived the situation to be more urgent:

Reduction of children's exposure to lead in Port Pirie and prevention of any further lead-induced neuropsychological impairment requires *urgent interventive action* [emphasis in the original]. Although further studies can and should be undertaken to define more precisely the limits of the problem, the basic issues have already been well delineated. Accordingly, proposals for additional studies should not be used to postpone intervention.¹²

Landrigan departed significantly from the task force approach by recommending that serious consideration be given to the possibility of evacuating the population from the most heavily

contaminated areas of the city. In addition, he was also critical of BHAS' housekeeping practices:

To the present time, BHAS management have done very little to reduce entrainment of lead dust into air from the slag heaps and ore stockpiles on their property.¹³

BHAS was as critical of the Landrigan report as the report had been of the company. F H Osborn, Chairman and Managing Director of BHAS, referred to the report as "questionable" and called for its conclusions to be dismissed. The alleged association between blood lead levels and intelligence deficiency was "nonsense and totally unsupported by scientific finding". The General Manager-Operations of BHAS called Landrigan "a crusader against the lead industry".¹⁴

Meanwhile, during 1983, a government-appointed Lead Implementation Group had been preparing recommendations for a programme of action for consideration by the state government. Given the conflict in opinion following the task force and Landrigan reports, the chairman of the Health Commission sought further independent advice. Professor Michael Rutter, an eminent British authority on the effects of lead contamination, was approached to review the existing reports and the draft report of the implementation group. Rutter's comments were not published explicitly, but the report of the Lead Implementation Group at the end of 1983 stated that Rutter did not support Landrigan's views on relocation. Bolstered by this opinion, the implementation group predictably recommended action strategies which were reflective of the earlier task force report proposals and dismissed the Landrigan suggestion concerning relocation.

The measures recommended by the implementation group included decontamination of homes and public places with high levels of lead-contaminated dust, the removal of all lead-based paint from houses, the "greening" or revegetation of Port Pirie, and the introduction of a comprehensive environmental health programme. An Environmental Health Centre was opened in 1984, and decontamination of dwellings began. Costs of these measures, to be met by the state government, were substantial: from December

1983 to June 1985, a total of \$1.4 million was committed, while the 1985-86 allocations reached \$2.8 million. Furthermore, in November 1984, Cabinet agreed to provide an additional 200 houses and cottage flats in Port Pirie over the following five years, at an estimated cost of \$11 million, thereby doubling the South Australian Housing Trust programme for Port Pirie for that period. Approaches to the Commonwealth government for special assistance in meeting the costs of these programmes were unsuccessful.

The BHAS contribution to the action programme focused principally on internal ameliorative measures. More than \$1.8 million was spent on upgraded changeroom, shower and laundry facilities for workers, improvements which serve also to reduce exposure of workers' family members.

An additional \$1.5 million was allocated in 1984 for plant improvements to reduce atmospheric emissions. Also, the batters of completed slag dumps were faced with rock mulch. Smelter management began an education programme to instruct workers in the importance of personal hygiene and in the need for thorough and regular housecleaning to reduce household dust levels.

Company contributions to the external clean-up programme have been at a much lesser scale and cost than the measures undertaken by the government. The company donated industrial vacuum cleaners and provided drivers and trucks to help remove contaminated material from the community. Company officials also assisted in the greening of Port Pirie by donating trees and by experimental planting of different types of plants and trees in soil and slag. BHAS also provides free of charge all analyses of lead in blood and rainwater.

Overall, the attitude of BHAS has been defensive and cautious. It is clearly fearful of legal proceedings and, accordingly, will undertake no remedial action which could in any way be implied to constitute an admission of fault. Hence, while the company contributed a significant proportion of the initial expenditure to the action programme, this was directed primarily to introducing changes within the plant. In the community, it provided manpower and equipment on a limited scale and made a small contribution to the greening programme.

The general response of the government also has been distinctly restrained. In view of government statements that emissions of lead and other pollutants to the atmosphere are now at satisfactory levels, it would appear that further demands on the company to achieve more reductions are unlikely. The government has sought to downplay the nature of the harm involved, to avoid a "panic" reaction within the Port Pirie community. The report of the implementation group was deliberately low-key and non-alarmist in its references to the nature of the harm in question:

The evidence suggests that in Port Pirie there may be a small number of children who because of elevated blood lead levels may be at risk of developing IQs a few points lower than would have been the case without these high levels. That is not unimportant and for the involved individuals is a major concern. The overall risk, however, must be kept in perspective.¹⁵

Indeed, there does remain a genuine element of uncertainty within medical and scientific circles concerning the extent, if any, of the alleged harm. But, overriding these considerations, government caution would seem to be motivated by a practical and political disinclination to adopt a tougher stance with respect to an industry which supports a township of 15,000 in an electorate traditionally held by the Labor Party. Such a stance would have been particularly ill-suited with respect to an operation that, by its own admission, is barely viable economically at present and has a limited future unless a massive investment is made soon in technological innovation.

More recent information reveals that the level of financial commitment required of the State Government may be considerably greater than was envisaged in the report of the Lead Implementation Group.¹⁶ A report to Cabinet by the South Australian Health Commission in November 1984, which reviews early progress with the Port Pirie programme¹⁷, indicates that the State is faced with a bill which could reach \$24 million for the decontamination of houses and a further charge of \$9 million for the replacement of substandard dwellings. Cabinet responded to this report by approving an expanded housing construction programme together

with the expenditure on decontamination for the periods 1984-85 and 1985-86 mentioned earlier. However, some doubts remain concerning the nature of the commitment required from the State Government over the longer term of seven to ten years for the complete decontamination programme.

In November 1984, Cabinet approved in principle a decontamination programme at an estimated cost of \$25 million. However, this approval was "subject to Commonwealth assistance", which in fact has not been forthcoming and seems most unlikely to be provided in the future. To what extent the State Government will, or is able to, foot the whole bill itself remains to be seen. In July 1985, Cabinet reaffirmed its commitment to a seven-year programme to combat lead pollution in Port Pirie, without specifying the extent of the financial commitment involved.

A significant aspect of events at Port Pirie was the lack of resort to the legal process. South Australian authorities have been reluctant to prosecute violations of the air-quality legislation at the worst of times, preferring instead to rely on a regulatory strategy of negotiation, compromise and the provision of technical assistance. In this case, any breaches which may have occurred (and the authors are aware of none) were likely to have been avoided by the grant of exemptions to the company following the introduction of controls in 1973.

Civil action has also been significantly absent in the particular situation. The parent of one Port Pirie child with an elevated blood level sought during 1984 to initiate an action against BHAS, but the ambiguity of medical evidence and consequent legal uncertainties in relation to establishing negligence have delayed this from going ahead. As noted earlier, there is no common law duty to guard against a risk which was not foreseeable at the relevant time. As the risk of low-level exposure to environmental lead only became apparent in the 1970s, there was no evidence to suggest that BHAS emission control policies during the earlier years of heavy emissions posed a threat to public health in the light of the medical knowledge then available. Thus, neither civil nor criminal remedies have appeared feasible in the circumstances.

It should be noted, first, that the lead pollution problem at Port Pirie did not contribute to any significant changes in South

Australian law or policy. Policy options were constrained primarily by economic realities. The long-term effectiveness of the strategies which have been adopted remains open to question.

It is highly possible that the depletion of the Broken Hill ore body will lead in the near future to the closure of the Port Pirie smelter. Three basic factors will influence the future of smelting operations in Port Pirie. The first is market demand and prices. Because of the toxic effects of lead, alternatives are being sought to a number of its traditional uses. Lead-free petrol is now required in many Western societies. Domestic use of lead-based paint has been significantly curtailed. These and other factors have combined to produce sluggish demand and lower prices for the metal. The second is availability of a suitable supply of ore. The third is the related matter of technology innovation.

A new smelting technology called KIVCET, currently under development in the Soviet Union, might be capable of efficiently processing lower grade ores, and of treating concentrates from mines other than at Broken Hill. The long-term availability of concentrate supplies is by no means certain, however, and the changeover costs to KIVCET technology would be massive, in the order of \$100 million. The KIVCET technology, if introduced, also will not give rise to significant reductions in levels of emission to the environment, but could lead to reductions in fugitive emission levels which would have a beneficial effect within the smelter.

Whether the South Australian Government would be in a position partially to subsidise such a changeover is yet another factor which may determine its ultimate implementation. The South Australian Government could face the unenviable choice of having to pay dearly to subsidise the operations of BHAS, or having to pay dearly for the social services required by the 15,000 inhabitants of a depressed city, should the plant close down.

Given these considerations, it seems clear that the State Government will bear the bulk of the financial burden in the longer-term in addressing the problems of lead pollution at Port Pirie. The question of whether companies have a moral, if not a legal, obligation to contribute to the rectification of unforeseeably harmful practices was not really raised.

Whether the continuing economic viability of a town dominated

by one major industry is sufficient redress in itself is a point that remains to be debated.

Smelter management continue to assert that no valid relationship has yet been established between low-level exposures and neuro-psychological defects in children. At the same time, they maintain that public health remains a public responsibility. In the words of the General Manager-Operations:

Our attitude has always been that given reasonable care and hygiene, then you can live with the level of contamination from past emissions (*Port Pirie Recorder*, 20 February 1984).

The most important long-term consideration, obviously, is whether the existing decontamination programme will be sufficient to protect the health of residents at Port Pirie, especially those younger ones who are particularly at risk. Authorities presently adopt, as a test of "sufficiency", the objective of reducing blood lead levels in all Port Pirie children below 25 ug/dl. This standard was changed in 1987 from 30 ug/dl and could become even stricter in the future with further gains in medical and scientific knowledge concerning the health effects of lead.

Whether this objective of the Port Pirie programme will be achieved within the next seven to ten years seems open to doubt on several scores. The commitment of sufficient resources by the State Government is one area of concern. Existing Cabinet resolutions do not put the estimated necessary expenditure of some \$24 million beyond doubt, particularly given the absence of Commonwealth assistance. A related concern is the effectiveness of the specific strategies being pursued under the programme. The level of resources required to achieve its objectives could increase or decrease as experience is gained and results become clearer. And the strategies themselves have been the subject of debate since they were first proposed by the task force. Landrigan, in his report, criticised their adoption by the Lead Implementation Group:

"In my opinion, all of those proposals constitute the elements of a reasonable short- and mid-term control strategy. With regard to the long-term, however, it appears to me that these proposals will bog down under their own weight."

For the residents of Port Pirie, the long-term prognosis is indeed uncertain, despite the current programme. The level of resources required, the effectiveness of the strategies being pursued, and the commitment by both the government and the company to provide whatever resources are needed to rectify the lead pollution problem, are clouded in doubt.

That this doubt is in at least some regards unavoidable in the circumstances is unlikely to provide much consolation or reassurance to those actually or potentially affected.

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6. Great Britain, Medical Research Council (1984), *The Neuropsychological Effects of Lead in Children: A Review of Recent Research 1979-1983*, Medical Research Council, London; Grant, L et al (1983), "Draft Air Lead Criteria Document", Appendix 12C US Environmental Protection Agency, Washington.

7. Smith, D (1983), "Living with Lead", *The National Times*, 22-28 July, 44.
8. Landrigan, P (1983), *Lead Exposure, Lead Absorption, and Lead Toxicity in the Children of Port Pirie: A Second Opinion*, South Australian Health Commission, Adelaide, 28.
9. Great Britain, Medical Research Council (1984). *The Neuropsychological Effects of Lead in Children: A Review of Recent Research, 1979-1983*, Medical Research Council, London. In commenting on an earlier draft of this chapter, BHAS officials referred to this sentence as "irrelevant and mischievous at this point, as BHAS operates as a corporate entity entirely separate to RTZ". We nevertheless have chosen to retain the reference to illustrate that dust control has been of concern in the smelting industry since the early 1970s.
Indeed, in evidence given to the Royal Commission on National Insurance in 1924, the then Plant Superintendent of BHAS testified that dust control was a matter of high priority for management: "The whole of the works are mapped out, and each department carries a plan showing the extreme range of the area for which they are responsible, and the heads of the departments are hauled over the coals if the watering down is not properly attended to. Watering down is done twice a shift through out the works." O. H. Woodward, *Minutes of Evidence Before the Royal Commission on National Insurance*, Melbourne, Government Printer, 1925-7, p. 612.
"A previous witness before the Royal Commission observed that the Port Pirie Town Council had discharged its gardening staff, because damage to local vegetation by lead and sulphur fumes had made gardening futile." Walter Robinette, *Minutes of Evidence Before the Royal Commission on National Insurance*, Melbourne, Government Printer 1925-7, p. 602.
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Chapter Eleven

CRIME WITHOUT PUNISHMENT: THE APPIN MINE DISASTER

Andrew Hopkins

It was a "gassy" mine. That was a common talking point about the Appin coalmine in NSW. It had been plagued with problems of methane gas build-up since it opened in 1962. For seventeen years the highly inflammable methane was kept more or less under control. Then on 24 July 1979 tragedy struck.

It was just another working Tuesday for the men at Appin. One shift had ended, a new one begun—and one of the maintenance jobs that needed seeing to during that shift was an auxiliary exhaust fan which helped to suck the methane out of the network of tunnels hundreds of metres underground.

An electrician went down with a supervising "deputy" in charge of operations. The electrician found the trouble and fixed the problem. One last thing to do—test the fan. He threw the switch. The motor sparked. And the methane exploded. The fireball killed 14 men that day—including the electrician and the "deputy".

So who was to blame? The electrician? The supervising "deputy"? The mine managers? The government safety inspectors? The workers?

Those 14 men died—arguably as a result of a series of criminal acts and omissions. A judge who carried out a major inquiry into the explosion found that the law had indeed been violated, but recommended against any prosecutions.¹

Explosions of this type are a recurrent feature of coalmining history and an elaborate body of regulations has been developed in an attempt to prevent them. These regulations are of two types: those designed to prevent the build-up of dangerous concentrations of gas and those designed to eliminate all sources of ignition. Violations of both types were associated with the Appin explosion.

IGNITION

The major source of ventilation in the mine is an exhaust fan which draws air through the colliery tunnels. This is supplemented by auxiliary fans near the work faces. The auxiliary fans, as well as the mining machinery, are electrically operated and the sparks which they generate are thus potential ignition sources.²

Both starting and stopping such a fan involves the creation of a spark. For this reason the starter wiring is enclosed in a metal box at the rear of the fan. The box has a heavy hinged door which, when closed, is tightened down around the edges with 24 bolts which can only be turned with a special key. The fan is operated by stop and start buttons on the outside of the door. When properly bolted down, the door, and hence the whole box, is "flameproof". This means that even though the spark inside the box may ignite any methane gas which happens to be present, the flame will not be able to escape and ignite gas outside.

During the shift on which the explosion occurred, one of these auxiliary fans had apparently been giving trouble and an electrician had been asked to fix it. He had switched off the fan, opened the box and remedied the problem. He then apparently wished to check his work by running the fan, and rather than tightening down all 24 bolts, had merely closed the door and inserted one bolt, giving it only two turns. The box was thus not in a flameproof condition and it was the test start or stop in these circumstances which triggered the explosion.

Regulation 21 of the 7th Schedule to the *NSW Coal Mines Regulation Act 1912* provides that:

In any gassy place a flameproof enclosure shall not be opened when the voltage is switched on to any conductor or electrical

apparatus within the enclosure nor shall the voltage be switched on to any such conductor or apparatus while the enclosure remains open.

Clearly, then, the explosion was more immediately the result of an illegal act on the part of the electrician. He was not, however, alone in this. According to Judge Goran, who carried out the inquiry, the "deputy" in charge of operations underground during the shift on which the explosion occurred was present when the electrician carried out his task and must have condoned the violation.³ Here are the judge's words:

I find myself constrained by the evidence to find that this was a flagrant breach of a safety regulation which must have occurred with . . . (the deputy's) knowledge, at least.⁴

The issue of prosecuting these men does not arise since they were both killed in the explosion. Liability for the violation is, however, more extensive. (In what follows all references are to the 1912 Act, in force at the time of the explosion. The *Coal Mines Regulation Act* 1982 became operational in 1984, but the change does not affect the argument of this paper.) Section 56 of the *Coal Mines Regulation Act* provides as follows:

Every person who contravenes or does not comply with any of the general rules in this Act shall be guilty of an offence against this Act; and in the event of any contradiction of or non-compliance with any of the said general rules in the case of any mine to which this Act applies, by any person whomsoever, the owner, agent, and manager, shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the said rules as regulations for the working of the mine, to prevent such contravention or non-compliance.

This section imposes what is known as "vicarious liability" on senior company officials for the actions of their subordinates. It specifies, in other words, that senior mine managers and company

directors are liable to prosecution for the electrician's violation, unless they can show that they had used "all reasonable means" to enforce the rule concerned.

In his inquiry Judge Goran found evidence of widespread violations of the regulations covering electrical equipment in the mine:

I have already dealt with those flagrant breaches . . . (involving the opening of the flameproof box). I am certain that these were not isolated cases and that risks were taken although lip service was paid to safe practices.

He went on to list other breaches discovered during the investigation and concluded that they demonstrated a "general attitude of carelessness for regulation".⁵ This view was echoed in a subsequent inquest into the deaths of the 14 miners in which the coroner found that "there existed in the mine an atmosphere of complacency confirmed by the evidence of breaches of proper standards of safety".⁶ In the light of these findings it is obvious that top management had not used "all reasonable means" to enforce the rule which the electrician had breached. Management was therefore liable for his offence.

Following the publication of the Goran report, the Minister for Mines wrote to Judge Goran asking him specifically whether there were grounds for prosecution arising from his report. In his reply, which has never been made public, Judge Goran is known to have expressed a distaste for vicarious liability, apparently believing that, although the law clearly imposes vicarious liability on owners and managers, it ought not to do so. He thus chose to give expression to this personal view by recommending against prosecution.

The disinclination to make use of the vicarious liability provisions was shared by the Minister. In a speech to colliery owners about the proposed new *Coal Mines Regulation Act*, which retains the vicarious liability provisions of the 1912 Act, he sought to allay the fears of managers and owners with the following statement:

I have been unable to find out how often persons have been prosecuted under the vicarious liability provisions in the distant

past but I can say that in more recent times the provisions have not been called into use. I can see no reason why the position should change under the proposed new legislation.⁷

As far as the judge and the Minister are concerned, then, vicarious liability is a dead letter and colliery owners need have no fear of the law ever being enforced in this respect.

Although the owners and managers of the Appin colliery were not prosecuted for the electrician's violation of the safety regulation, it is clear that they could have been. Whether they could have been prosecuted for causing the deaths of the 14 workers is another matter. For such a prosecution to succeed it would be necessary to show "beyond reasonable doubt" that the electrician's act was the cause of the explosion. This was certainly Judge Goran's view. But the coroner was not so certain in his report. He canvassed an alternative possibility that a defective safety lamp had been the ignition source and found himself unable to decide positively between these two competing explanations.

Although the starter box theory was clearly the most likely on the evidence, the element of doubt which the coroner perceived makes it unlikely that a prosecution for manslaughter or some other form of criminal homicide would have succeeded. It remains the case, however, that the regulatory violation itself was prosecutable, regardless of whether it was the cause of the explosion.

THE BUILD-UP OF GAS

How did the build-up of gas to dangerous levels in the Appin Mine occur? Air is drawn into the mine through one or more of the main tunnels. It is then made to follow a path which covers the mine by means of barriers located at strategic tunnel intersections. These barriers may be either solid walls constructed for the purpose, or woven fibreglass material known as "brattice", which is hung from the roof to the floor. The air finally makes its way out a return airway through the exhaust fan.

Coal is won from the mine by extending the tunnel system further into the coal seam. These extensions become dead-end tunnels for a time until cross or connecting tunnels are driven through. The

ventilation of dead-end tunnels poses a particular problem since air cannot be simply forced through them.

Various solutions are possible, the preferred one being the use of an auxiliary fan in the dead-end tunnel. The fan draws air to the tunnel mouth and into the main body of air circulating in the mine.

The path followed by the air is changed from time to time as the tunnel network is extended, and shortly prior to the Appin explosion, management decided to make such a change. In the shift prior to the explosion, preparations were made for the redirection of the air flow.

Detailed plans for the changeover had been worked out by senior management but these plans were not adequately communicated to the mine officials who supervised the work underground. The result was that these men were unaware of the importance of removing a particular brattice barrier—this became a critical blockage in the changed ventilation system. The changeover was actually effected—except for the brattice—a few minutes before the end of the pre-explosion shift. So, the deputy on the explosion shift went on duty believing that the new ventilation system was in operation. In fact, there was no ventilation at all at the mine face.

It is likely that the deputy discovered the dangerous build-up of gas and it is conceivable (but unlikely) that he realised the cause and removed the offending brattice.

Even if he did, the build-up of gas would already have been substantial and would probably not have been entirely dissipated by the time the explosion occurred more than 3 hours into the shift. Since all those in a position to know whether the brattice was in fact removed were killed in the explosion, the judge found himself unable to decide that failure to remove the brattice caused the build-up of gas. But on the evidence this was clearly the most likely explanation.

The company obviously felt that this was what had happened. Judge Goran found that company officials were systematically lying to him trying to convince him that clear instructions had been given to the deputy in the pre-explosion shift to remove the brattice and that the deputy was at fault in having failed to carry out these

instructions. Company officials also tried to convince the court that they had realised at the end of the shift that the brattice had not been removed and had instructed the incoming deputy to remove it immediately. The judge found, however, that the witnesses were lying to him in this matter as well, and that the incoming deputy had no idea of the true position.⁸

So the ventilation failure was caused by a failure of communication. Senior officials had planned the ventilation change but had not explained it adequately to those responsible for carrying it out. The mine's undermanagers, who did not participate in the planning meeting, were later given copies of the minutes of the meeting which detailed the particular jobs to be done but which did not explain the purpose behind these alterations. The deputies who were actually to oversee the changes received nothing at all in writing. Their orders were verbal—from undermanagers who, as we have just seen, were not themselves aware of the significance of the instructions they were giving. Here is the judge's analysis:

What I am stressing highlights an old problem, of course. There is always a tendency for those who issue instructions to believe that those who obey them are in as good a position as themselves in understanding the instructions. There was a grave communication problem at Appin even though it only came to the surface at odd occasions. It was good enough to believe that all persons concerned understood the changeover or the steps needed to bring it about.⁹

The judge went on to find that the mine management had shown a generally negligent attitude towards the ventilation changeover. He made two specific recommendations in this connection.

First, that the mine should appoint a ventilation officer whose prime concern would be to ensure adequate ventilation. Under the existing system, ventilation was just one of the many concerns of the deputy on duty and was unlikely to receive the same priority in his mind as production.

Second, as an elementary precaution, mining should cease during ventilation changeovers and should not recommence until the new system has been demonstrated to operate effectively.

Very probably, the company negligence in relation to the ventilation changeover was a key factor in the explosion. But was that negligence prosecutable? The statute which regulates coal-mining in NSW contains a large number of specific rules about how mines are to be run. Negligent behaviour of the type under discussion is not specifically prohibited by any of these rules. Thus the company is probably not guilty of any statutory offence.

There remains the possibility of prosecuting the company under the general criminal law for some form of "negligent homicide".

A possible precedent here is the prosecution of the Ford Motor Company in the US for "reckless homicide" after it produced a car with a known design defect which ultimately led to the death of several people.¹⁰

However, in the present case a prosecution for some form of criminal homicide or criminal negligence could not succeed. To succeed, it would be necessary to prove beyond reasonable doubt that the failure to remove the offending brattice was the cause of the fatal build-up of gas. While this was certainly the most likely explanation, we have already seen that the judge found himself unable to rule out that the deputy on duty in the explosion shift had in fact discovered the problem and removed the brattice and that the build-up of gas was caused by some other accidental failure of the ventilation system.

THE TOLERANCE OF GAS

It is ironic that the most flagrant and continuous violations at Appin mine were those least directly implicated in the explosion. They concern the level of gas normally tolerated in the mine. The *Coal Mines Regulation Act*

prevents the switching on of the voltage to any electric machine before a competent person as described makes an examination for inflammable gas with a locked oil flame safety lamp of the place where the machine is to work. If gas is found on the lamp (*that is one and a quarter per cent or more being present*) in the place where the machine is to work the machine cannot enter, if already there can receive no power. Whilst the machine is

switched on the operator must carry out similar gas inspections at least every half hour.

If gas is detected on the lamp the person finding the gas must at once erect a danger fence and report the finding to the deputy of the district or senior official. The deputy must ensure that the power is off to the machine and that the trailing cable has been disconnected at the junction box. Thus, if coaling is taking place at the time of discovery of gas in such concentration it must stop¹¹ [emphasis added].

The limit of 1.25 per cent specified above was not, however, observed at Appin. Deputies routinely found gas levels up to "2 per cent plus" which would be regarded as dangerous, and "1.8 per cent was not abnormal".¹²

Moreover, government mines inspectors, who are supposed to make sure their safety regulations are observed, tolerated these violations. The Act specifies that in intake airways (i.e. upstream from the work area), the level of gas must be kept at even lower levels—below 0.25 per cent. Yet inspectors normally tolerated twice this figure on the grounds that it was "not practical" to enforce the 0.25 per cent figure in gassy collieries such as Appin.¹³

High levels of gas were regularly recorded at the work face at the end of the dead-end tunnels. This was because the auxiliary fans being used to ventilate these areas were not powerful enough. An inspector pointed this out on several visits over a period of months and each time the mine management promised to install a secondary fan. This was never done. The judge commented on this as follows:

One can never escape the inference that gas was tolerated in this mine unless it was believed to be dangerous . . . What was in fact allowed to happen was the growth of a philosophic attitude towards methane as a fact of life. It was a nuisance, it could hold up production in working places, but it was not a matter of great concern in standing places where the possibility of ignition was remote. The officials had their own view of when gas was permissible. It differed from the standard of the Act. Even Inspector Mould tolerated it.¹⁴

Violations in relation to the levels of gas tolerated in the mine were flagrant and routine. They provide, moreover, evidence of the general carelessness on the part of the management which, as we have already seen, was a prime cause of the explosion in any direct way. As regulatory offences they were eminently prosecutable and the judge clearly took a serious view of them as the following statements indicate.

I have already expressed deep concern at the tolerance allowed by the inspector of Appin's continual breach of statutory requirements relating to gas . . . Such a position is intolerable in any law-enforcement body, and no judge should hesitate to say so.¹⁵

And again,

there can be no support for any action which allows a body of inflammable gas to accumulate, whether there is a source of ignition present or apparently neither present nor likely.¹⁶

Why then did he not recommend the prosecution of company officials and indeed of mine inspectors? His reasons are not clearly spelt out, either in his confidential communication to the Minister or in his report. He did say at one point in his report, however, that he had given witnesses an undertaking that

the Inquiry was 'not a witch hunt', that any allocation of blame was a secondary consideration to finding out what really happened and what could be done to avoid such happenings in the future.¹⁷

Furthermore, about two of the men most involved in the failure to remove the critical brattice and who were also found to be lying to the court, the judge had this to say:

(They were really victims of a communications failure.) They were also victims of their own belief that they understood—either that or they were too proud to ask questions and so betray

their lack of knowledge. Both men were obviously hard working, willing servants. The importance of their work needed greater explanation for their benefit. It is important that they not be misjudged and that their failure should be put into correct perspective.¹⁸

It is clear from these comments that the judge felt a certain sympathy for those involved. Despite his finding of widespread illegality he apparently thought that after all was said and done the explosion was really an accident for which no one should be held responsible.

SOME FURTHER COMMENTS

The mines inspectors are, after all, employed by the government and would appear to have no vested interest in allowing safety violations. However, over time they undergo the process of "co-optation" to which those who work in regulatory agencies are so often prone.¹⁹ When confronted with a problem such as excessive gas they have a choice. One option is to stop the mining until the problem is rectified, with the consequent loss of thousands of dollars of company profit and the loss of workers' productivity bonuses. Such a choice would generally be opposed by management and workers alike. Alternatively they may request management to do something about the problem but allow mining to continue, knowing very well that the chances are minimal that any particular violation will lead to death or injury. The pressure to choose the latter course is overwhelming and since such situations arise routinely on mine inspections a pattern of non-enforcement develops.

This pattern of non-enforcement emerged clearly in the prosecution in 1981 of two mining company officials by Mines Department inspectors, for offences which occurred some time after the Appin disaster. The charges concerned the use of electrical welding equipment in a gassy place without adequate safety precautions (*The Picton Post*, 29 January 1981). The welding was carried out in haste to "ensure that production could get underway when the Easter holiday ended", according to the men's counsel. The court

was told that "someone with a grudge", presumably a mine worker, had written to the Minister and made allegations about the lack of safety in the mine. Defence counsel said he could remember no similar prosecution in the past and drew the obvious inference that the mines inspectors were prosecuting in the present case only because of the promptings of the complainant and because of the criticism to which they had been subjected following the Appin disaster. The magistrate took a serious view of the offences, however, and convicted and fined the defendants noting that they had obviously been routinely violating the safety regulations with impunity.

The co-optation of safety inspectors to company viewpoints is not confined to the coalmining industry. The safety officer of the AMWSU has given dramatic evidence to a government inquiry of just how far this process of co-optation has gone in some contexts.²⁰

He says that a government inspector once refused to listen to complaints by union safety officials on the grounds that to do so "would cause him to appear biased". Another inspector refused to comply with a union request that a safety inspection be carried out on the grounds that he did not "do deals" with unions. Inspectors have also on several occasions refused to give union officials copies of reports dealing with health and safety hazards at establishments which have been inspected unless they have written permission from the companies concerned.

As these instances make clear, the co-optation of safety inspectors to company viewpoints seriously undermines their capacity to enforce the law. Given the reluctance of the authorities to prosecute the offenders at Appin, could not other organisations, such as unions or citizens' groups, or indeed individuals, take it on themselves to enforce the law? There are insuperable legal obstacles to such a course of action. In the first place, according to the *Coal Mines Regulation Act*, prosecutions must be launched within six months of the event in question or of the submission of a judicial report or the conclusion of an inquest. This time limit has long since elapsed and a criminal prosecution is therefore now impossible. But even if this were not the case, the Act is written in such a way as to prevent the possibility of outside prosecutions. Section 72 of the Act effectively prohibits the prosecution of owners and

managers except by an inspector or with the consent of the Minister. Thus unions would not have been able to initiate prosecutions. In the view of the Minister of the day this provision is designed to "prevent any frivolous or vexatious proceedings being instituted".²¹ But the effect is to ensure that the government policy of non-enforcement cannot be circumvented.

The only remaining avenue by which Australian Iron and Steel might be made to account for its violations at Appin is civil action for damages brought by the miners or their survivors. Several such actions were started, but were settled out of court and the outcome is unknown.

It is obvious from the foregoing that the failure to prosecute following the Appin explosion is part of a general pattern of non-enforcement. Indeed the annual reports for the two years immediately before the explosion reveal not a single prosecution undertaken by the coalmines inspectorate. Interestingly, however, there were five prosecutions initiated by *management* against *workers* for offences such as riding on coal conveyor belts.²²

These prosecutions are indicative of an attitude which is very general throughout the coalmining industry that it is not the companies but the workers who are really responsible for the failure to observe safety regulations. What is at work here is the well-known response of "blaming the victim" for his or her misfortune. (Other examples of this are blaming the unemployed for their failure to find work and blaming the rape victim for putting herself in situations where she might be raped.)

This attitude of company management is also, perhaps more surprisingly, the attitude of government: in an article in the miners' journal *Common Cause* the Minister wrote at considerable length about the need for workers to observe safety regulations for their own sakes (*Common Cause*, 28 January 1981). Most surprisingly, the tendency to blame the workers is exhibited by mine union officials. Almost every issue of *Common Cause* carries articles by union safety officers urging miners to be more safety conscious and implicitly blaming the workers themselves for many of the accidents which befall them.

There seems little doubt that miners are prone to cut corners in relation to safety matters, and to this extent their behaviour

can be seen as a contributory factor in certain accidents. Miners are paid a wage plus a productivity bonus which depends on how much coal is produced. Safety regulations which slow production or which require the temporary cessation of mining thus work to the miners' economic disadvantage. The companies have so structured the situation that miners have a vested interest in ignoring safety regulations when they interfere with production. It is clearly up to governments to legislate against this situation. A worker's safety should not be at the expense of his income. Indeed, workers should be entitled to refuse to work in situations where safety regulations are being violated, and to continue drawing the highest possible pay while the problem is being rectified. It is quite inconsistent to exhort miners to be more careful while at the same time subjecting them to economic pressures to cut corners.

Since this article was first published certain changes have occurred in the regulation of coalmines. First, the mines inspectorate was moved in 1982 from the old Department of Mineral Resources and Development to the Department of Industrial Relations. The record of prosecutions has not improved, however. In the year to 30 June 1983 there was only one prosecution initiated by the inspectorate, that of an electric mechanic. He was fined \$30 on each of two offences.

Second, the *Coal Mines Regulation Act* 1982 came into force along with a totally redrafted set of regulations in 1984. It is too early to evaluate this legislative change but it unlikely to affect the pattern of non-enforcement. It is abundantly clear that the problem is not so much a matter of inadequacies in the law, although there are certainly plenty of these²³, but rather the total lack of enthusiasm on the part of the authorities for enforcing existing law.

Notes

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Chapter Twelve

DEATH AT KELLOGG'S

Andrew Hopkins

INTRODUCTION

Early in 1983, a 16-year-old apprentice at Kellogg's Sydney plant, Jeff Cleary, was working inside a large pressure cooker when a burst of steam enveloped him for 90 seconds.

He staggered out in agony, his skin peeling, and died nine hours later of burns said by a plastic surgeon who attended him to be worse than any napalm burn he had seen during the Vietnam War.

How did the accident happen? Rice bubbles are cooked at Kellogg's Sydney plant in a bank of nine pressure vessels, each large enough for a man to enter. The vessels are connected by a common line bringing steam from a central boiler. Flavour is also fed into the vats from a common pipe line. Finally, there is an outlet from each vessel to a common steam-release line.

The vats are rotated slowly to ensure even cooking. If the electricity supply is interrupted, rotation ceases, potentially endangering the contents of the cookers. The system was designed to open the aspirator valves of all the cookers automatically in the event of a power failure, releasing the steam along the aspirator line.

The problem was that if any of the vats was not in use and its lid open, steam from the other cookers, rather than flowing along the escape line, would vent through the open cooker. Anyone working inside the open cooker would thus be caught in the escaping steam. This is exactly what happened to Jeff Cleary.

Evidence was given at the coroner's inquiry that men who worked with the vats had been aware that something was wrong with the system and that there had been more than one close call when pressurised steam had blasted out of an open hatch while operators were reloading grain.¹ One employee, in a statutory declaration, said that at other times he had seen partly cooked rice splattered some eight to ten feet above the cookers on the ceiling.² The company's maintenance engineer states that he had been aware of the situation and that early in 1982 an unsuccessful experiment was done to see if the steam could be cooled as it passed through the aspirator line. His testimony, in question and answer form, is worth quoting at length:

Q. The object of the exercise of that experiment was to attempt to avoid the situation where you could get a flow of steam from one cooker into the aspiration manifold connecting all cookers, and into an open cooker. Is that what the object of the exercise was in that experiment?

A. That's correct.

Q. Of course then if that was the object of that experiment then it was appreciated that that sort of thing could happen, is that right?

A. That's correct.

Q. Do I take it from that then that you, at least at that time, realised if steam was released from a cooker into the aspiration manifold it could vent into an open cooker?

A. Yes that's right.

Q. You realised that?

A. Right.

Q. And you realised that because I suppose you observed that happen at some time?

A. Mainly that it has been reported to me that it is a possibility, and obviously from the mechanics of the installation it's an obvious fact that it could happen.

Q. Do you recall who had reported an occurrence like that to you?

A. I believe one of the cooker operators reported it to the plant manager.

Q. Was there just a single report of this sort of thing happening or was there a number of reports about it?

A. I believe it has been reported because when the cookers were manually operated that steam was observed coming out of the cookers when they were open and the operators informed each other when they opened aspiration valves for the particular reason that you were saying.

Q. But certainly so far as your state of awareness goes you'd heard a number of reports about it, it wasn't an isolated report?

A. No.

Q. And the experiment was done in the attempt to avoid that situation perhaps in the future?

A. That's correct.

The problem was only finally eliminated after the accident when the system was reprogrammed to keep the aspirator valves closed in the event of a power failure.

In subsequent correspondence with the author, Kellogg's said that its records indicate that there had been only two close calls,

one involving the rice splattered on the ceiling above a cooker and the other, an incident in which an operator had been burnt by escaping steam when putting a lid on a cooker.

According to the managing director: "No-one apparently made the deduction that both incidents were related or were, in fact, the result of a defective system." This no doubt explains why the company did not see the need to warn people of the hazards or to instruct them on what to do in case of an emergency, or to take other measures to protect those working inside a cooker.

The Standards Association of Australia suggests a number of possible procedures to be followed prior to work inside a pressure vessel, procedures aimed at effectively isolating the vessel from all pressure sources.

These procedures include: inserting a mechanical blockage (a plate or a blank) in the steam line and, alternatively, removing a section of the connecting pipe work altogether. Unfortunately, these standards are not prescribed by law in the case of normal maintenance work and were not in fact observed by Kellogg's. It is noteworthy that pressure vessels are required by law (regulation 43 of the Boiler and Pressure Vessel Regulations made under the *Factories, Shops and Industries Act*) to be effectively isolated from sources of steam when a *government inspection* is carried out.

THE CORONIAL INQUIRY—EVIDENCE OF MANSLAUGHTER?

Following a death such as Cleary's the police notify the coroner who is obliged to hold an inquest. One of the coroner's obligations under the *Coroners Act* is to assess whether there is *prima facie* evidence that the death occurred as a result of an indictable offence, that is an offence which is sufficiently serious to warrant a trial by judge and jury. If he decides that there is such *prima facie* evidence the coroner is obliged to terminate the enquiry forthwith and forward relevant details, with a signed statement setting out the names of those responsible and particulars of the offence, to the Attorney-General.³

Normally, in the case of industrial fatalities the only possibly relevant indictable offence is manslaughter. The question arises,

therefore, as to whether in the Kellogg's case the company, the maintenance engineer or any other person might have been indictable for manslaughter.

To prove manslaughter, the prosecution must establish beyond reasonable doubt that the death was due to negligence "of a very high degree"⁴ on the part of the defendant. Now it is certainly arguable that the company was guilty of negligence ("the failure to conform to the standard of care to which it is the defendant's duty to conform").⁵ This was in effect the coroner's conclusion when he found as follows: "Insufficient care and attention was given by the employer to implementation of a system to enable complete isolation of a cooker for internal access; or to ensure safe working procedures, including training programmes, to prevent a possible flow-back of steam, particularly in the event of a power failure" (p. 49 of transcript).

There remains the question of whether the negligence was of a sufficiently high degree. The coroner's decision on this point was that the degree of negligence did *not* warrant indictment. "Notwithstanding the finding (he said) there is no evidence to support a *prima facie* case of criminal negligence" (p. 49 of transcript).

It should be noted at this point that violations of health and safety statutes are generally not in themselves indictable and the coroner therefore was under no obligation to consider whether breaches of these provisions had occurred or to inform relevant authorities. In light of the extensive powers and forensic support facilities now available to coroners in Australia⁶, it might well be appropriate that, at least for industrial deaths, future legislation extend their duties to include making such notifications. Coroners are, after all, in a singular position to determine the facts in these cases.

REGULATORY VIOLATIONS

Although the coronial inquiry did not result in a referral to the Attorney-General there was still the possibility of prosecution by the Department of Industrial Relations for violations of the relevant health and safety provisions.

It might have been thought that the failure to isolate the cooker effectively from all sources of steam would violate some provision of the Boiler and Pressure Vessel Regulations. There is, however, no relevant provision. Vessels must be isolated during government inspections but, presumably as a result of a drafting oversight, such a precaution need not be observed during routine maintenance work. There was thus no obvious provision on the basis of which a prosecution might be launched.

The new *Occupational Health and Safety Act* in NSW augments the *Factories, Shops and Industries Act* by imposing an additional general duty on employers to ensure, so far as is reasonably practicable, the safety, health and welfare of their workforces (section 15[1]). However, this Safety Act was not in force at the time of the accident.

Notwithstanding the absence of any clear legal violation, departmental officials told the author that in this case they felt under some obligation to prosecute and therefore searched the legislation for some provision which might cover the situation. In the end they decided to make what they called "innovative" use of section 27 of the *Factories, Shops and Industries Act*, which requires dangerous machinery to be fenced; not, it might be thought, a directly relevant provision.

They also charged the company under section 44 with failure to instruct workers on the dangers of machinery they work with. The company pleaded guilty on 6 February 1984 in the Chief Industrial Magistrates Court and was fined \$750 on the first count and \$2000 on the second, respectively half and just under half the maximum penalties possible.

In justifying his failure to impose heavier fines, the magistrate cited the prior "good record" of the company. Since 1959 it had been prosecuted only three times for failure to guard dangerous machinery. Moreover, the fact that after the tragedy the company had taken steps to prevent a re-occurrence was to its credit, he said.

While not disputing the magistrate's assessment, the decision perhaps highlights the problem of applying traditional reasoning about individual offenders to cases involving corporate violations.

Undoubtedly, compared with most defendants before the criminal

courts, an individual who had broken the law just three times in 30 years, and who had taken immediate steps to rectify the problem causing the most recent violation, would deserve a lenient sentence. In the author's view, however, major companies employing large numbers of people should be judged by a different, and higher, standard. One commentator (*Workers News*, 21 February 1984) has alleged that this was the third fatality at the plant in 14 years. If this was the case, and if the other incidents also involved an element of negligence, surely the time had arrived to review closely the company's record of industrial safety.

Given that there was no obvious provision of the *Factories, Shops and Industries Act* violated by the company in relation to the fatality, the question arises as to why the department chose to prosecute at all. It is well known that violations of health and safety regulations are routine in most industrial environments and seldom result in prosecutions. Indeed, the usual response of departmental inspectors who discover violations is to try to *persuade* employers to observe the regulations without recourse to legal threats.⁷ So why a prosecution in this case? To answer this question we need to know something of how the department operates.

Most departmental inspections occur in response to complaints or accidents. The resources of the department are such as to make a programme of routine inspections virtually impossible. The author was told that it is departmental policy to make a routine inspection of every factory in the State at least once every five years.

Following an accident such as that which occurred at Kellogg's, a departmental inspector based in the local area would have gone to investigate. He would have seen that it was a pressure vessel matter and handed over to a boiler inspector. The latter would have reported that there were no apparent violations of the Boiler and Pressure Vessel Regulations. His superior, the Chief Inspector of Pressure Vessels, would have seen this report and in this case passed the matter on for further examination. Normally, a committee made up of the relevant inspectors with certain of the department's legal officers would examine any reports coming to head office to determine whether a prosecution was warranted. On this occasion, however, this process was short-circuited when the department's prosecuting officer was instructed by a superior

to look into the matter. It was as a result of this instruction from above that the "innovative" use of section 27 was decided on.

In effect, it seems the department decided that, if at all possible, action should be taken against Kellogg's, and it searched for a provision under which this might be done. The reasons for such a course of action are not clear, but it is possible that the publicity surrounding the case and the persistent representations and phone calls to the department by the boy's father may have had some bearing. Nor can we entirely discount the possibility that one of the family's relatives being a Minister in the State Government at the time played its part.

Whatever the reasons, the department's reaction is consistent with a range of research findings on the way departments charged with the responsibility of enforcing health and safety legislation operate.⁸

Leaving the Kellogg's case aside for the moment, there is no doubt that violations of health and safety regulations generally go unpunished. It is normally only when a violation leads to death or injury that a prosecution may be launched. The fact is that violations are not regarded as especially culpable. Thus when a prosecution is launched, the psychological reality is that the defendant is prosecuted for causing the harm, not for the regulatory violation.

But although penalties specified in legislation are arguably appropriate for a regulatory violation, they are inadequate when called on to function as retribution for injury or death caused to a worker. It is for this reason that the penalties imposed in such circumstances inevitably appear to the community as a whole to be ludicrously and unjustly inadequate.

Returning to the Kellogg's case, there is no doubt that this is how the fines for failing to guard machinery were seen. Among newspaper headlines at the time were these: "Company fined \$950 for death—but it is only par for course" (*Tribune*, 15 February, 4); "Company's \$950 fine an insult" (*Daily Mirror*, 7 February, 2); and "Only \$950 fine for life of apprentice" (*Workers' News*, 21 February, 11). The boy's father said this: "We are bitterly disappointed by the small fine. It is an insult. Surely Jeff's life was worth more than that." (*Daily Mirror*, 7 February, 21). It is

clear from these comments that in the public perception, the company had been prosecuted not for a regulatory violation but for causing Jeff's death and that viewed in this way the penalty seemed preposterously small.

How then are such problems—of a discrepancy between public expectations and the realities of what occupational health and safety legislation can do—to be avoided? Since there are no general prohibitions in safety legislation on causing death or injury, and since departments are constrained to prosecute only for violations of the legislation they administer, there is really no suitable way they can legitimately prosecute a company for causing death or injury.

One way around this problem would be to enable departments charged with responsibility for health and safety to launch prosecutions under the general criminal law, for example, for manslaughter. In this connection it is worth noting that although manslaughter has traditionally been seen as an individual offence, there is no logical reason why a charge of manslaughter could not be brought against a company.⁹ Corporate homicide was recognised in United States law as long ago as 1855 (*BC and M Railroad v State* (1855) 32 NH 215), and there have been several successful prosecutions recently of companies for such offences (*Corporate Crime Reporter*, Vol. 1, No. 2 (20 April 1987); No. 3 (27 April 1987)).¹⁰

To establish the necessary mental element—negligence of a high degree—it would be necessary to treat the negligence of senior company officials as negligence on the part of the company, but there is ample precedent in the criminal law for such a strategy.¹¹ Moreover, to prosecute companies rather than individuals for manslaughter would circumvent the reluctance of many enforcement agencies to hold individuals personally responsible for industrial fatalities. Were companies rather than individuals held responsible, prosecutions for manslaughter might well be more common.

An alternative solution would be to make it an offence under the relevant health and safety acts for a company negligently (or deliberately) to cause death or injury. Given that a manslaughter charge is theoretically possible in these circumstances, the creation

of such an offence might seem unnecessary from a strictly legal point of view. An analogous situation occurs in relation to death caused by negligent driving. The refusal of juries to convict defendants on manslaughter charges has led to the creation in various jurisdictions of a new type of offence (e.g in NSW, culpable driving occasioning death) for which convictions seem somewhat easier to obtain. The creation of a new offence—industrial homicide—might well have similar consequences. The legislative enactment of such an offence has been suggested from time to time in the literature¹² and indeed was advocated before the Williams Inquiry into Occupational Health and Safety in NSW. Unfortunately Williams dismissed the suggestion without giving it serious consideration.

It should be emphasised that in discussing these possible new approaches, the intention is *not* to imply that Kellogg's could or should have been prosecuted for manslaughter—or for that matter for any other indictable offence. The fact is that after considering all the circumstances of Cleary's death, the coroner did not see it as appropriate to make a recommendation along these lines. Nonetheless in reviewing community and media reactions to this and other cases, one cannot help but feel that if relevant legislation were wider, and included an offence of industrial homicide, there would be much less likelihood of public dissatisfaction and concern at the way the legal system deals with such problems. Many members of the public undoubtedly feel that when there is a workplace death and a company has been guilty of serious neglect, the authorities should be able to prosecute for some form of homicide.

(Once again it should be emphasised that the author is not implying that had an offence of industrial homicide been available, Kellogg's would or should have been prosecuted under it. Such a course of action would have depended, among other things, on the precise definition of the offence.)

In reviewing the specific Cleary case it should be acknowledged that the New South Wales *Occupational Health and Safety Act*, which came into effect after the incident, contains a general requirement that companies ensure, so far as is reasonably practicable, the health, safety and welfare of employees, the maximum penalty for

a violation being \$50,000 in the case of a corporation and \$5,000 in the case of an individual.

The convictions in the industrial court provide at least some grounds for believing that Kellogg's failed to ensure Cleary's safety and that it would have been reasonably practicable to do so.

In the future, such a case might well give rise to a prosecution for failure to ensure the safety of an employee. However, even though in these circumstances the prosecutor would be able to use the fatality as evidence of the company's failure to ensure a safe work place, prosecution would still be for the safety violation and not for causing the death. Moreover, the scale of penalties is essentially that which legislatures see as appropriate for regulatory violations and not what might be expected for an offence of industrial homicide.

Prosecutions under the new provisions are thus unlikely to have the same impact as prosecutions for manslaughter or industrial homicide. Unless solutions such as those suggested above are found, regulatory agencies are likely to continue to use regulatory laws for purposes for which they were not designed, thus perpetuating community feeling that in cases of industrial death or injury the law is grossly biased in favour of employers.

COMPENSATION AS RETRIBUTION?

Feeling that the departmental prosecution had failed to provide adequate retribution for Jeff Cleary's death, his father sought other means of making the company pay a penalty more appropriate to the crime as he perceived it. He considered suing the company for compensation.

The fact is, however, that the family incurred no significant economic loss as a result of the tragedy and compensation was therefore not possible on this basis. Nor did they experience physical pain or suffering, also potentially compensable. Their undoubted psychological anguish, their acute sense of loss and the disruption to their lives is not compensatable. Thus their demand for court-ordered compensation, in effect a demand for retribution, has gone unmet. They are now seeking damages for the psychosomatic problems which they have experienced since the tragedy.

Following the company's conviction for safety violations, Mr

Cleary wrote a long letter to the Attorney-General asking that something further be done to make amends for his son's death. As a result of this letter, the Attorney-General directed that an investigation be undertaken to ascertain whether sufficient evidence existed to warrant an ex officio indictment for some form of criminal negligence. However, witnesses were by this stage reluctant to testify, and the matter was quietly discontinued.

All this has prompted Mr Cleary to press the NSW Government to change the law, so people in his situation can sue for what they regard as adequate compensation. In a letter to the Attorney-General dated 9 July 1984 he wrote as follows:

We, as a family, do not want anything from Workers Compensation (which we know is not applicable in Jeff's case anyway), nor do we want anything from any governmental body of financial resources. All we want is for the law to be altered to allow people like ourselves (in the position we are in regarding Kellogg's proven negligence and guilt) to have a free right to sue the corporate body for a sum which is not laid down, or controlled, by State Government. We want the right to be able to sue Kellogg's for a hefty maximum sum without restrictions.

THE COMPANY RESPONSE

Union officials have argued that before the accident the company had apparently given safety a relatively low priority. They claim, moreover, that it had resisted union attempts to set up worker safety committees on the site.

Whatever the case, there is no doubt that the company instituted a series of changes after the accident. The cookers were immediately reprogrammed so that in the event of a power failure, steam would not be released from cookers in use, thus ensuring that the particular sequence of events which occurred in the Cleary case could not recur. But beyond this, a task force consisting of senior company officials with consultants from an outside firm of specialists (no workers were included) was set up to plan a health and safety strategy.

The task force set about implementing the system of safety

committees envisaged under the NSW *Occupational Health and Safety Act*. Several such committees were established, one for each department of the plant, each consisting of six or seven elected workers' representatives, plus supervisors, the company's health and safety co-ordinator and departmental managers if required.

These committees met monthly and after some assistance from the health and safety consultants on how to conduct meetings effectively, functioned well, according to company officials. The committees have served mainly as forums for the discussion of management-initiated safety procedures, but they have also begun to function in a limited way to channel safety suggestions from workers to management.

Another change has been to replace the company's previous safety officer, a relatively lowly official with little scope for influencing company policy, with a higher paid health and safety co-ordinator. This man, because of his better qualifications and status, has greater access to the company's managing director. He also has a budget of \$180,000 a year which is spent mainly on training. The health and safety co-ordinator has initiated a number of procedural changes of which perhaps the most important is the "permit to work" system.

A range of potentially dangerous jobs (for example, working inside cookers) has been specified and before carrying out these jobs employees are required to obtain a permit signed by the relevant foreman. One of the features of these permits is that the foreman must specify the precautions to be taken in carrying out the work. A check list of possible precautions is provided. Thus, for example, a foreman authorising work inside a pressure vessel is encouraged to specify that a blank be fitted in any lines connecting the vessel to a source of steam.

A second procedure which has been introduced is the system of danger, caution and warning tags for use in different situations. The most important of these is the "Danger—Do Not Operate" tag which must be placed on any potentially dangerous machinery by any person working on or around the machinery. The tag must not be removed by anyone other than the persons who placed it there and any contravention of this rule is regarded as a serious offence.

Union officials are sceptical of these procedures. They regard them literally as "paper" solutions and they are particularly critical of any system which requires workers' signatures. Workers, they say, often feel constrained to sign when asked, regardless of whether they understand the documents given to them. Such a system, they say, cannot guarantee safety, and serves merely to shift responsibility from the company to the workers who sign.

Moreover, danger tags can blow away or be removed by "skylarkers". A more effective system would have locks on dangerous machines with keys issued only to people authorised to work on them. Notwithstanding the doubts of union officials, the shop steward at Kellogg's believes that the new safety procedures are working well.

The procedures outlined above are in fairly widespread use in sections of Australian industry, and when conscientiously implemented, are credited with bringing about a substantial reduction in accident rates.

According to the present Kellogg's health and safety co-ordinator, implementing these procedures in his previous place of employment saw a decrease in the accident rate over a five-year period from 86 to 28 lost-time accidents per million man hours.

Unfortunately, there are as yet no data on the effectiveness of the new arrangements at Kellogg's. Whether, as union officials claim, they are only "paper" solutions must await further investigation.

CONCLUSION

As stated earlier, most of the relevant legal decisions about the Kellogg's tragedy have been made, and there is little point in or justification for speculating about possible alternative outcomes. Nonetheless, there can be no doubt that cases such as this do tend to give rise to expressions of concern about the adequacy of current law.

In Jeff Cleary's death, as in most such industrial fatalities, the coroner was unable to recommend an indictment for manslaughter, and this effectively ended the case as far as the conventional criminal justice system was concerned.

The Department of Industrial Relations was able to prosecute the company for regulatory violations associated with the death. However this meant that for at least some members of the community, these proceedings were made to carry the weight of their demand for some form of retribution for Cleary's death, a purpose for which they were not designed and for which they proved totally inadequate. In such cases, it is almost inevitable that the public will be left with a sense that justice has not been done.

It is also obvious that the fines imposed on Kellogg's are hardly likely to induce a large company to modify its practices. The larger fines now possible under the new legislation (up to \$50,000) may go some small way towards rectifying this situation.

Ultimately, though, it is difficult to see how these problems can be finally resolved without modifying the legal system itself. In particular, it is essential that laws and procedures be amended, or new ones introduced, to ensure convictions for manslaughter or industrial homicide—followed by fines calculated to really affect shareholders' returns—in appropriate cases. Until this is done the public perception will remain that there is one law for the rich and one for the poor.

Notes

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Chapter Thirteen

COKE AND CANCER AT BHP*

John Braithwaite and Brent Fisse

Coke ovens can be killers—the medical evidence around the world is “overwhelming”. Workers at steelmaking plants live with the constant danger of cancer of the lungs, bladder and skin.

But at BHP's steelmaking plant in Port Kembla it took a flexing of union muscle, screaming newspaper headlines, claims in parliament and government inquiries to get things moving.

In addition to extensive oil and mineral investments, BHP monopolises the manufacture of steel in Australia. BHP's largest steelworks are at Port Kembla, run by its Australian Iron and Steel subsidiary (AIS). Carcinogenic emissions from coke ovens at Port Kembla were the subject of an extraordinary series of industrial disputes between 1979 and 1981. Local unions (the Federated Ironworkers and Amalgamated Metalworkers) accused BHP of putting profits ahead of the safety of 1,000 coke oven workers through intolerable levels of emissions of dangerous gases.

A crucial stage in steelmaking is the conversion of coal to coke for use in the blast furnaces. Coke is made by cooking coal in batteries of ovens arranged in rows. At Port Kembla there are four batteries, each with between 66 and 101 ovens. Many of the gases driven out of the coal by the cooking processes are captured and

*This is a modified version of Chapter 7 of the authors' book *The Impact of Publicity on Corporate Offenders* (State University of New York Press, 1983) updated for the present volume.

sold as by-products. However, some of these gases also escape from the doors at the side of the huge ovens or from the lids on top.

The emissions are a complex mixture of small particles and vapour, in addition to gases. They include such gases as carbon monoxide, hydrogen sulphide, benzene, and hydrogen cyanide, as well as other carcinogens such as benzopyrene and coal tar.

There is voluminous evidence from North America, Europe and Japan indicating an association between the products from the carbonisation of coal and cancers of the skin, lungs, and bladder.¹ After reviewing this evidence, the US Occupational Safety and Health Administration (OSHA) described the support for the conclusion that coke oven emissions are carcinogenic as "overwhelming".² OSHA estimated that 100 US coke oven workers have been dying needlessly each year from job-related cancer.

In mid 1977, the unions representing Port Kembla workers became concerned about the health risks faced by their members working at the coke ovens. On 30 August 1977, the New South Wales Labor Council requested a conference with BHP to discuss the issue. Following that meeting, the company reported back to the Labor Council on 30 November 1977 with plans to improve the situation. But by 1978, it was the local Port Kembla branches of the unions that were running the campaign. After being sent OSHA material on coke ovens by the United Steelworkers of America and the International Metalworkers Federation, they wrote to BHP asking to be informed whether the company accepted the standards laid down in the OSHA regulations, and if it did not, the reason why not. A campaign began for the application to BHP of the OSHA prohibition against exposing workers not wearing protective equipment to coke oven emissions of benzene-soluble particulate in excess of 0.15 milligrams per cubic metre of air.

The company openly admitted emission levels that reach more than six times the OSHA maximum.³ In fact, company records for 1980 revealed emission concentrations at the worst locations of over 100 times the OSHA standards.⁴

There is no New South Wales or national legislation setting a legal limit to coke oven emissions. The National Health and Medical Research Council promulgated a voluntary standard of 0.2 milligrams of benzene-soluble particulate per cubic metre. BHP's

Port Kembla ovens, in addition to its ovens at Newcastle and Whyalla, are routinely in excess of this voluntary standard. A central plank in the unions' campaign was to persuade the New South Wales government to enact legally enforceable limits on the emissions.

Many more specific reforms were also sought. These included:

- (a) Air-conditioning and air-filtration of the "cars" which travel up and down the ovens filling them with coal and pushing the coke out once it has been cooked.
- (b) Employment of additional lidsmen to work on top of the ovens. The lidsmen are responsible for sealing the lids with clay to cut down the escape of fumes. With more lidsmen, a better sealing job can be done, and it would be possible to give existing lidsmen more time in air-conditioned rest rooms to recuperate from the hellish heat and fumes.
- (c) Installation of the air-conditioned rest rooms and the introduction of the relief time mentioned in (b).
- (d) Annual medical examinations paid for by the company with the results to be made available in writing to the workers.
- (e) Provision by the company of lockers and laundering for workers' clothes so that there would be no need to take these home. There is evidence that such carcinogens carried home in workers' clothes pose a potential threat to their families.⁵
- (f) Washing time prior to breaks to allow workers to clean carcinogens from their hands before eating food.
- (g) Worker education and training on the dangers of coke oven emissions.

Steve Quinn, of the Amalgamated Metalworkers and Shipwrights Union, described the attitude of BHP management to the initial 1977 campaign as "intransigent".⁶ The company response was said

to be "Don't get things emotional and the workers stirred up". The unions turned to their elected representatives for help. A government backbencher, George Petersen, castigated BHP in the New South Wales Parliament, and as a result the government sent a team from the Health Commission to report on conditions at Port Kembla.

An inspection led by Dr W Crawford of the Health Commission took place on 19 December 1979. The team concluded that emission levels "exceeded the National Health and Medical Research Council Standards in nearly all the assays undertaken by the company" and that "the employees are at considerable risk to health by the physically and chemically hostile environment in which they must work".

A variety of reforms was recommended, including the employment of additional lidsmen, the provisions of lockers and industrial laundering for the work clothes of oven employees, and the speeding up of engineering improvements to reduce the emissions.

Four months after the inspection, the contents of the report were revealed to the company. Between the receipt of the report in April 1980 and September of that year the company introduced no changes in response to the recommendations of the report. By September, the unions were wondering why they had heard nothing about the results of the Health Commission inspection. When they were told that the government had informed the company, but not the unions, of the contents of the report five months earlier, the 1,000 coke oven workers went on strike for four days.

The government responded by setting up another working party to determine the action necessary to implement the Crawford Report. This was an inter-departmental working party with officers from the Departments of Industrial Relations and of Health. An inspection took place on 15 and 16 September 1980. The resulting report adopted a softer line than the earlier report on the rate at which leaking oven doors would have to be replaced, although there were other respects in which tougher recommendations were made. The Minister for Industrial Relations requested the company to act on the recommendations.

The company, among other reforms, had already agreed to provide

lockers and industrial laundering for workers employed on the ovens, and these reforms were implemented. This did not satisfy the unions; they wanted the same benefits to apply to workers in the vicinity of the coke ovens—mainly in the coal washery (which washes the coal before it is fed into the ovens) and in the by-products plant (which processes the gases extracted from the ovens).

At the request of the unions, Dr Crawford was brought in for another inspection to ascertain whether his recommendations with respect to workers on the ovens should also apply to those around the ovens. In this report Dr Crawford exacerbated the dispute with the ambiguous conclusion that extending the same recommendations to the 320 by-products and associated workers would be “desirable” but not “essential”. Bitter dispute between management and employees as to whether these workers should get the same benefits as those on the ovens continued until the entire coke plant work force went on strike on 15 May 1981, and stayed out until 28 May.

On 26 November, the Industrial Commission of New South Wales decided in favour of the company that laundering and locker benefits not be extended beyond workers actually on the ovens.⁷

MEDIA COVERAGE OF THE SCANDAL

Throughout the 1979–81 period, the coke ovens saga was reported many times on the front page of the Port Kembla newspaper, the *Illawarra Mercury*. The Sydney and national press devoted much more limited attention to the problem. Some of the headlines seemed to be damaging for BHP: e.g. “BHP MEN IN CANCER PERIL AFTER GOVT ERROR” (*Australian*, 11 September 1980); “CANCER KILLING COKE WORKERS” (*Illawarra Mercury*, 6 September 1980). One front-page story was headlined “AIS CANCER RISK COVER-UP CLAIM” (*Illawarra Mercury*, 12 October 1979). This article reported statements in the New South Wales Parliament by George Petersen that the company had settled two coke oven compensation cases out of court so that there would be no evidence on which to establish a precedent for future claims. BHP issued a press release denying that this was its motivation in settling the cases. But as happens so often with corporate scandals,

allegations of cover-up can draw stronger fire than the material concerning the offence itself. The worst publicity came in union journals. For example, one story was headed: "DEATH ON THE COKE OVENS—BHP STYLE: KEMBLA CHALKS UP 13 KNOWN CANCER DEATHS" (*The Metal Worker*, September 1980).

Contrary to complaints made to the authors by BHP management, not all the press coverage was negative. There were a number of articles giving the company's side of the story: e.g. "BHP DEFENDS HEALTH AND SAFETY PROGRAM" (*Sydney Morning Herald*, 13 October 1979); "COMPANY REFUTES CANCER CLAIMS: AI&S DEFENDS HEALTH POLICY" (*Illawarra Mercury*, 13 October 1979). The Health Minister was reported as saying that the coke oven workers were "being well looked after" by BHP in a story headed "BHP TREATS MEN WELL" (*Illawarra Mercury*, 13 October 1979). In addition, there was a variety of newspaper articles lauding safety improvements made to the coke ovens: e.g. "AI&S ACTS ON CANCER REPORT" (*Illawarra Mercury*, 23 September 1978); "AIS TELLS OF PLANT IMPROVEMENT" (*Illawarra Mercury*, 12 September 1978). However, none of these were front-page stories.

The industrial confrontation aspects of the problem generated much of the media coverage. For example, when Dr Crawford and his team inspected the ovens on 17 December 1979, the company was at first not agreeable to union representatives accompanying him on the inspection. In response, a stop-work meeting was held and a television crew from Channel 10 in Sydney arrived to film the action. The company backed down and gave permission for union representation during the inspection. However, Channel 10 was refused permission to enter the steelworks itself and was forced to film from outside the gates.

Adverse publicity over the occupational health problem led to a limited amount of snowballing into publicity over related issues. The main example was pollution from the ovens drifting into the suburbs of Port Kembla and Wollongong.

Steven Quinn, the union leader, believed that the company "likes to give the image that they are good for Wollongong".

When the ABC programme *Nationwide* took their cameras to the plant in the early hours of the morning to film the fumes emitted

at that time, the company was not pleased. Coke oven workers had long alleged that when the company fell behind with its production targets, it was the night and early morning shifts that were required to cook "green ovens"—coke which emits excessive green fumes because it had not been cooked for long enough. At 2 am there is less risk of billowing fumes alarming members of the public (or government inspectors). The company categorically denied these allegations and in its defence showed the authors a memorandum of 19 February 1979 from the General Superintendent to battery foremen instructing that:

1. No oven is to be pushed unless it is coked (no matter what the cooking time).
2. No oven is to be pushed under minimum coking time.

Another related risk—the subject of some adverse publicity in the *Illawarra Mercury*, and in a speech to the State Parliament by Petersen—was that "Escaping fumes from the vats of by-product liquid materials cause sleepiness and watering of the eyes of operators".⁸

BHP did not run a counter publicity campaign. It was averse to "feeding the hand that bit us" by paying for advertisements explaining its position in the press. However, when the authors visited Port Kembla, Mr M J Burns, the Manager, Coke and Sinter, could not meet them because he was taking a course at the head office in Melbourne on handling media appearances and public relations.

In the four years since the Industrial Commission decision, particularly as the steel industry went into deep recession in 1982, accompanied by massive retrenchments, the media, locally as well as nationally, had virtually ignored coke oven cancer as an issue. Once the issue returned to being simply one of slow, imperceptible killing of workers, when there was no longer an industrial dispute to report, media interest evaporated.

IMPACTS ON THE COMPANY

The financial consequences of the emissions struggle for BHP were minor. Neither objectively nor subjectively in the minds of

management could the problem be viewed as having any impact whatsoever on BHP share prices. From late 1980 to mid 1981, when the struggle reached its climax with the plant-wide strike, BHP shares were trading at three times their 1978 prices. The period was one of a consistent climb in BHP share values.

Since BHP is a virtual monopolist in Australian steel, there was little chance of reduced production resulting in competitors seizing a slice of the market. It is doubtful if there was any diminution in ultimate steel production as a result of the strikes by the coke oven workers (cf. *Australian Financial Review*, 24 July 1981). Coke is stockpiled, and at no point was the stockpile expended. During the strikes, the ovens, run by the supervisory and management staff, continued to operate at about 70 per cent capacity. (Coke ovens cannot be shut down because their life will be reduced if their temperature is not kept at about 1,000°C). Undoubtedly, however, the disruptions to other working functions, by pulling people out of their normal responsibilities, had certain costs in inefficiency and aggravation of management problems.

The total capital costs of improvements, from new oven doors to lockers for workers' clothes, could reach a total of \$5 million. However, as noted below, many of these monies might eventually have been spent without the extra impetus of the union campaign.⁹ Another cost was in the double handling of coal during the strikes. Instead of coal being dropped straight into bins on railway tracks at the pit-head ready to be transported to the ovens, it had to be trucked elsewhere and picked up after the strike. Finally, it is possible that the publicity and antagonism aroused by the campaign may well provoke some victims of coke oven emissions into damages litigation against the company. According to the unions, by 1981 BHP had settled 13 cases out of court for payments running up to \$25,000 to the families of deceased coke oven workers.

Whatever the total costs, they will not loom large when compared with BHP's \$6 billion a year sales. Moreover, BHP in the past has usually managed to employ its monopoly status to pass on to consumers whatever extraordinary costs it incurs in its steel operations, although in recent times Australian protectionism has not been sufficient, given the world steel glut, to shield BHP from growing import competition.

The adverse publicity to which the company had been subjected was certainly cause for considerable objection and concern over loss of corporate prestige among the ten executives with whom the authors spoke during the course of their research. Because of some hostile coverage, primarily in the *Illawarra Mercury*, the company's repute in Port Kembla and Wollongong undoubtedly suffered as a result of the affair. However, individual executives were not singled out as villains in this press coverage. Consequently, our senior informants did not report loss of personal prestige to match the damage to corporate prestige.

Employee morale was also reported as having suffered. One executive expressed concern that wives who had been washing their husband's work clothes for years were now being told that by doing this they had been putting their families at risk of cancer. Hence, there was a belief that the morale of the work force was also being debilitated through family involvement in the issue.

Another adverse consequence of the affair for the company was a deterioration of already poor industrial relations. On 13 May 1981, when the workers started work late because of a gate meeting to consider the company's replies to a number of claims on cancer and emissions, they were forbidden their normal morning tea break, docked an hour's pay, and, according to the unions (although denied by the company), told to handle the same number of ovens they would push in a full eight-hour shift. It was this kind of event which badly soured industrial relations at the plant.

Avoidance of publicity was a consideration in many important management decisions. For example, after being told that the National Health and Medical Research Council standard for coke ovens was unrealistic, we asked why management had not complained to the Council with a view to setting a "realistic" standard. We were told that appeals against medical judgments on the grounds of "practical considerations" would only result in public attacks on the company for putting dollars ahead of lives.

REFORMS

Numerous technological and other emission-control measures have been introduced since 1977. Machine-operated door and frame

cleaners have replaced manual cleaning on all batteries, thereby eliminating one of the jobs with the highest exposures. Fifty additional workers have been engaged as door adjusters and for sealing the lids on top of the ovens. Water seals have been introduced on the standpipes which take gases to the by-products section. There has been extensive machining of oven lids to improve their seal.

Stage one of the programme, which involved the installation of air-conditioning and air-filtration equipment on charger cars (which move up and down the battery dropping coal into ovens) and establishment of air-conditioned and air-filtered oven-top rest cabins, was completed in mid 1979. However, the government inspection of 15-16 September 1980 found that the air-filtering systems on two of the charger cars were not functioning properly. A videotape was made to explain the dangers of coke ovens and means of minimising risk to employees. Workers are now given five minutes' washing time before tea and meal breaks.

The most expensive engineering improvement has been the replacement of leaking doors on three of the four ovens with a new Japanese spring-loaded self-adjusting model.

The unions' view is that the reforms have not gone far enough fast enough. However, considerable amounts of money have been expended on a variety of measures. There have been a number of technological repairs and other changes mentioned above. When they are all catalogued in the company's public relations handout, they appear to be an impressive list of improvements. They are not trivial reforms. However, the question remains whether emissions levels have measurably improved.

We have been able to obtain only three sets of figures for emissions, one for 1978-79, another for September 1980, and the third for the 12 months to August 1983. The first two sets of figures were the subject of some discussion before the Industrial Commission of New South Wales on 4 June 1981. As J Bauer pointed out at the hearing, the two sets of figures indicated that, if anything, emission levels had worsened.¹⁰ There was certainly no evidence of an improvement up to September 1980. When we visited the company in 1981, we asked whether it had any data suggesting an improvement since 1978. We were informed that it did not. We were then told that if one looked at the whole decade to take in

the total programme of upgrading, improvement would definitely be evident.¹¹ When we asked for evidence from systematic recording of emission levels throughout the period to substantiate this, we were informed that no such data existed.

Data for the 12 months to August 1983 showed that emissions from the batteries with the new Japanese doors had improved compared to the battery on which the doors were not replaced, though not dramatically so. It remained the case that over 80 per cent of workers sampled were exposed to average emissions in excess of the OSHA standard.

"Valve men" on one of the ovens were exposed to *average* readings of six times the permissible US level. BHP has stopped short of the drastic action which would be needed to create a low-risk environment at the Port Kembla coke ovens. The oldest and least productively efficient battery, No. 1, was closed down in 1982. However, the unions argued that it is the second oldest battery, No. 3, which should have been shut down because its design results in excessive emissions. The structural defects of No. 3, it was claimed, caused it to emit more dangerous fumes than No. 1. But management opted for closing the least efficient battery rather than the most dangerous one. Consequently, notwithstanding the new doors on the other ovens, workers on them are not protected from emissions above the OSHA standards because of spillover from No. 3. A year later part of No. 3 (3B) was closed, but 3A remained in production. The unions expressed the hope that the company would totally replace battery No. 3 in 1987 or 1988. However, they were not confident of this; allegedly, the company had consistently refused to hold talks with them about closing the killer No. 3 battery. One company spokesperson told the authors that the new battery was to provide for expansion rather than the replacement of No. 3. Battery 3A remains in production as this is written.

Little of the credit for the reforms which have been introduced by BHP can be given to the New South Wales government. Witness the fact that no new initiatives were introduced between the communication of Dr Crawford's report to the company in April 1980 and its discovery by the union in September. Things started to happen when the unions flexed their industrial and political muscle.

For the same reason, not much of the credit for the reform can be attributed to adverse publicity. While the publicity undoubtedly helped the workers in their cause, no change in the pace of reform was primarily attributable to industrial agitation. Two managers with whom the authors spoke, while adamant about the unions not forcing them to do anything they would not eventually have done of their own initiative, expressed the view that the industrial threats, backed by adverse publicity, had quickened the progress of reform. In responding to the authors' draft, however, the company rejected any interpretation that it had been forced into more rapid reform by the use or threatened use of the strike weapon. Its position was that reform should be interpreted in terms of a self-motivated corporate desire to improve health on the job.

In this case, in summary, adverse publicity played a relatively minor role in ushering in relatively minor reforms of company practices. Perhaps more significant was the part that adverse publicity played in jolting governmental authorities into action. In 1979, Dr Crawford of the Health Commission was quoted as saying that the Port Kembla coke ovens had a good pollution monitoring and filtering system (*Sydney Morning Herald*, 17 October 1979). By 4 June 1981, in giving evidence before the Industrial Commission, Dr Crawford could be heard to describe emissions from the same ovens as "dangerously high" and "frightful".¹² In fact, J Bauer in his Industrial Commission judgment, found that a previously lax approach of the government to monitoring coke oven emissions, had been replaced by a new, appropriate level of concern:

Whilst it might reasonably be said that there was a long delay in the commencement of detailed inspections and formation of recommendations after the responsible departments had been or ought to have been seised [*sic*] of the seriousness of the problems of industrial exposure to coke oven emissions and other industrial substances, the present position appears to be that the problems are being treated by these departments in a manner commensurate with the risks.

Furthermore, while disquiet might also reasonably be expressed at the delay in implementing the overall programme,

the commendable vigilance of the unions will no doubt ensure that the departments continue their supervision of the amelioration of the problem . . .¹³

Notwithstanding this improvement, the New South Wales Department of Industrial Relations has pointed out that its staff resources are still insufficient to conduct a comprehensive survey of emission levels at the Port Kembla ovens.

In 1982, the House of Representatives Standing Committee on Environment and Conservation strongly criticised both BHP and the health authorities for the tardiness of their responses to the coke and cancer problem at Port Kembla.¹⁴ Unless the scandal is more vehemently pursued through renewed industrial agitation and concomitant media focus, however, this admonition will also continue to fall upon deaf ears.

PROSPECTS FOR REAL REFORM

BHP is a company with an unimpressive record on occupational health and safety.¹⁵ While the recession of the early eighties brought pleas that investment in occupational health and safety could only be purchased at the price of jobs, the Australian record profits of recent years make BHP the last company which can credibly advance such claims.

Unfortunately, BHP is one of those companies which in the past has often had to be prodded into action on occupational health by aggressive government or union action. The New South Wales Department of Industrial Relations is a notoriously weak enforcer of occupational health laws. Overcoming its inertia would seem to be every bit as great a challenge as shifting BHP itself. Since progressive change has been stimulated by union activism in the past, this remains the hope for the future. However, it is a matter of considerable disappointment that when the Hawke government, in one of its early economic achievements, revitalised the industry with the Steel Industry Plan, the unions did not insist on commitments to invest in improved occupational health and safety as part of the plan.

The current stand-off on the coke ovens is devastating. BHP

claims to have done its bit by investing in the Japanese doors and the other new technology it has in place. The fact that this money has been spent without getting emissions down to levels internationally recognised as an acceptable health risk leaves everyone perplexed as to where to go now. Government inspectors do not have the expertise in coke oven technology to tell BHP that the engineering judgments of the past have not been good enough and to specify the kind of technology which should be purchased in future. The government feels reluctant to introduce a standard which is unattainable at present without more massive investments in new technology. What is the point of fining the company every day for non-compliance with a standard which was written in the full knowledge that the company had no prospect of compliance for a number of years? To do so would bring the law into disrepute. Yet to persist in doing nothing continues to bring the government into disrepute with workers and others who are aware of the problem. If the law enactment and law enforcement route would be a farce, then there is one alternative which would place a recalcitrant company under real financial pressure for reform. This is to impose emission charges on BHP's coke ovens. For every .01 milligram per cubic metre of air by which coke oven emissions exceed the OSHA standard of 0.15, BHP could be required to pay \$1,000 per exposed worker per year into a special fund to support workers' health clinics at Port Kembla (and Newcastle).

Equally, for every .01 milligram per cubic metre of air by which emissions are *below* the OSHA standard, BHP could be given a rebate against the emission charge owed. This would give BHP, the Big Australian which takes pride in "the pursuit of excellence", an incentive to pursue innovative, cost-effective solutions to the problem.

The use of emission charges is a regulatory approach which has a great number of problems when applied on a wide scale.¹⁶ However, in a situation of regulatory standoff where any other enforcement solution seems impracticable, and where an enforcement solution is needed to deal with an affluent company with little willingness to make further large investments to render the workplace safe, then a short-term solution which gives the company a financial incentive to invest in the expertise and technology to solve the

problem is perhaps the only road to take. Union mobilisation with maximum building of community support through the media, directed at the New South Wales government as well as BHP, is the only hope for moving down that road.

Notes

1. Henry, S A (1946), "Cancer of the Scrotum in Relation to Occupation", *Oxford Medical Publications*, 1946, 40-48; Kawai, M and Harada, K (1967), "Epidemiologic Study of Occupational Lung Cancer", *Archives of Environmental Health*, 14, 859-864; Lloyd, W J (1971), "Long Term Mortality Study of Steelworkers, Part V: Respiratory Cancer in Coke Plant Workers", *Journal of Occupational Medicine*, 13, 53-68; Sakabe, Hiroyuki, Tsuchiya Kenzaburo, Takebura Noburu, Nomura Shigeru et al (1975), "Lung Cancer Among Coke Oven Workers: A Report to Labour Standard Bureau, Minister of Labour, Japan", *Industrial Health*, 13, 57-69; Dole, R, Fisher, R E W, Gammon, E J, Gunn, W et al (1965), "Mortality of Gas Workers with Special Reference to Cancers of the Lung and Bladder, Chronic Bronchitis and Pneumoconiosis", *British Journal of Industrial Medicine*, 22, 1-12.
2. U.S. Occupational Health and Safety Administration (1976) "Exposure to Coke Oven Emissions: Occupational Safety and Health Standards", *Federal Register*, 41 (206) 22 October; See also *American Iron and Steel Institute v OSHA*, 577 F 2d 825 (1978) where the OSHA coke oven emissions standard of 0.15 mg of benzene-soluble particulate was upheld by the Court of Appeals, Third Circuit.
3. The company made the following comment in response to a draft of this work which we sent to it:

There are very few US batteries with water-sealed standpipe caps. Moreover, there are batteries in the US which today still involve manual removal of charging lids. Many US batteries, even some of their newest batteries, do not have mechanical door cleaners on machines and yet the inference is that, compared to the US situation, Australia (BHP) is behind and deficient in this area because we choose not to agree with some USA decisions and regulations. This view ignores the areas where we have adopted other remedies.
4. The company's response to this sentence in the draft we sent them for comment was as follows:

This is a true statement but again gives no perspective. We do not deny that there are instances where such very high figures have been recorded. However, they are the infrequent exception rather than the rule. As is the case with the American and other overseas coke ovens, an emission level of 0.15mg/m³ is routinely not met in many areas but it is rare indeed

for an exposure level to be 100 times the level. Moreover, in many cases where very high values have been reported we have doubts as to the validity of the result in that unrepresentative readings can be easily generated by holding a sample filter over an emission source. There have been numerous occasions when this practice has been detected.

Legally enforceable limits in America have not, at this point in time, resulted in compliance by American batteries, as is the simplistic inference implicit in the text. The nature of the problem and the stringency of the standard, notwithstanding the engineering and work practice controls specified by the OSHA regulations, have meant that the standard is currently unattainable in a number of areas on all batteries throughout the world for which we are privy to information.

5. Masek, V, Zdenek, J and Kandas, J (1972), "Content of 3, 4 Benzo(a) pyrene in the Working Clothes and Underwear of Workers at a Pitch Coking Plant", *Journal of Occupational Medicine*, 14, 548-551.
6. The company denies that its attitude was "intransigent":
That there were claims by the unions for changes, which the company did not accept, is not disputed. Whether any fairminded person examining what was claimed, what was agreed to, and what effects might reasonably be expected from not agreeing to all the unions' claims, would conclude that the company's attitude was intransigent is debatable! Certainly J Bauer, in his recent judgment, effectively concluded that some of the unions' claims were not reasonable.
7. Steel Works (Broken Hill Proprietary Company Ltd) Award and Another Award, Industrial Commission of New South Wales 355 (26 November 1981).
8. NSW Legislative Assembly, *Hansard* 23 October, 1980, 2087.
9. The expenditure on new doors is the major new capital investment, which the company points out was beginning to take shape before the industrial campaign:
The decision to install new doors had nothing to do with an industrial campaign. The trials with Ikio doors were begun in 1976. It was the company's intention all along to employ these doors subject only to the doors proving suitable. The initial design did not.
10. Notification under section 25A by Australian Iron and Steel Pty Limited of a Dispute with the Amalgamated Metalworkers and Shipwrights Union and Ors Re Claim for Two Lockers for Each Employee and Other Claims—Coke Ovens Department, Compulsory Conference 281, Industrial Commission of New South Wales, 4 June 1981.
11. BHP offered this response:
In many cases, e.g. water-sealed standpipe caps, the engineering reforms were completed prior to the commencement of significant data collection. We have no doubt that these steps have "measurably improved" the situation but because statistics were not kept during the period prior to the steps being taken we cannot statistically evidence our conclusion.
12. Compulsory Conference 281, transcript.
13. Steel Works Award, p. 86.

14. House of Representatives Standing Committee on Environment and Conservation, (1982), *Hazardous Chemicals: Second Report on the Enquiry into Hazardous Chemicals*, Australian Government Publishing Service, Canberra, 120-123.
15. Kriegler, R (1980), *Working for the Company*, Oxford University Press, Melbourne; Hopkins, A (1981), "Crime Without Punishment: The Appin Mine Disaster", *Australian Quarterly*, Summer, 455-466; Lewis, S and Matters, P (1985), "In the Belly of the Monster", *Australian Left Review*, 91, 17-21.
16. Braithwaite, J (1982), "The Limits of Economism in Controlling Harmful Corporate Conduct", *Law and Society Review*, 16, 481-504; Stewart, R B (1981), "Regulation, Innovation, and Administrative Law: A Conceptual Framework", *California Law Review*, 69, 1256-377.

Chapter Fourteen

ASBESTOS MINING AT BARYULGIL: A CASE OF CORPORATE NEGLIGENCE?

Neil Gunningham

The men worked in a dense cloud of dust . . . it was so thick they couldn't see the walls of the mill just a few yards away. At times it was so thick, they couldn't even see the man holding the sack as they shovelled in asbestos dust.

That was life at the Baryulgil asbestos mine owned by the James Hardie Group of companies between 1953 and 1976.

Who knows how many people died from the asbestos dust?

Could Hardies have saved some of them? And why didn't the government mines inspectors do more about it?

The public spotlight first fell on Baryulgil in 1977.

An ABC journalist, Matt Peacock, visited the asbestos mine at Baryulgil near Grafton in northern New South Wales as part of his research for a series of radio programmes on the theme: *Work as a Health Hazard*.¹ Those programmes brought to public attention for the first time the plight of the Baryulgil Aboriginal community, among whom there was thought to be widespread (albeit unrecorded) asbestos-related disease. It was subsequently alleged that the mine's former proprietors, James Hardie, had operated the mine so as to constitute a major health hazard, and that approximately 100 people had either died or lost their health as a result.²

In the years following Peacock's visit, the fears for the health of the community and the criticisms of Hardies' conduct intensified, culminating in the establishment of a wide-ranging inquiry conducted by the House of Representatives Standing Committee on Aboriginal Affairs. That Committee made its Report (hereafter the Baryulgil Report) in October 1984. Here, the allegations made against the mine operators and others are examined in the light of the evidence presented to the House of Representatives Committee.

THE HISTORY AND EFFECTS OF THE MINING OPERATION

The existence of an asbestos deposit at Baryulgil in northern New South Wales was known as long ago as 1918, but it was only in the early 1940s that any serious attempt was made to mine it. In 1940, Wunderlich Ltd (later a subsidiary of CSR) began the development and the mining plant was installed in 1943 and 1944. In 1944 Asbestos Mines Pty Ltd (AMPL) was formed to operate the mine with 50 per cent of shares being held by Wunderlich and the other 50 per cent by the James Hardie Group of Companies (hereafter Hardies). In 1953, Hardies bought Wunderlich's share and from that time until 1976 the operating company, AMPL, was a wholly owned subsidiary of Hardies. The mine was sold to Woodsreef Mines Ltd in 1976, and finally closed in April 1979.

Throughout the period 1953 to 1976, AMPL operated the mine through a mine manager employed by that company. The workforce engaged in the quarry and mill varied between 15 and 40 at any one time, the greater number being occupied in the quarry. Of that workforce, a small number, usually four or five, were engaged in the milling process—separating the asbestos from the host rock. The workforce consisted mostly of people of Aboriginal descent drawn from the local community.

There can be little doubt that workers at Baryulgil were exposed to substantial doses of asbestos dust for much of the period of the mine's operation at levels which could certainly be anticipated to cause serious damage to health.⁴ Specifically, workers were at risk of developing any of several serious and often fatal diseases including lung cancer, stomach cancer, colon-rectum cancer, pleural

mesothelioma (cancer of the lung lining), peritoneal mesothelioma (cancer of the stomach lining) and asbestosis, an irreversible lung disease caused by the scarring of lung tissues with asbestos fibres.

Members of the local community, who were exposed to lesser levels of dust, were at risk, if not from asbestosis then at least from the asbestos-induced cancers, which may be associated with trivial exposure to asbestos. To what extent the health of the workforce and community *actually* suffered as a result of asbestos exposure is less clear.

Although a number of surveys of the health of former workers and residents at Baryulgil were conducted in 1977, 1981 and 1982 by the New South Wales Department of Health, the results are inconclusive. It is not possible from this data to form a clear and quantitative impression of the extent of asbestos disease in the Baryulgil Aboriginals.⁵ Nor is there any other basis on which to calculate rates of past disease or to project future likely rates of disease, not least because personal records at the mine were incomplete.

Even given these limitations, there is clear evidence that asbestosis has occurred in ex-mine workers at Baryulgil:

It was present, at least to a mild degree, in the lungs of three who were examined post mortem and also in the lung of a woman who developed lung cancer, who had not been employed in the mine or mill but had lived in Baryulgil for most of her working life. On clinical grounds also, given the evidence available to us, at least five living ex-mine workers probably have asbestosis. It would appear, however, that it is not severe in comparison with what is commonly observed in circumstances of long-term occupational exposure. A number of other ex-mine workers have some of the clinical features of asbestosis.⁶

Further, one case of malignant mesothelioma of the pleura, one of malignant mesothelioma of the peritoneum, and one case of lung cancer were found among the Baryulgil population. However, it is uncertain in any of these cases whether asbestos exposure was a contributing factor. Moreover, there was an apparently high incidence of chronic bronchitis in ex-mine workers which might

possibly be causally connected with dust exposure at Baryulgil.⁷

There are a number of possible explanations for the apparent lack, to date, of any large amount of asbestos-related disease in the Baryulgil Aborigines. One might be low exposure, but this is most unlikely, given the evidence concerning working conditions, discussed below. A second possibility is lack of diagnosis, bearing in mind that the Baryulgil Aborigines probably did not have ready access to the best medical care and cases of asbestosis may have been missed in the early years. However, more recent investigations have not revealed any large number of subjects suffering from asbestosis, although it is possible that X-rays taken of two workers in 1949 and 1952, which revealed evidence of asbestosis, *might* represent the tip of an earlier iceberg rather than the total of asbestos disease at that time.

Finally, the latent period (the period between exposure and observable symptoms of disease) for asbestos-induced cancers is between 15 and 40 years, and for asbestosis 10-20 years. It is possible therefore, that the toll of asbestos-related disease at Baryulgil will rise significantly in the future, despite the closure of the mine in 1979. Unfortunately it is impossible to make any valid projection of future disease rates because of uncertainty as to time of past employment and duration of employment as well as the actual levels of exposure to asbestos during employment.⁸

ASSESSING HARDIE'S ROLE

Accepting that the *extent* of asbestos-related disease at Baryulgil is uncertain, there remain a number of questions as to the culpability of the mine operators. In particular:

- Did the operators know of the health hazards to which they were exposing their workers?
- If not, as reasonable employers, should they have known?
- Assuming knowledge, how much should the operators have done, as reasonable employers, to reduce the dust hazard and protect the health of their workforce?

More specifically, did Hardies or their operating company (AMPL):

- fail to provide an adequate system of dust extraction and suppression?
- fail to warn workers of the dangers of exposure to asbestos dust?
- fail to take reasonable steps to prevent or limit the creation of asbestos dust during the mining operations?

The House of Representatives Committee faced severe difficulties in unravelling the story of the Baryulgil mine, given that the events in question occurred many years ago, and that records were incomplete. Piecing together the accounts of former employees and the fragmented documentary material which became available, the following picture emerges.

For the early period of the mine and milling operation between 1944 and 1958, few records are available and it is not possible to make any precise assessment of the dust hazard, beyond noting that conditions were poor indeed. Former employees describe working in a dense cloud of dust, being unable to see the wall inside the mill, a distance of a few yards, and shovelling asbestos dust into sacks while in such a cloud of dust as to be unable to see the men holding the sack.⁹ The Committee concluded:

Although the evidence is incomplete, and although there is uncertainty as to the precise fibre levels to which workers were exposed, it seems very probable that the then recommended level of five million particles of dust per cubic foot was routinely exceeded. Levels of exposure were undoubtedly high enough to cause a substantial incidence of asbestos-related disease.¹⁰

In 1958, a new mill was built which came into operation in 1959. The mill was undoubtedly less dusty than its predecessor although there is evidence that in particular areas, dust levels remained high.¹¹ The Committee concurred with the view of a senior officer of the New South Wales Division of Occupational Health that

“extremely dust generating procedures were in use for many years. It is obvious that the use of dust control measures and respiratory protection were extremely limited”.¹²

A much more precise assessment of the dust hazard can be made for the period 1970-76. Not only was dust-counting technology itself dramatically improved with the introduction of the membrane filter method in 1970, but in the same year, Hardies themselves established dust-counting stations to monitor airborne dust levels at particular locations in the quarry and mill.

The internal company records of many of these dust counts came into the hands of the Aboriginal Legal Service (representing the Baryulgil community) and were submitted as evidence before the Committee. These records provide a substantial insight not only into the extent of the dust hazard at Baryulgil, but also into Hardies' response to this information.

Although great care must be taken in interpreting the results of the dust surveys,¹³ they leave little doubt that dust levels between 1970 and 1976 were excessive, judged by the standards of the time, which for practical purposes may be assumed to be 4 fibres per cubic centimetre (i.e. 4f/cc, averaged over an 8 hour shift¹⁴). Dust levels routinely exceeded the acceptable (4f/cc) level and in some cases readings were far higher. The Committee concluded that “the mining of ore, crusting and fibre separation, bagging and tailings disposal, all produced excessive levels of atmospheric dust”.¹⁵

Among the most revealing evidence contained in the internal company documents is the comments made by Hardies' Industrial Hygiene Engineer, Mr Winters, and by its Federal Medical officer, Dr McCullagh. For example, Mr Winters, commenting on Hardies' first industrial hygiene survey in September 1970, states:

It can be said that at locations where men are working for 8 hours per day dust levels are reasonable, however . . . dust levels at [certain] locations are alarmingly high, the bag shaking operation recording an average count of 245 f.p.c.c. and the emptying operation recording 302 f.p.c.c. The operator is subject to dust levels created by the shaking operation for about 1 hour per day and by the emptying operation for about 2 hours every 2 to 3 days.¹⁶

As the committee pointed out, workers would only have to be exposed to such concentrations of fibres for a brief period to exceed the recommended 4f/cc limit (averaged over an 8 hour shift). Since Hardies' internal company record indicates that the general dust level in the mill was 19f/cc, the overall exposure of workers in the mill, and particularly those involved periodically near the two worst locations, would have exceeded the recommended level.¹⁷

Both Winters and McCullagh noted the urgent need for dust control measures to safeguard the workforce, but only limited improvements were achieved in the following months. In February 1972, V. Gerrard, acting in McCullagh's absence, reported that "standards of hygiene are still deplorable" and later drew attention to conditions in the sack and dust collector building:

This is unquestionably the worst dust source. I inspected the mine on a mild still day after much recent rain. Nonetheless billowing clouds of fibre could be seen coming from this building and Mr Burke [the mine manager] tells me he has on occasion seen such clouds from distances of several miles. We have on previous occasions obtained counts of about 1,000 fibres/cc here and I have no doubt that the count was of that order when I made my inspection.¹⁸

Winters and McCullagh continued to express grave concern about dust levels at particular locations, and optimistic assessments and descriptions of improvements were punctuated by comments about "alarmingly high" levels at particular dust-counting stations.

Not all the evidence pointed in the same direction. Gradual improvements *were* achieved between 1970 and 1976. Moreover, dust counts conducted by the government agencies during the same period sometimes recorded much lower dust levels.¹⁹ However, where disparities exist between Hardies' surveys and those of the regulatory agencies there are, for reasons discussed below, "strong reasons for believing that some of the government agencies' figures are substantial underestimates".²⁰

In summary, in the period 1953-1976, during which Hardies controlled the Baryulgil operation:

They only infrequently achieved their own stated objectives in relation to dust control, and they often breached the legal limits which applied after 1964. Before 1970 they made no systematic effort either to monitor or control the dust hazard. After 1970, they did implement a number of controls and dust levels were progressively reduced. However, the improvements were often delayed, piecemeal and spasmodic, and were insufficient to bring dust levels in some areas within the legal or recommended levels, or to provide the degree of dust control achieved elsewhere in the organisation. Even in August 1976, shortly before Hardies sold the Baryulgil operation, they had not managed to achieve compliance with the legal standard at three of nine dust stations monitored.²¹

There can be no doubt that workers at Baryulgil were exposed to levels of asbestos that were excessive by modern standards and in the asbestosis-producing range.²² Was this a consequence of corporate neglect, of industrial irresponsibility or culpability on Hardies' part, or did Hardies act reasonably in the light of the then available knowledge and technology?

The evidence suggests the former. Although the public and industry generally remained largely unaware of the hazards of asbestosis until the 1970s, there are reasons to believe that Hardies were not similarly ignorant. Although by 1953 (the year Hardies took over Wunderlich's share of APL) the link between asbestos and cancer had not been established beyond doubt, the connection with asbestosis, a severe and often fatal fibrosis of the lungs, was clear. Regulations to control the use of asbestos had been introduced in Britain in 1931 and in Victoria in 1945. It is most unlikely that Hardies, a major asbestos manufacturer, could have been unaware of this evidence and indeed it was conceded before the inquiry that "asbestosis was known in the [Hardie] group as a serious problem in the 1950s".²³

In 1956, a study commissioned by Hardies diagnosed a number of their employees as suffering from asbestos-related disease, and that report was presented to Hardies in 1957.²⁴ Yet, despite the extent of Hardies' apparent knowledge and awareness of the hazards of asbestos, for many years they took little interest in the dust

hazards at Baryulgil.²⁵ The committee concluded that Hardies could and should have done far more to achieve dust control at Baryulgil and to safeguard the health of the workforce, and that Hardies' response fell short of that which could be expected of a reasonable employer.²⁶

One critical shortcoming, which can only have exacerbated the problem, was Hardies' failure to inform the workforce of the health risks of asbestos.

Had they done so, workers might have been far more willing to use such limited protective equipment as was available and to take other precautions when handling the dust. As it was:

No meetings were organised by Hardies' management to provide such information, no warning posters or letters were issued, there was no suggestion to workers (in later years) that they should not smoke because smoking increased the dangers. No instructions were sent to the mine manager directing him to bring the hazards to the attention of the workforce. Nowhere, in any of the internal company documents to which the committee had access, was there any reference to the need to educate or inform the workforce or the Baryulgil community about the hazards of asbestos . . . It is an indictment of Hardies that although they were aware of the asbestosis hazard by the 1950s, neither then nor at any subsequent time did they attempt to communicate their knowledge to the workforce or to warn them of the dangers.²⁷

Hardies' position before the late 1960s was of almost total indifference to conditions at Baryulgil. One reason why the Committee had such difficulty in determining how hazardous conditions were before 1970 is that Hardies themselves had made very little effort to find out. They made no systematic attempt either to ascertain how high dust levels were, or to reduce them. They took no dust readings themselves nor, until 1969, was any programme introduced for monitoring the health of the workforce (although an X-ray survey was conducted in 1967).²⁸ Yet X-rays taken at the local hospital as early as 1949 and 1952 had revealed detectable asbestosis in two workers, although whether Hardies

had access to this information cannot be established.

Symptomatic of Hardies' attitude towards Baryulgil was the low ranking it had in the Hardie Group's industrial hygiene programme, introduced during the 1960s. Baryulgil, by all accounts, had a worse dust problem than Hardies' other operations, yet it was among the last to benefit from an industrial hygiene survey or the internal medical surveillance scheme. The explanation may well lie in the fact that the mine was a small and economically marginal operation, that it was tucked away in a relatively obscure corner of New South Wales, lacking any effective union organisation, and that it had a compliant and unsophisticated Aboriginal workforce.

Even when Hardies did begin to take a more active interest in working conditions at Baryulgil, and after the introduction of dust monitoring in 1970, Baryulgil continued to pose a more serious health hazard than Hardies' other Australian operations. Beyond the problems of controlling dust in a mining and milling operation, which could have been solved by available technology²⁹, two critical factors appear to have influenced Hardies' behaviour. One was their limited commitment to the future of the mine, which inhibited any major investment or dust control programme. The second, and closely related, reason was the cost of achieving effective dust control.

For example, a recurrent theme in correspondence between Dr McCullagh and Mr Winters is Hardies' reluctance to implement dust control measures where substantial expenditure was involved. Thus in September 1971 Mr Winters's report began:

The mine manager is well aware of the necessity for controlling asbestos dust. However, the dust control programme for Baryulgil has been hampered through lack of a decision by management as to the future and likely life of the mine. Consequently, all modifications performed to reduce dust levels have been stop-gap measures and planning for major modification has not been possible.³⁰

Similarly, the mine manager, Mr Burke, suggested that the projections concerning the life of the mine were quite short and that this often minimised the prospect of capital expenditure on dust suppression:

The short life of the mine was usually the lever used, not so much in deliberately refusing to do it but as to the viability of doing quite major works. About 1970, I discussed it with the hygiene engineer of James Hardie and we estimated it would take about \$70,000 to \$80,000-odd to put a complete new dust system in.³¹

Finally, the importance of costs in the decision-making process, and the consequences which Hardies threatened would follow if they were required to introduce expensive dust control technology, are most starkly stated in a letter of 27 July 1972 from the chairman of the Dust Diseases Board to the Director of Occupational Health. The letter refers to a proposed inspection at Baryulgil, and to claims (presumably by Hardies). . .

that certain dust counts previously taken by the Division were excessive and that the modifications which had been suggested on the basis of those counts *were of such an expensive nature that might require closure of the mine.*³² [emphasis added]

THE ROLE OF THE REGULATORY AGENCIES

If Hardies failed voluntarily to rest on their responsibilities as reasonable employers, what role did the State regulatory agencies play in ensuring the health and safety of the workforce?

Such agencies are purportedly established to protect the public or sections of the public (e.g workers) from the undesirable side-effects of business activity.³³ Arguably, in the case of the safety inspectorates, they are intended to counter the pressure on employers to sacrifice the health and safety of their workers in the pursuit of profit and, sometimes, economic survival.³⁴ What role then did the government agencies *actually* play at Baryulgil?

The main task of monitoring and inspecting activities at Baryulgil was shared between the Mines Inspectorate and the Division of Occupational Health and Radiation Control (hereafter DOH), now part of the New South Wales Department of Industrial Relations, and formerly within the Department of Health.³⁵ There was a curious division of responsibilities between these two Departments,

resulting from the fact that the DOH had the scientific and technical expertise in measuring hazards, but no enforcement powers. The Mines Inspectorate on the other hand, while lacking in technical skills, had quite broad powers, including the right to make "such inspection, examination and inquiry as may be necessary to ascertain whether . . . this Act and the general rules and special rules are complied with" and the right to enter any mine "at all times by day and night".³⁶

The pattern that emerged was that the DOH often responded to requests for assistance from the Mines Inspectorate and conducted most of the monitoring of dust or fibre levels at Baryulgil. Inspections were also made by the Mines Inspectorate but most of these were routine visits by the district inspector who, as a generalist, was concerned more with conventional mine hazards, and had no particular concern with asbestos dust or its dangers, of which he seems to have been oblivious.³⁷

The regulatory agencies' response at Baryulgil was unsatisfactory in a number of ways. First, there was the infrequency of inspection, particularly in the early years of the mine's operation. Tests were conducted in 1948 and 1952 but no further dust counts were taken between 1952 and 1960. Why did the Mines Inspectorate fail to take any action during the period, despite hazardous dust levels described by many witnesses and apparently recorded in the 1948 and 1952 reports? According to the House of Representatives Committee:

One must conclude that either the inspectorate was aware that a health hazard existed but failed to take reasonable steps to protect the workforce or that it failed to keep itself reasonably informed of the hazards. In either event, the inspectorate failed adequately to discharge its responsibilities.³⁸

Even after 1960, the mine monitoring authorities failed to conduct regular and frequent visits to measure dust levels. From 1960-76, dust measurements were made on average only every two years, which, as the Committee pointed out, "can hardly be considered adequate when, even on the Division of Occupational Health's own figures, dust levels clearly exceeded the then recommended levels".³⁹

A second criticism concerns the manner in which inspections were conducted, and the accuracy of the dust readings obtained. Before the inquiry, considerable evidence was presented to suggest that it was the usual practice for prior warnings to be given of inspections. For example, the fitter, Mr Hindle said:

... in the 25 years that I had been there, I had never seen a mines inspector or health inspector or anything like that come in for a spot check. You would always get about a day or two days notice to slow down, clean up, get everything spic and span and in they would come when it was all beautiful.⁴⁰

This account was corroborated by many other Aboriginal and non-Aboriginal workers and the Committee concluded that the evidence that prewarnings did routinely take place was overwhelming⁴¹:

There is no doubt, that clean-ups prior to inspections did take place routinely at the instigation of the mine manager. The evidence suggests that very vigorous efforts were put into such clean-ups and often the men worked overtime through the weekend to achieve satisfactory results. Indeed, on at least one occasion, evidence of a clean-up was obvious to the inspectors since the mill floor was still wet and had presumably been hosed down to suppress dust.

Whether such clean-ups were deliberate attempts to disguise the hazards, or were more in the nature of good housekeeping (in much the same way as one might tidy the house for visitors) is unclear. The result, whether intended or not, was to reduce dust levels in the general mill area and to create a favourable impression. Consequently, inspectors rarely saw working conditions as they really were, and dust levels were presumably lower than at other times.⁴²

There are strong reasons for believing that, because of these practices, the government agencies' figures were substantial underestimates of the true dust levels. The evidence is strongest for the period 1970-76 when the agencies' reading can be compared

with the results of Hardies' own dust monitoring. The results obtained by the regulatory agencies present a far more optimistic picture of conditions at Baryulgil than Hardies' own surveys. For example, the DOH in 1969 recorded comparatively low dust counts while Hardies' first survey in September 1970 recorded "alarmingly high" levels of asbestos fibres at some points. The Committee concluded that the evidence of Hardies' own surveys was to be preferred to that of the regulatory agencies, and that the latter's lower figures could be attributed mainly to the practice of prior forewarnings and clean-ups, and to technical difficulties experienced by the agencies in taking readings and interpreting the results.⁴³

A third criticism, applying specifically to the Mines Inspectorate, is that its response to the health hazards at Baryulgil (even taking the agencies' own measurements of dust levels at face value) was inadequate. For example, some of the surveys conducted by the DOH revealed dust levels far in excess of the then recommended levels⁴⁴ yet the Mines Inspectorate, as the agency responsible for enforcement, made little effort to ensure that improvements were carried out:

The only action which was usually taken was to send a copy of the report to the mine manager and to Hardies' head office. These reports often contained recommendations for dust control arising out of the inspection, but there was generally little or no follow-up by the inspectorate. If their recommendations (or those of the Division of Occupational Health) were not carried out, or if the operating company did not succeed in reducing dust levels, this would not become apparent to the inspectorate until they (or the Division of Occupational Health) took their next dust count, perhaps two years later.

Even then, their approach was hardly systematic or rigorous. For example, the site identified as having an excessive dust count in 1960, was not even re-measured in the survey of 1963, nor indeed were most of the sites measure in the previous survey.⁴⁵

The Chief Inspector of Mines asserted that this departmental policy (of making recommendations but *without* invoking its powers

under the *Mines Inspection Act*) was the most appropriate response and that it had ensured a gradual improvement in conditions. This claim is not supported by the evidence. Although some improvements were achieved, dust levels remained high for many years. The Committee concluded:

Taken overall, however, the inspectorate's policy cannot be judged a success. As Hardies' own figures show, many stations still recorded dust levels in excess of the recommended levels, even in the mid 1970s. As late as 13 December 1977, the Assistant Under-Secretary of the Mines Department, Mr Rose, acknowledged in a Minute Paper that:

It is apparent that there is a problem of lung disease in the Aboriginal population at Baryulgil . . . The Department has consistently pursued the four particles rule as far as asbestos is concerned in mining operation, *but we cannot claim to have been particularly successful in forcing company observance of this standard* [emphasis added].⁴⁶

It was only in the last two years of the mine's operation that dust levels came under close scrutiny from the inspectorate, and only in 1978 that the legal standard was clearly complied with throughout the mine and mill.

We are not convinced that the inspectorate was sufficiently decisive either in conveying to management the sense of urgency that was appropriate in achieving improvements or in pursuing the question of prosecution when, over a period of years, improvements were not forthcoming. There were undoubtedly occasions during the inspectorate's administration of the Baryulgil operation, when its statutory powers could have usefully been involved to ensure that a recalcitrant management complied with its obligations. Even before any specific asbestos standard was imposed in 1964, the general powers under GR65A could have been used to ensure that dust levels were reduced to safer levels.⁴⁷

Finally, it should be noted that the Mines Inspectorate did not

inform workers adequately about the dangers of asbestos exposure or of the need for safe handling, thereby failing to take an obvious first step towards alleviating the health hazard at Baryulgil.

DEFECTS IN THE LAW AND ITS ADMINISTRATION

The Baryulgil Inquiry has brought to light a number of serious deficiencies in existing arrangements for securing the health and safety of the workforce. Although these deficiencies were highlighted in the case of asbestos mining at Baryulgil, the evidence suggests that they are widespread, and relate to the enactment and enforcement of occupational health and safety legislation generally. It would be unwise to consider the Baryulgil experience in isolation from these wider factors.

THE ENACTMENT OF SAFETY LEGISLATION

One particular issue which gives rise to concern is the slowness with which the State health and mines authorities acted in taking steps to regulate occupational exposure to asbestos.

The first legislation governing permissible dust levels in New South Wales was introduced under the *Mines Inspection Act* in 1964, 33 years after the British Government had introduced the first, though inadequate, asbestos regulations and almost 20 years since the first asbestos regulations became operative in Victoria.⁴⁸

The 1964 standard provided for a maximum of 5 million particles per cubic foot of air, a measure that had also been proposed by the American Conference of Governmental Occupational Hygienists as long ago as 1938, as being low enough to prevent asbestosis. Following directions from the Chief Inspector of Mines, the permissible level of exposure at Baryulgil was reduced to 4f/ml by 1973 and to 2f/ml in 1978.⁴⁹

For workers not covered by the *Mines Inspection Act*, there was no legislation regulating asbestos use until 1977, when the *Factories (Health and Safety Asbestos Processes) Regulations* were introduced. For these workers, it took nearly 40 years from the initial recognition of asbestos as a health hazard for a standard to be set which provided some measure of protection.⁵⁰ It also took more than eight years from the time meetings were first convened by the relevant

departments before legislation was finally enacted. As Dr Longley, Chairman of the NSW (Dust Diseases) Medical Authority pointed out:

We had been waiting for a period at that time from 1969 when the asbestos regulations were drafted by a committee of us. They were fed into the pipeline for gazettal and did not re-emerge until 1977—about 8 years later. This disease in that period had killed maybe 150 people with asbestosis and maybe 50 or 60 with mesothelioma and about 30 or 40 with cancer of the lung—an enormous toll of death and injury in that period.⁵¹

Given that knowledge of asbestos hazards was readily available in the technical and medical journals,⁵² and given the much earlier introduction of legislation in other jurisdictions—most notably the UK, it is disturbing that the relevant government departments took so long to initiate the enactment of protective legislation in New South Wales. This cannot be attributed to the absence of practicable fibre monitoring and fibre counting technology. The UK Regulations of 1931 had made at least rudimentary attempts at regulation, and more sophisticated measuring equipment (specifically the membrane filter method) was available by 1969. It was in that year that the British legislature established a hygiene standard of 2 fibres per c.c. of air measured over a 4-hour period.

Yet only in 1977 were similar regulations introduced generally in New South Wales. The time lag between the recognition of the asbestos hazard and the introduction of protective legislation does not engender confidence in the ability of the regulatory system to protect workers from the new health hazards introduced by changes in technology.

RESOURCES AND ENFORCEMENT STRATEGY

Two factors are particularly important in understanding the role of the Mines Inspectorate in relation to Baryulgil. The first is its lack of resources, which contributes to its failure to inspect more often, to undertake follow-up inspections or to take more vigorous enforcement action. Evidence was given that:

There was a period from July 1967 to January 1974 when Special Duties Section was reduced from three inspectors to one inspector. This was due to an inability to recruit inspectors of mines. Thus the work in the dust area was delayed considerably.⁵³

However, as the Committee pointed out:

It is questionable whether the Mines Inspectorate's response to working conditions at Baryulgil would have been markedly different even if extra resources had been available. After all, there was no apparent difference in its role between 1967 and 1974 and in the years immediately before and after that period.⁵⁴

The second, and critical, factor identified as influencing the inspectorate's responses at Baryulgil, was its underlying policy which was to operate by advice, help and persuasion, and to invoke sanctions in only the most extreme circumstances.⁵⁵ As Mr Marshall, the Chief Inspector of Mines put it:

I will never be convinced that prosecution is the answer. The answer is the psychology to get to the people and tell them to work safely.⁵⁶

and again

CHAIRMAN—So the policy of the department is to convince people of the dangers and try to bring the standards up, bring the plant up . . .

Mr Marshall—We wanted the plant to comply, yes.

CHAIRMAN—Not to enforce?

Mr Marshall—Not to enforce. The danger I see with enforcement—it might be not particularly true in this case—is that if you start prosecuting people for beaches of the Act your sources of information dry up. People will not talk to you.⁵⁷

The Chief Inspector also suggested that it would have been a misuse of limited resources to engage in prosecutions, since time spent in court giving evidence could more usefully be spent in the

field. In any event, he suggested that prosecution would be futile in view of the low fines involved (the maximum, for much of the relevant period, being \$200):

Mr BLANCHARD—I would argue that where there is risk to life and limb the time spent in the court trying to put pressure on management is equally as important as field inspections. Do you agree with that?

Mr Marshall—Not when it was a \$200 fine.

The chief inspector gave evidence that there had been a maximum of probably 10 prosecutions under the Act in as many years and that none of these had, to the best of his knowledge, been brought against any asbestos mine.⁵⁸

This description of how the inspectorate approached its responsibilities is a familiar one, which characterises the work of similar agencies in New South Wales and throughout Australia.⁵⁹ Thus the inspectorate's failure to take more vigorous action at Baryulgil should not be seen as a specific lapse, either in dealing with a particular employer, or in the inspectorate's overall response to one particularly hazardous industry. Rather it should be seen as part of a broader philosophy, according to which the inspectorates choose to operate by advice and persuasion, assuming that industry will almost invariably be willing to regulate itself, without need for the law to be strictly or stringently applied.

As the Committee recognised:

It is this philosophy which largely explains why the Chief Inspector of Mines, Mr Marshall, saw no objection to a policy of giving advance notice of inspections, and why the inspectors themselves undoubtedly did so. This is why the Chief Inspector viewed the idea of "surprise" inspections with some concern, as being an attempt to "trap" employers, when the better approach was to try and clean-up the industry by liaising more closely with employers. This is also why the inspectorate relied almost entirely on the goodwill of the employers to implement its recommendations, and why the employers knew that if they

failed to do so, the chances of further action being taken against them were remote.⁶⁰

The history of asbestos regulation bears tragic witness to the failure of the "advise and persuade" philosophy. At Wittenoom in Western Australia, over 200 out of a total of some 6,000 former asbestos workers (one in every 30) have died from asbestos-related disease, and this number is likely to rise given the long period between exposure and manifestation of these diseases. The performance of the regulatory agencies at Wittenoom has been characterised by some commentators as being one of "bureaucratic weakness" and as "negligent"⁶¹. However, regulation also suffered from the division of responsibilities between the Mines and Health Departments, and from the Health Department's lack of power and inability (rather than reluctance) to take effective action.⁶²

In the United Kingdom, where regulations have existed for decades, enforcement has also been weak. In 1972, the House of Lords, awarding damages to a worker suffering from asbestosis, criticised the "supine attitude" of the Factory Inspectorate, which had resulted in workers being constantly exposed to serious hazards from asbestos dust.⁶³ Four years later an ombudsman inquiry again made serious criticisms of the practices of the inspectorate.⁶⁴

The reasons why self-regulation and the "advise and persuade" philosophy have failed in relation to the asbestos industry were identified by the House of Representatives Standing Committee on Environment and Conservation in its report *Hazardous Chemicals*:

There are, in general, no dramatic work-stopping agents associated with asbestos-related diseases and industry would achieve negligible savings in production time by reducing their incidence. The benefits of reduced workers compensation premiums and tort claims has, until recently, been negligible and therefore, the total economic benefits to an employer of reducing asbestos hazards are minimal, as is the case for a wide range of occupational diseases. Recently the Johns Mansville [sic] subsidiary of the giant Johns Corporation in the United States has sought to alter its structure to avoid the mounting liability

of asbestos damages claims. *In this instance it would appear necessary that legal standards be created and enforced in such a way that it is unprofitable to violate them.* [emphasis added]⁶⁵

Without denying the obvious value of the “advise and persuade” philosophy in some circumstances, it is clear that it needs to be backed up by effective sanctions. Vigorous enforcement of safety legislation is the mechanism most likely to curb work hazards. The prospects of detection, prosecution and conviction must be sufficiently high, and the penalties on conviction sufficiently severe, to convince most employers that it is more sensible to implement safety precautions than to risk the consequences of failure to do so.

THE GOVERNMENT'S RESPONSE

The cause of the Baryulgil community was taken up by the Aboriginal Legal Service. Finding substantial obstacles to the success of conventional compensation mechanisms—either in common law damages or under the *Workers' Compensation (Dust Diseases) Act*⁶⁶—the ALS sought a political solution. It lobbied the Federal Government for a royal commission, which it hoped would recommend the award of substantial compensation to the Baryulgil community.

It was against this background that the Minister for Aboriginal Affairs, Clyde Holding, announced the establishment of the House of Representatives Committee's inquiry.

The Minister asked the Committee to examine the conditions under which Baryulgil people worked at the mine and mill and to identify factors which may have contributed to any health risks attributable to the way it was operated.⁶⁷

The Committee was also asked to examine the adequacy of the law applicable to possible claims for compensation and to recommend measures necessary to overcome any inadequacies in the law.⁶⁸ The Committee concluded that any such inadequacies result from features of the general law and affect all claimants. Members of the Baryulgil community suffer no particular disadvantage in this regard. For example, the principal disadvantage

which prospective Baryulgil claimants would suffer is that the company against which the claim would be brought is a subsidiary company with no funds to meet any award of damages that may be made. Recommendations are made in the report which, if implemented, would overcome these inadequacies. Any benefit from these suggested measures would, however, have general application and is not specific to the Baryulgil situation. Therefore, the Committee did not believe it appropriate to recommend any scheme to make individual payments of compensation. It believed that, subject to some technical difficulties, there are adequate avenues of compensation available to members of the Baryulgil community who contract, or have contracted, an asbestos-related disease.

The Aboriginal Legal Service, in its submission, as well as pressing for an alternative scheme for compensation for individuals, argued that the Committee should also recommend general compensation for the community. In putting forward these claims the Aboriginal Legal Service identified a programme of remedial and compensatory measures to include public health measures, a building programme, environmental rehabilitation, job creation and development, and land. The Committee concluded that there was no basis for any general compensation for the community arising out of the manner of operation of the mine or mill. In the Committee's view, the broad issues raised by the ALS should be addressed, not as part of an inquiry into the affairs of a particular community, but rather in the context of government policy on the advancement and welfare of Aboriginal people generally.⁶⁹

Nevertheless, the House of Representatives Committee did make a number of limited recommendations relative to the future health and well-being of the Baryulgil community.⁷⁰ These included the establishment of an Aboriginal Medical Service in Grafton, which would conduct regular clinics in the Baryulgil area, and measures to reduce to a minimum, risk from airborne asbestos from the old mine site.

THE LONG TERM CONSEQUENCES

In a sense, Hardies' response to the asbestos scare preceded the Baryulgil Inquiry. Peacock's radio programmes in 1977 had sparked

off a number of follow-up stories in major newspapers and on television, and the anti-asbestos campaign that followed identified Hardies, Australia's leading asbestos manufacturer, as its primary target. Braithwaite and Fisse (1983) have documented Hardies' reaction.⁷¹ They show how the anti-asbestos campaign adversely affected Hardies' corporate image and employee morale and how, partly at least in anticipation of adverse publicity, Hardies decided to engineer its way out of the problem. The company invested large sums in dust control technology, established employer-management safety committees, and developed less hazardous substitutes for asbestos in its building products. By September 1983, when the Baryulgil Inquiry got under way, this strategy was largely complete.

Certainly, Hardies were at pains to minimise the effects of any adverse publicity arising out of the inquiry. A strong team (including a public relations consultant and the chief executive of Hardie Trading Services) attended the Baryulgil hearings and argued long and persuasively against the allegations made by the Aboriginal Legal Service. However, it is doubtful whether the Baryulgil Report will have any significant impact on Hardies' future behaviour. The Baryulgil mine itself has long since been sold (and closed).

One issue, however, which might have far reaching economic implications for Hardies, is the cost of damages awards made against them. In September 1984, Mr Justice Rogers warned that asbestos claims made against certain companies might run into large amounts of money and the outcome of litigation "must be of immense consequence to the future financial well-being of the parties".⁷²

However, Justice Rogers may well have overstated the likely implications for the companies concerned. Neither Hardies' shares nor those of one of its insurers, QBE, have been much affected by such dire warnings.⁷³ Hardies' latest annual report acknowledges that it "has been joined as a defendant in six actions for damages in Australia which allege asbestos-related disease" but continues "the holding company and its subsidiaries believe that any amounts that may ultimately be involved will not be significant and further that its insurance arrangements will cover them".

The unavailability of class actions in Australia, the relatively limited exposure of *most* Australian asbestos workers (as compared

for example to ladders of ships' boiler rooms in the United States), and, in the case of Baryulgil workers, difficulties of getting an award against the impecunious operating company AMPL and in penetrating the corporate veil to sue Hardies themselves⁷⁴, suggest that Hardies are unlikely to be threatened by an avalanche of claims in the manner of Johns-Manville, the American company which in 1982 filed for protection under the US Federal *Bankruptcy Code*.

Finally, given the serious criticisms of the government regulatory agencies made in the Baryulgil Report, what reforms are likely to be made in the future? At the level of the enactment of safety legislation, there is evidence that the bureaucracy is capable of responding to pressure, no doubt brought from above by Ministers who themselves have been criticised for their department's shortcomings. Thus the ABC, in publishing the transcripts of Matt Peacock's *Broadband* programmes, pointed out that:

Within months of the first program the Australian asbestos standard was halved to two fibres per cubic centimetre and the NSW Government had introduced its first asbestos regulations.⁷⁵

Subsequent pressure arising from the asbestos scare has resulted in further changes to the asbestos standard. The current standard is one fibre per millilitre of air for chrysotile asbestos and this was adopted in New South Wales as the legal standard as from June 1984.

So far as enforcement is concerned, the regulatory agencies responsible for administering occupational health and safety legislation have been, from their inception, remarkably consistent in their preference for a "kid glove" rather than a "mailed fist" approach to enforcement, and particularly reluctant to invoke criminal sanctions against employers who break the law.⁷⁶

As early as 1903, the New South Wales Department of Mines Annual Report stated that "every effort to induce compliance with the Act by friendly representation is exhausted before any other steps are thought of"⁷⁷. Similar sentiments were expressed by the responsible Minister in 1962 and more recently by the Williams Report on Occupational Health and Safety in New South Wales.⁷⁸ Senior officials in other States have expressed a similar view.⁷⁸

In relation to the administration of asbestos regulations, the inspectorate's approach at Baryulgil closely resembles that of the regulatory agencies at Wittenoom in Western Australia, and Acre Mill in the United Kingdom.⁷⁹

It is against this general background that events at Baryulgil must be judged. The deficiencies revealed by the inquiry are not restricted to one set of inspectors or to the control of a particular industry. Rather, they are endemic in the philosophy embraced by the inspectorates as a whole.

The advent of the *Occupational Health and Safety Act 1983* (NSW) has given the inspectorates more teeth. The Act provides for maximum fines of \$50,000 in the case of a corporation and \$5,000 in the case of an individual and contemplates the introduction by regulation of improvement and prohibition notices—administrative devices which would enable inspectors to require that apprehended breaches of the statutory safety standards be remedied within a specified period (improvement notices), or that hazardous activity cease within a specified period (prohibition notices).

However, it remains to be seen whether the 1983 Act will result in any change of policy in the future and whether the inspectorates will make effective use of the new enforcement mechanisms available to them. If they do not, there may well be more Baryulgils, and the number of deaths and disablements resulting from occupational injury and disease will remain unacceptably high.

The author was specialist adviser to the House of Representatives Standing Committee on Aboriginal Affairs Inquiry into the Effects of Asbestos Mining on the Baryulgil Community. The views expressed are not necessarily those of the Committee.

Notes

1. Peacock, M (1978), *Asbestos: Work as a Health Hazard*, ABC Transcripts, Sydney.
2. Aboriginal Legal Service (1984), Submission to House of Representatives Standing Committee on Aboriginal Affairs Inquiry into the Effects of Asbestos Mining on the Baryulgil Community.

3. Baryulgil Report (1984), "The Effects of Asbestos Mining on the Baryulgil Community", *Report of the House of Representatives Standing Committee on Aboriginal Affairs*, Australian Government Publishing Service, Canberra.
4. Ibid, ch. 5.
5. Ibid, 7.1-7.18.
6. Ibid, 7.33.
7. Ibid, 7.36-7.40.
8. Ibid, 7.44.
9. Ibid, 5.22.
10. Ibid, 5.26.
11. Ibid, 5.28.
12. Ibid, 5.44.
13. Ibid, 5.49.
14. This was the level recommended by the National Health and Medical Research Council in 1969, adopted by Hardies in that year, and ultimately applied as the legal standard at Baryulgil in January 1973.
15. Baryulgil Report, op cit supra note 3, 5.51.
16. Ibid, 5.54.
17. Ibid, 5.55.
18. Inter-house letter from V Gerard, 7 February 1972.
19. Baryulgil Report, op cit supra note 3, 5.65-5.73.
20. Ibid, 5.74.
21. Ibid, 5.152.
22. Ibid, 5.154.
23. Ibid, 5.112.
24. Ibid, 5.113.
25. Hardies argued that it was only the very high levels of dust associated with the textile industry that were thought (at least until the mid 1960s) to constitute a hazard. This explanation, for good reason, was rejected by the Committee (Baryulgil Report, 5.119).
26. Baryulgil Report, op cit supra note 3, 5.117.

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27. Ibid, 5.48, 5.101.
28. Ibid, 5.124.
29. Ibid, 5.147-5.151.
30. Ibid, 5.144.
31. Transcript of evidence, 182.
32. Baryulgil Report, op cit supra note 3, 5.146.
33. Whether much regulation is *actually* intended to protect the public interest, or whether it is effective in doing so, is, of course, another question. For a summary of the literature see Fels, A (1982), "The Political Economy of Regulation", *University of New South Wales Law Journal*, 5, 29-60.
34. Gunningham, N (1984), *Safeguarding the Worker*, Law Book Company, Sydney.
35. Responsibility for control over air and water pollution lay initially with the Department of Health and later with the State Pollution Control Commission (SPCC). These agencies played a very subordinate role in relation to Baryulgil. Indeed the SPCC failed almost entirely to perform its functions at all (Baryulgil Report, 6.48-6.76, 6.93). Accordingly the present account will focus on the roles of the Mines Inspectorate and the Department of Health.
36. *Mines Inspection Act* (NSW) s. 36; Baryulgil Report op cit supra note 3, 6.5.
37. Ibid, 6.7.
38. Ibid, 6.11.
39. Ibid, 6.29.
40. Ibid, 6.13.
41. Ibid, 6.16.
42. Ibid, 6.23-6.24.
43. Ibid, 5.71-5.75.
44. Ibid, 6.34.
45. Ibid, 6.35-6.36.
46. Ibid, 6.40.
47. Ibid, 6.40, 6.41, 6.43.
48. Vic. *Harmful Gases, Vapours, Fumes, Mists, Smokes and Dusts Regulations* 1945, made pursuant to the *Health Act* 1945.

49. This amendment was introduced not at the initiative of the Mines Department but in order to achieve consistency with the *Factories (Health and Safety-Asbestos Processes) Regulations 1977*.
50. Even these regulations did not cover all workers. It was only when further regulations were made in 1984, that the workforce as a whole received protection.
51. Transcript of Evidence, 10 February 1984, 1158.
52. Baryulgil Report, op cit supra note 3, ch. 3.
53. Transcript of Evidence, 1120.
54. Baryulgil Report, op cit supra note 3, 6.83.
55. Such a policy is more easily identifiable in the case of the Mines Inspectorate than is the case of the State Pollution Control Commission. The latter had responsibility for control of air and water pollution emanating from the Baryulgil site (Baryulgil Report, 6.48-6.78) but failed almost entirely to discharge its responsibilities in relation to Baryulgil and it was often difficult to identify any policy (apart from inertia) governing its actions.
56. Transcript of Evidence, 1124.
57. Ibid, 1122-1123.
58. Baryulgil Report, op cit supra note 3, 6.84.
59. Gunningham, op cit supra note 34; Hopkins, A and Parnell, N (1984), "Why Coal Mine Safety Regulations are Not Enforced", *International Journal of the Sociology of Law*, 12, 179-194.
60. Baryulgil Report, op cit supra note 3, 6.86.
61. Hall, T (1980), *The Ugly Face of Australian Business*, Harper and Row, Sydney; Peacock, op cit supra note 1.
62. Layman, L (1984), "Occupational Health at Wittenoom 1943-1966", Paper presented to the ANZSEARCH/APHA Conference, University of Adelaide.
63. *Central Asbestos v Dodd*, (1972) 1 All ER 1135 per Lord Salmon, 1162.
64. Madden, M (1976), Report by the Parliamentary Commissioner for Administration to Mr Max Madden MP C/253/V 1976.
65. House of Representatives Standing Committee of Environment and Conservation (1982), *Second Report on Hazardous Chemicals*, Australian Government Publishing Service, Canberra, 133.
66. Baryulgil Report, op cit supra note 3, ch. 8.
67. Ibid, ch's 5 and 6.
68. Ibid, ch. 10 and Appendix III.

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69. Ibid, 10.2-10.6.
70. Ibid, ch. 10.
71. Braithwaite, J and Fisse, B (1983), "Asbestos and Health: A Case of Informal Social Control", *Australian and New Zealand Journal of Criminology*, 16, 67-80.
72. *The Age* 20 November, 1988.
73. *Sydney Morning Herald* 22 November 1988.
74. Baryulgil Report, op cit supra note 3, ch. 9.
75. Peacock, op cit supra note 1.
76. Carson, W G (1970), "White Collar Crime and the Enforcement of Factory Legislation", *British Journal of Criminology*, 10, 383-398; Carson, W G (1979), "The Conventionalisation of Factory Crime", *International Journal of the Sociology of Law*, 7, 37-60; Gunningham, op cit supra note 34; Hopkins and Parnell, op cit supra note 59.
77. NSW Department of Mines (1903) Annual Report, Government Printer, Sydney.
78. NSW Parliamentary Debates (1982) (3rd ed), 1710; Williams Report (1981), *Report of the Commission of Inquiry into Occupational Health and Safety*, NSW Government Printer, Sydney.
79. Broughton, R (1975), "The Participation and Role of Legislation in Accident Control", SESA Seminar, *Accident Control—Towards an Applied Science*, Canberra; Prior, P F (1985), "Enforcement: An Inspector's View" in Creighton, W B and Gunningham, N (eds), *The Industrial Relations of Occupational Health and Safety*, Croom Helm Australia, Sydney; Hall, op cit supra note 61; Layman, op cit supra note 62; Madden, op cit supra note 64.

CONCLUSION

In view of the limited knowledge of corporate misconduct and its control in Australia, a book such as this can only raise more questions than it answers. These concluding pages seek to draw together some of the common issues running through the case studies, and to make some tentative generalisations about the circumstances giving rise to corporate crime, and about the inadequacy of current strategies for prevention and control. We offer some suggestions for reform, but more importantly, identify issues and problems for further inquiry.

The studies illustrate rather forcefully that Australian companies, agents acting in furtherance of corporate objectives, or individuals exploiting the corporate form have been responsible for inflicting a wide range of harm. Some of this harm has occurred in undeniable breach of the criminal law, while other cases have involved conduct defined simply as unlawful. In other cases, liability at either criminal or civil law appears to be out of the question. But the purpose of the case studies in this volume has not been to denigrate or to belittle Australian enterprise for its harmful and often unrepentant conduct. Rather, the cases have been collected to draw attention to the shortcomings which characterise some aspects of commercial life, and to suggest ways in which the standards of Australian corporate citizenship may be improved.

The deaths, injuries and financial losses arising from the corporate practices discussed were neither necessary nor inevitable. They were not crimes of passion, occurring in a rage triggered by some actual or perceived insult, nor were they crimes of need. None of the cases in this collection involved businesses on the brink of bankruptcy, although the long-term viability of the Port Pirie smelter remained in question, and the Baryulgil asbestos mine was a marginal operation within the Hardie group. Some of the

companies under review were among Australia's largest and most profitable corporations.

Only two or three of the decisions which gave rise to the harmful practices described above could be described as impulsive or irrational. The intransigence of Sir Reginald Ansett could perhaps be characterised in this way, as might the high rolling investment practices of Andrew Stathis of Bishopgate Insurance.

Whether the high-risk investments which led to the downfall of TEA could also be regarded as impulsive is doubtful, although the secret reports commissioned by the Victorian Government might one day reveal otherwise.

Rather, the corporate behaviour in most of the cases presented in this book was instrumental, not expressive.¹ In some instances the conduct was planned, one imagines calmly and rationally, by pinstriped executives in the comfortable surroundings of high-rise boardrooms. In others, notably the Appin case, the Kellogg's case, and perhaps Baryulgil, the decisions creating those conditions which gave immediate rise to the injuries in question were made by middle managers and supervisors, not by senior executives. Indeed, in some instances they were non-decisions, errors of omission rather than commission.

Employers never intended their workers to be killed. Rather, the harm occurred because there was insufficient foresight, wilful blindness, or an unwillingness to make expenditure which would have ensured that the hazards of a working environment were minimal. Concern for profit took precedence over responsibilities to consumers or employees.

Are corporations inherently criminogenic? Is there something about the structure of a company which allows for responsibility to be diffused throughout an organisation so that blame for harmful acts or omissions cannot be "sheeted home" to any individual? Social psychologists have long been aware of the "risky-shift" phenomenon, where decision-makers tend to be less cautious when acting in groups than when alone.² Psychologists have used the term "groupthink"³ to refer to the over-optimism, lack of vigilance, pressures toward uniformity, avoidance of controversy, and the unwillingness to question weak arguments which may contribute to grossly miscalculated decisions in some organisations.

To be sure, the culture of a corporation may be conducive to cutting corners or to "achieving results at any cost". It may also be the case that the experience of working within an organisation can insulate one from the world outside—to the extent that workers, consumers, or the public at large become dehumanised. It is a long way from the boardroom table to the coal face or the factory floor.

One problem common to chief executives of large organisations is a lack of access to vital information of an adverse nature.⁴ Perhaps the most recent dramatic example of the unfortunate consequences of imperfect information flow within an organisation may be seen in the ill-fated launching of the US space shuttle Challenger. Although engineers expressed strong reservations about the effects of cold weather on the shuttle's rocket boosters, NASA's middle managers failed to communicate these concerns to agency executives.⁵

Such communication breakdowns may be grounded in organisational culture. Subtle pressures exist within both public and private sector organisations to discourage the upwards transmission of "bad news". Indeed, the old fable about the king who killed the messenger bearing news of a military defeat remains apposite. Yet it is very much in the interests of executives to be made aware of impending problems before they attain crisis proportions.

Another possible source of communications failure is the structure of the organisation itself. A steep hierarchical structure with a formal chain of command is more likely to inhibit the flow of adverse information than an organisation which provides for easier access to senior executives. A "flatter" organisational structure consisting of small units makes it more difficult to conceal bad news. Formal incentives may also be employed to encourage prompt reporting of problems.

The collapse of TEA might have been averted had information regarding its financial vulnerability been made available at an earlier date. In the clubroom atmosphere of TEA board meetings, the directors of a company whose motto was "I go on forever" may have been disinclined aggressively to question investment decisions. Whether the risks posed by the Dalkon Shield were made apparent to Robins's senior management early on is open to

question. If there was an initial lapse in communication it was compounded by the eventual failure to acknowledge risks which had become all too obvious. Communication breakdowns were also identified as having contributed to the Appin mine disaster. Chronic safety hazards appear not to have come to the attention of senior executives, and circumstances of the ventilation changeover were inadequately communicated to mine personnel.

Although the dynamics of decision-making are not always clear, in many cases it is possible to apportion responsibility for the misconduct in question without great difficulty. In the cases involving relatively small enterprises, the behaviour was a matter of individual choice on the part of the principal. The medical practitioner who submitted fraudulent bills, the purveyors of submerged land and tax evasion schemes, the small meat processors who substituted horsemeat and kangaroo for beef, all knew precisely what they were doing.

In the cases involving industrial safety, knowledge of the risks posed by routine company procedures was not limited to the immediate supervisor on the factory floor. In the Baryulgil case, notification of elevated dust levels was on several occasions transmitted to Hardie headquarters.

In the TEA case, the alleged insider trading and receipt of secret commissions were, of course, individual acts. Other decisions, however, for example those concerning high-risk investments and the composition of financial statements, appear to have constituted either intentional acts or failure to exercise adequate oversight by the TEA board. The decision to discriminate against female pilots was nominally a collective one, but in reality one dominated by Sir Reginald Ansett.

REGULATORY INADEQUACY: LAW AND ADMINISTRATION

As is the case with conventional street crime, much corporate crime is a product of opportunity. A number of overseas studies cited by Braithwaite⁶ reveal that opportunities to commit corporate crime are enhanced by relaxed enforcement practices. One theme boldly apparent in this collection of studies has been the permissive regulatory context within which many cases of misconduct took

place. In a number of instances, the law itself was patently inadequate to prevent the behaviour in question, either because of inherent ambiguities or loopholes or because of prospective penalties which posed no credible deterrent threat. Recall how the risk of a paltry fine hardly discouraged the fly-by-night operators in the export meat industry from their fraudulent practices. The sorry state of Australian tax law as it existed in the late 1970s, a patchwork of legislation the permissiveness of which was reinforced by decisions of the High Court of Australia, created the widespread impression that income tax was optional for the rich and constituted a positive invitation to tax consultants to stretch their advice to the limits of the law . . . and beyond.

Recall from the Kellogg's case how the New South Wales regulations required that pressure vessels be effectively isolated from sources of steam when a government inspection was carried out, but that similar protections were not accorded employees under normal working conditions. The continued availability and use of the Dalkon Shield long after its hazards became apparent constituted yet another scathing indictment of the Australian regulatory process.

Asbestos regulations were not enacted in New South Wales until 1964, some 33 years after their introduction in Britain. South Australia, the home of the world's largest lead smelter, was a decade behind the eastern states in the introduction of lead emission standards. There remain no regulatory standards governing emissions from coke ovens in New South Wales.

In the face of such weak legislation or subordinate regulation, it is perhaps not surprising that the enforcement strategies of regulatory authorities were in most cases mild. Those charged with responsibility for regulating the description and quality of export meat saw their legislation as hardly worth enforcing. But weak enforcement can by no means be explained entirely by weak legislation; a recent study of regulatory enforcement in Australia shows that regardless of the powers at their disposal, which in some cases are formidable indeed, Australian regulatory officials prefer to seek regulatory compliance through negotiation, consultation and compromise rather than through rigorous enforcement.⁷

In appropriate circumstances, such a non-confrontationist

strategy can be most effective. It is particularly suited to situations which involve recurring contact between inspectorial officials and company management. In the opinion of many regulators, the provision of technical assistance, friendly advice, or a gentle note of caution can achieve compliance more readily than the threat of formal legal action and the polarisation which this can entail. Indeed, an adversary relationship may induce a siege mentality in some corporate officials, an intransigent resistance to change, and a disinclination to comply with regulations.⁸

On the other hand, a regulatory strategy based essentially on negotiation and persuasion may be dangerous indeed, particularly when there is no credible threat of formal sanctions in the event of chronic non-compliance.

A number of the cases in this book illustrate the futility of adopting an informal regulatory strategy without providing a credible deterrent threat for use when the need may arise. Such regulatory breakdown has been particularly characteristic of occupational health and safety regulation, and was clearly visible in the Appin, Kellogg's and Baryulgil cases.

The challenges facing Australian regulatory agencies today are twofold. First, they must develop the ability to discern precisely when existing methods of informal social control begin to lose their effectiveness. More sophisticated analysis is required to determine just when to shift from friendly persuasion towards more aggressive responses to unacceptable corporate behaviour. Then regulatory authorities must identify those formal strategies, be they administrative, civil, or prosecutorial, which are best suited to the prevention of future corporate misconduct.⁹

An unduly gentle approach to business regulation characterises a number of the above case studies. The reluctance of State corporate affairs commissions to prosecute for late lodgment of returns provided the environment in which "bottom of the harbour" entrepreneurs could thrive. The tolerance by the Office of the Insurance Commissioner of similar delinquency of documentation by firms in the insurance industry added to the delay in discovering the Bishopsgate debacle. The art of perfunctory inspection and minimal enforcement has been all but perfected by occupational health and safety authorities in Australia.¹⁰ Inspectorial inertia

characterised governmental response to the plight of the Baryulgil asbestos miners, the Port Kembla coke oven operators and the Appin colliery workers. Attempts to negotiate compliance in these cases can only be regarded as having failed dismally.

It has been suggested that a considerable amount of regulatory failure may be traced to capture—that is the internalisation of company values by regulatory officials.¹¹ Avoiding capture can be difficult. Few would argue that the effectiveness of regulatory agencies could be improved if they were so distant from their client industries that they knew little or nothing of their day-to-day operations and problems. The quickest path to acquiring knowledge will always be to work in or with the industry. And almost invariably, this means assimilating its values. The area of regulation which is most commonly suggested to be characterised by capture is occupational health and safety. Indeed, suggestions of capture appear in three of the four occupational health and safety cases in this book. In the Appin case, it was argued that capture of the inspectorate led to persistent non-enforcement of mines regulations. In the coke ovens case, it was observed that officials saw fit to provide information about emission levels to the company, but not to the workers. In the Baryulgil case, plant managers were routinely advised of forthcoming inspections and never were the asbestos workers warned by State health and safety authorities of the workplace hazards they faced.

Beyond capture, some instances of regulatory breakdown arise from corrupt practices. Bribery is a common business practice overseas.¹² Allegations of bribery in Australia are not unusual, particularly in New South Wales, but documented examples are less common. Of the cases included in this book, the most obvious examples of corruption were found in the meat substitution scandal, where not only Commonwealth meat inspectors but also officers of the Australian Federal Police were culpable. Another example occurred in the medifraud context, where Commonwealth employees were alleged to have advised certain medical practitioners of forthcoming visits by health investigators.

Inadequate regulatory performance may also reflect the structural and managerial shortcomings of regulatory bureaucracies. Australian regulatory bureaucrats are, first and foremost,

bureaucrats. As such, they tend to keep a low public profile, and avoid "rocking the boat". Indeed, they generally succeed in escaping public attention except in instances of major scandal.

Regulatory authorities' criteria of performance and productivity are not phrased in terms of law enforcement. In most instances, they are not held accountable for corporate misconduct occurring under their regulatory purview. Rarely are they called upon to answer for their inaction; rarely do they respond with other than platitudes.

The cases in this book suggest that neither business self-regulation nor a continuation of the regulatory status quo may be regarded as adequate safeguards against corporate misconduct. In many instances, it has been the citizen, not the government, who has mobilised the law in the aftermath of corporate illegality. As we saw in the case study of the tobacco and advertising industries, the apparatus of self-regulation functioned much more effectively against government sponsored anti-smoking campaigns than against tobacco promotions. It was not the Australian Broadcasting Tribunal or any other government authority which bought a prosecution against United Telecasters for broadcasting the "Winfield Spectacular", but rather a private citizen. In a number of cases, government intervention was triggered automatically. Industrial fatalities, such as the Appin and Kellogg's cases, inevitably attract the attention of the authorities. It does appear, however, that in the latter case the decision to prosecute was largely influenced by pressure from the father of the deceased. In the meat substitution case, the Australian Government was notified by overseas authorities, who in effect demanded a firm response as a condition of future export arrangements. Company collapses inevitably come to official attention, although only the most dramatic, such as TEA, ever get more than a second look. Even then, corporate affairs commissions in Australia are so overwhelmed with cases of serious misconduct that they are forced to overlook most of them.¹³

Over the past two decades, the United States has seen a number of "grass roots" challenges to corporate wrongdoing.¹⁴ A number of the cases in this book have illustrated the role which can be played by private citizens and groups in confronting corporate

misconduct and inadequate governmental response in Australia. By highlighting the deaths and injuries which resulted from defective intra-uterine devices, groups like the Public Interest Advocacy Centre not only alerted members of the public and medical practitioners about such hazardous products, but they also highlighted gross inadequacies in the prevailing regime of therapeutic goods regulation. The Russell Island land fraud investigation might never have happened had Dennis and Patricia Gibbons not compiled a dossier summarising the experience of themselves and others.

In some overseas industries, consumer boycotts have succeeded in producing significant improvements in corporate conduct. Perhaps the most successful of these was the boycott of Nestlé's products in response to the company's aggressive marketing of infant formula in the third world.¹⁵

The threatened boycott of Ansett Airlines may not have dissuaded Sir Reginald from his intransigent opposition to hiring a female pilot. It did, however, demonstrate to other Australian business executives that certain types of business conduct can be so counter-productive as to be uneconomic.

Perhaps the area with the greatest potential for citizen self-help is occupational health and safety. Left to their own devices, employers would appear to have insufficient incentives to enhance the safety of their workplaces. Regulatory enforcement is negligible. Through insurance, the costs of workers' compensation are spread throughout each industry, and their deterrent influence is thus significantly diluted. Moreover, production pressures and desire to maximise profit often drive companies to cut corners in matters regarding safety. This appears especially to be the case in today's economy where there is a surplus of unskilled labour. Although renewed interest in occupational health and safety enforcement throughout Australia has been accompanied by some restructuring of inspectorial organisation and procedure, whether the political will exists to effect more than symbolic changes remains to be seen. Meanwhile, a considerable degree of responsibility for vigilance in the area of workplace safety must rest with trade unions.

Worker-management safety committees, which draft safety rules for particular workplaces and monitor them on a continuing basis,

have been a fact of life in Europe for many years.¹⁶ The institution of worker safety representatives with the power to stop production already has a precedent in Australia—the Queensland Government contributes \$24,000 to the salary of full-time union safety inspectors in coalmines. The Mines Department of Western Australia pays the entire salary of full-time union safety inspectors.¹⁷

Such institutional involvement of workers in the regulatory process may be less costly and more effective than deploying legions of government inspectors, if something less than a fully adequate alternative. It has great potential not only in the occupational health and safety field, but in other areas of regulation as well.

POLITICAL CONSTRAINTS

Decisions on how to respond to corporate offending are not made in a vacuum; rather, they are conditioned by a social and political environment. In the United States, for example, there was a significant contraction of regulatory activity under the Reagan administration.¹⁸

The political constraints which regulatory authorities faced in the cases presented here did not automatically militate against strict enforcement and the prosecution of offenders. Cases such as the meat substitution scandal and the “bottom of the harbour” affair, which became matters of partisan conflict at the Federal level and thus highly publicised, tended to elicit a “crackdown”. In the medifraud context, this lasted until the organised medical profession was able to regroup, flex its muscles, and convince the Commonwealth government to back down.

In the Kellogg’s case, the fact that the deceased was a relative of a State cabinet minister may also have explained the unusual enthusiasm for prosecution by a department traditionally tolerant of safety breaches.

Political circumstances had the predictable effect of muting government response in a number of other cases. Recall how the South Australian Government would not appear critical of BHAS management, for fear of antagonising one of the State’s largest employers.

With the New South Wales steel industry already vulnerable,

the State Government was doubtless unwilling further to jeopardise employment at the Port Kembla steelworks by requiring strict adherence to emission standards. In recent years, only the Western Australian government has demonstrated the willingness to confront the joint forces of the tobacco and media industries in the legislative arena. It lost.

Other research suggests that these are not just isolated examples: Venturini¹⁹ describes how political constraints influenced the administration of the *Trade Practices Act*; a recent survey of 96 regulatory agencies throughout Australia revealed that incidents of political interference to inhibit enforcement or prosecution had recently taken place in no fewer than 26 agencies.²⁰

Corporate crime control was not foremost among the concerns of those who drafted Australia's constitution. After nearly a century of constitutional evolution, there remains considerable difference of opinion whether regulatory responsibilities are best met by the Commonwealth, by the States, or through some joint arrangement.

The current cast of characters responsible for each of the substantive areas of regulation in Australia is too long to be summarised here.²¹ What we can say is that the current alignment of regulatory responsibility is a patchwork of arrangements forged not as a result of rational planning but rather as a consequence of rampant buckpassing and of concessions made for reasons of political expediency.

This is especially significant in light of the increasing economic integration of Australia. No longer are the state economies insulated and independent. The collapse of a trustee company in Victoria left investors stranded throughout Australia. A number of blocks on Russell Island were bought by investors from southern states. The abuse of pesticides in Queensland can have an adverse effect on the water supply of Adelaide. Corporate crime no longer respects state, or even national, boundaries. Yet many products and processes are subject to parochial and varied regulatory standards.

The beneficiaries of such a regulatory melange are, of course, the corporate predators. The compartmentalisation of bureaucratic roles perhaps explains how a person awaiting trial on State drug charges was able to acquire the controlling interest in an insurance company yet not attract the attention of the Office of the Insurance

Commissioner until a considerable proportion of the company's assets had been moved offshore, with the protagonist soon to follow.

Had state corporate affairs commissions been more diligent in their enforcement of laws regarding the lodgement of company financial returns, the "bottom of the harbour" frauds might not have developed into such a vast industry. Overlapping responsibilities of Commonwealth and State meat inspectors created a climate of regulatory chaos which was readily exploited by the less scrupulous practitioners in the export meat industry. Indeed, Australia now faces the paradox whereby meat for export is subjected to greater quality control and inspectorial scrutiny than is meat for domestic consumption.

The parliaments of the Commonwealth and some, but not all, states, have enacted anti-discrimination statutes. Despite the tenuous existence of a national Human Rights Commission, and constitutional authority flowing from various international covenants, the Commonwealth Government still treads very lightly in Queensland regarding matters of alleged discriminatory practice. Interstate variations in cigarette excise taxes not only enhance the health risk of residents in low excise States, but also provide an incentive for cigarette smugglers. States which threaten to impose stricter standards of workplace safety or environment quality themselves face the threat, if not the reality, of capital flight or economic blackmail.

It would be easy enough to suggest that the solution to these problems lies in centralisation—the assumption of regulatory responsibility by the Federal Government. Whether or not primary responsibility for regulation lies centrally, there can be little argument that Federal Governments will come under increasing pressure to intervene in States and territories with lax enforcement practices. And yet centralisation is no panacea. Governments vary, from time to time and from place to place, in the enthusiasm with which they police and prosecute corporate crime. Whether the current or any future Federal Government will have the political will to improve the existing system of corporate crime control is open to question.

COMPLEXITIES OF THE LEGAL PROCESS

The formal legal system is an imperfect instrument for controlling business misconduct. For reasons ranging from ignorance or fatalism on the part of victims, to insufficient inspectorial resources, a great deal of corporate crime never comes to the attention of regulatory authorities. Of those cases which do, only a handful of matters ever elicit a formal legal response. The reluctance of authorities to mobilise the law stems from their own role perception as advisers—rather than adversaries—of business. It is reinforced by the perceived futility of prosecution in many cases. Assembling sufficient admissible evidence to prevail over a tenacious and well-resourced defence is a daunting challenge in itself. But even in the event of a successful prosecution, the leniency which routinely characterises the sentencing practices of judges and magistrates can only be discouraging.

For a citizen to seek redress at civil law can be as daunting. Even if the problems of access to the court and standing prove surmountable, the legal resources at the command of the ordinary Australian are completely overshadowed by the resources and expertise at the disposal of even average sized companies.

A number of studies have shown how the task of corporate crime control has been made more difficult by complexities of the legal process. To be sure, the rights of alleged corporate offenders, or of any offenders for that matter, should be safeguarded. But corporate offenders are often able to exploit their status and resources to rise above the law. Explaining complex principles of finance or engineering to a jury may be challenging enough; consider, for example, how judicial and coronial authorities in the Appin and Kellogg's cases recommended against prosecution despite considerable evidence reflecting adversely upon the companies. Reluctance of magistrates to convict members of the medical profession for fraudulent billing actually led to legislative amendments which allow disqualification from the medical benefits programme after two proven charges of fraud, rather than two recorded convictions. The tortuous process of conciliation, hearing, and appeal, can discourage a disadvantaged and inarticulate individual from ever lodging a complaint of discrimination. When

criminal charges are laid, the path from committal to trial to appeal may be long indeed. The Russell Island trial had become the longest trial in Australian history when it was finally aborted after 20 months. Because of the inherent limitations of the Australian legal system, it is appropriate to explore less formal means of controlling corporate misconduct. Of these, perhaps the most promising is adverse publicity. Fisse and Braithwaite have shown how media attention to corporate misconduct can have a reforming influence on wayward businesses.²² It may have a bonus salutary effect on inept regulatory authorities as well.

Despite their reputation for being preoccupied with sex and violence, the Australian media have played a role in the detection and control of corporate misconduct. More often than not, however, the role has been a passive one. Only in the case of the Baryulgil asbestos miners was there anything approaching investigative journalism, where a reporter more or less singlehandedly unearthed a story. In the other cases, the media reported matters brought to their attention by victims or by third parties, by special commissions of inquiry, or through the normal operation of the governmental process. By contrast, journalists overseas have made numerous and significant contributions to exposing harmful corporate conduct. The complicity of ITT in the overthrow of the democratically elected government of Chile was disclosed by columnist Jack Anderson.²³ Dowie (1977) first drew public attention to fatal design flaws in the Ford Pinto.²⁴ A San Francisco journalist, Paul Shinoff, published evidence which revealed that Johns Manville, the world's largest asbestos manufacturer, had concealed the nature and extent of workplace health hazards from its employees.²⁵

Perhaps the most widely publicised of the cases reviewed in this volume were the "bottom of the harbour" disclosures, the meat substitution scandal, and the medifraud revelations. The degree of publicity which they attracted was less a consequence of the intrinsic harm of these practices, or of the culpability of their perpetrators, than because the attending accusations of maladministration themselves became the subject of political confrontation in the national arena. Scathing criticism of the Tax Office and of the Deputy Crown Solicitor's Office by the Costigan Royal

Commission, allegations of corruption in the Department of Primary Industry, and evidence of medical benefits maladministration published by the Joint Committee of Public Accounts, provided opposition parties with an abundance of debating points, which the media were all too willing to cover.

Because of the very nature of media accounts, they tend to focus on individual personalities rather than endemic practices and their structural antecedents. Moreover, much less attention appears to have been accorded those matters which occurred within the boundaries of a single state, and issues such as occupational health and safety which appear less likely to engender partisan conflict.

One final, and by now means insignificant, impediment to publicity as a means of controlling corporate misconduct is the law of libel. Indeed, the publication of this book was delayed for over two years, and the text of one chapter significantly diluted on the advice of a solicitor. Under current laws, which vary from State to State within the Australian Federal system, powerful interests may shield themselves from criticism, while at the same time spending millions of dollars to fabricate a favourable public image. Until all Australians enjoy freedom of expression, publicity will remain an imperfect means of combating corporate crime.

The type of corporate crime which traditionally attracts the harshest governmental response is commercial fraud. In Australia, the most extreme negligence giving rise to death or injury of a worker will attract no more than a fine, or perhaps, for members of some professions, loss of licence. But fraud other than consumer fraud can and does attract sentences of imprisonment. The reasons for this contrast are numerous. Fraud constitutes breach of trust, the cornerstone of the capitalist system. And the system of justice, be it civil or criminal, reacts with greater rigour to the victimisation of the affluent, prestigious and powerful, than to the poor and the isolated.

Those corporate offenders who do become the subject of criminal charges or civil action tend to fare rather well. The least fortunate protagonist in the cases reviewed here, "bottom of the harbour" entrepreneur Brian Maher, was sentenced to a total of five years' imprisonment in October 1985. Following a successful appeal, the sentence was reduced to two years and nine months. Otherwise,

only the one or two most egregiously unabashed perpetrators of meat substitution and medifraud saw the inside of a prison. The remainder were fined and/or disqualified from meat exporting or from the medical benefits programme. Kellogg's was convicted and fined a relatively trivial amount for safety violations which led to the death of one of its employees.

More than four years after the TEA collapse, the former managing director of TEA was convicted and sentenced to prison. The former chairman was still facing charges six years after the event. A warrant still exists for the arrest of the principal of Bishopsgate Insurance, who was arrested by Greek authorities. Charges against the Russell Island defendants were dropped. Four years after the "Winfield Spectacular", Channel 10 Sydney was convicted and fined \$2,000, although it successfully appealed in 1988 against the conviction.

Recourse to the civil process resulted in the employment of Deborah Wardley, and in compensation for the period in which she was excluded from the Ansett training programme. Settlements of an unspecified nature were reached in the Appin Mine and Port Kembla coke oven cases. In the aftermath of the resort to bankruptcy by A H Robins, settlements have finally been reached in the Dalkon Shield Case. A number of suits brought by American and Australian plaintiffs are pending against US tobacco companies; whether civil actions brought by Australian smokers will ultimately succeed remains to be seen.

Evidence appeared insufficient to support any action for damages against Broken Hill Associated Smelters. Problems of standing further inhibit civil action in that case.

LAW REFORM

The cases under review gave rise to significant law reform in some areas, but to little change in others. The area most resistant to change appeared to be insurance regulation. Despite occasional recommendations by the Insurance Commissioner for the introduction of "fit and proper person" tests, no such requirements have yet been introduced. Moreover, exchange control regulations have actually been relaxed, greatly facilitating the movement of funds

offshore. The Commonwealth Government appears to have come to the conclusion that the benefits to be gained from deregulation of financial institutions outweigh the likelihood and the risk of future predatory practices in the insurance industry.

The TEA collapse led to a wholesale revision of the trustee law in Victoria and elsewhere. Occupational health and safety law in New South Wales had been under review since the 1970s and the *Occupational Health and Safety Act* 1983 introduced modest changes. The mines inspectorate was incorporated into the Department of Industrial Relations. In contrast to the paltry penalties previously available, the new act provided for fines of \$50,000 for corporations and \$5,000 for individuals. Nevertheless, it appears that the government's strategy remains one of primary reliance on industry self-regulation, with the role of the inspectorate one of consultation and supervision, and less of enforcement.

The meat substitution scandal was quickly followed by a new *Export Control Act* and by significant amendments to the *Australian Meat and Livestock Corporation Act*, each drastically increasing the penalties which can be imposed for breaches, and providing the respective agencies with increased powers of search, seizure and investigation. The "bottom of the harbour" affair gave rise to the first significant reform to Australia's tax laws in a half century.

REGULATORY REFORM

A number of cases resulted in substantial reform within the relevant regulatory authorities. The "bottom of the harbour" affair led to the establishment of the Director of Public Prosecutions, and to a reorientation of enforcement resources within the Tax Office towards some of the more complex cases that were previously dismissed as not sufficiently cost-effective to pursue. The Department of Primary Industry established a new Export Inspection Service and undertook a complete overhaul of export control and inspection procedures. The medifraud scandal gave rise to a tough new enforcement regime in the Commonwealth Department of Health, which heralded a vigorous enforcement of the law until it was dismantled in 1985 in deference to the medical profession in New South Wales. A significant improvement in the scrutiny

of medical devices and therapeutic goods was heralded as a result of the Dalkon Shield case.

CORPORATE REHABILITATION

A number of the companies under review took specific measures to reduce the likelihood of further harm. Approved quality control procedures are now in place throughout the export meat industry. With the passing of Sir Reginald Ansett, Ansett Airlines are under the managerial control of executives whose values are much more attuned to those prevailing in contemporary Australia. The airline became one of the original participants in the Commonwealth Government's affirmative action programme.

After Kellogg's conviction following the death of an apprentice, it repaired its hazardous rice cookers, appointed a health and safety coordinator, and implemented a system of elected worker safety committees in its plant. A safety training programme has been introduced, and a permit system established to provide for special authorisation and supervision in the case of dangerous tasks.

James Hardie Asbestos changed its name to James Hardie Industries, invested considerable funds in dust control technology, and developed less hazardous substitutes for asbestos in its products. In addition, it too established employee-management safety committees. The notorious Baryulgil facility has long since been sold.

In the aftermath of the coke ovens controversy, BHP has invested to a limited extent in improved coke oven technology, and has instituted various training programmes. The systematic publication of emission levels has still not been introduced, however.

Even where no legal action has been taken, certain firms have been seen to change their practices. Broken Hill Associated Smelters continues to deny that the accumulated emissions from their plant have produced intellectual impairment in the children of Port Pirie. They have nevertheless invested significantly in laundry and washing facilities for their workers, and contributed to the State Government's environmental health programme. They have in addition appointed a manager for health and environmental affairs.

The tobacco industry remains unrepentant, still contending that

there is insufficient evidence of a relationship between cigarette smoking and ill health. The advertising and media industries continue to argue that if a product is legal to sell, it should be legal to advertise; they insist that the public interest is best served by self-regulation of their respective industries. With an eye to the future, cigarette manufacturers are diversifying into other, less contentious, areas of activity.

As a result of their more extreme difficulties, the Brian Maher companies, TEA, Bishopsgate and Russell Island companies are now defunct. Whether their principals will comport themselves more responsibly in their future careers is open to question.

CORPORATE SOCIAL RESPONSIBILITY

In the 1980s, the extent to which companies should be constrained by legal responsibilities has become a subject of considerable controversy. Deregulation has become a fashionable topic, so much so that Commonwealth and state governments of every political persuasion have established committees to review existing regulatory frameworks with an eye to dismantling them as far as possible.

In such a political climate, to suggest that companies have obligations to society beyond those required by law might be regarded as quaintly archaic. The most extreme antagonists to such a position would argue that the responsibility of companies, or of those who manage them, is to make as much for their shareholders as possible. On the other hand it could be suggested that some enterprises are the beneficiaries of considerable government largesse, whether in the form of subsidies or in the form of protection from competition. Recall how Sir Reginald Ansett, who deeply resented having to employ a female pilot, benefited handsomely from the Australian Government's two airline policy, which he staunchly defended.

In the Port Pirie case, we saw how smelter management voluntarily improved shower and laundry amenities for workers, and contributed to revegetation programmes and other civic events in the local community. Company management was under no obligation to do this. Cynics would argue that such gestures do

not arise out of pure altruism, but rather are calculated to maintain community and governmental good will. In the case of the tobacco industry, sponsorship of cultural and sporting events may also be regarded as a means of circumventing prohibitions on advertising rather than as examples of corporate largesse.

Given the tremendous political and economic power which some Australian and overseas multinational companies wield, they could perform an important educative role within Australian society by setting an example of generosity. Australian companies also have a responsibility to prevent corporate crime, a responsibility which they have yet to fulfil. Rarely, if ever, does one hear Australian business organisations condemn the misconduct of one of their members, even when it is the image and reputation of Australian enterprise in general which stands to suffer.

When pressed, they may be expected to explain the behaviour of one of their own in terms of a "rotten apple" theory, suggesting that the transgressor in question is unique, or at worst represents a small minority of their number. The collective response, usually in the form of reassurances that self-regulation is the most effective instrument of corporate crime control, is of a nature which tempts one to suggest that corporate misconduct is the rule rather than the exception. Australian companies owe it to themselves and the public to be more aggressive in keeping their own houses in order.

DEREGULATION AND RISK

There can be little doubt that, in some sectors of the economy, deregulation has proven on balance to be advantageous. New competition in the banking industry, for example, may benefit both the consumer and the economy, without greatly increasing the risk of bank failure. It has been suggested that deregulation of the airline industry (in relation to matters other than safety standards) may bring substantial savings to passengers.

If Australian governments are to choose the path of deregulation, they should do so with great care. In the United States, the rhetoric and the reality of deregulation have been interpreted by less responsible business people as an open invitation to predatory conduct. Those who have chosen not only to probe the limits of

permissible conduct but also to transcend them, are not limited to the marginal fly-by-night operators, but include some of the largest and most prestigious corporations in America. In recent years, that nation's largest defence contractors have not only fraudulently padded their invoices, but have sold their government dangerously defective equipment. A leading investment firm obtained millions of dollars in interest by writing billions of dollars of cheques against deposits that had not been collected. Pharmaceutical companies fabricated test results and marketed drugs which produced fatal and other dangerous side effects. Chemical manufacturers have negligently released toxic substances to the environment causing immediate illness and posing the risk of death and disease at some future date. In the end, it may not be possible to relax governmental standards in Australia without having it perceived as an open invitation by corporate predators, and without jeopardising the well-being of many Australians.

NEW TECHNIQUES FOR CORPORATE CRIME CONTROL

The inadequacy of penalties imposed on corporate offenders, in the rare event that the criminal process runs its course, would appear to have little deterrent, rehabilitative, or retributive value.

Indeed, the adequacy of the civil justice system as a means of compensating victims of corporate harm may also be called into question. Only in the Wardley case was anything approaching a satisfactory settlement achieved.

Even in light of the paucity of sentencing options available to them, Australian judges and magistrates have shown a general lack of imagination in responding to corporate offenders. A fine of less than \$1,000 imposed on the Australian subsidiary of a multinational company could hardly be expected to have much effect on the offender's subsequent behaviour.

But a sentence of probation, which could entail such conditions as a change in standard operating procedures, or the special allocation of corporate organisational and financial resources for a company occupational health and safety programme, may be much more appropriate. Such corporate probation might also be subject to supervision by an appropriately qualified probation officer.²⁶

Another condition of probation might require the mobilisation of a company's internal disciplinary processes, to investigate misconduct, discipline responsible officers, and report to the court on the outcome.²⁷ Enforced self-regulation, where a company designs and implements a compliance programme subject to periodic government audit, has also been heralded as a cost-effective alternative to traditional regulatory approaches.²⁸

An appropriate probation order could also require an offending company to place advertisements in the mass media informing the public of past misbehaviour. Indeed, a precedent for this exists in Australian law. Until a few years ago, publicans in Queensland convicted of serving watered-down beer were required to post a placard outside the premises, which disclosed their misdeeds.

The community service order, a sentencing option which has been introduced in all Australian jurisdictions for individual offenders, could usefully be imposed on corporate criminals as well.²⁹ For example, a mining company convicted of an environmental offence might be required to test the alternative methods of reclaiming and revegetating abandoned mine sites.

Variations on the traditional monetary fine also merit consideration. An equity fine, for example, would require a company to issue new shares to a victim compensation fund.³⁰ This would dilute the value of shares held by existing shareholders; unlike the conventional monetary fine, the cost cannot be shifted to consumers.

A wide range of alternatives to traditional criminal penalties could thus be directed against corporate offenders. Such new sentencing options, if conscientiously employed, would constitute more appropriate responses to corporate crime than the odd trivial fine.

More effective control of corporate crime in Australia will depend upon the commitment of Commonwealth and state Governments. Whether the political will exists to confront corporate misconduct in anything more than a symbolic way is open to question. If the political will were to exist, and be acted on, whether it would then produce the oft-threatened flight of capital interstate or overseas is unclear.

In the absence of governmental commitment, it should at least be possible for citizens to protect themselves against corporate

predation to a greater extent than has been the case thus far. While laws and powers available to governments are now generally adequate, members of the public lack sufficient tools for defence against predatory corporate conduct. In the event of government inaction the citizen is so much more vulnerable.

Access to justice by individual Australians remains limited. A spate of exceptions render freedom of information acts rather toothless in those jurisdictions (the Commonwealth and Victoria) which have them. Notice of recall of defective therapeutic goods has been concealed from the consumer. Secrecy provisions in the *Insurance Act* prevent access by prospective policyholders to information regarding the financial viability of insurance companies. The results of governmental workplace inspections have been withheld from the workers whose very health and safety is in question. Basic information which would assist individual Australians to protect themselves is often denied.

There remain many impediments, both monetary and procedural, which make it exceedingly difficult for an individual or group of citizens to confront large and powerful interests. In the initial days of Mrs Wardley's confrontation with Ansett Airlines, the potential legal and psychological costs of a prolonged struggle were not insignificant. The Dalkon Shield victims, in the absence of mutual support and suffering the effects of serious injuries, faced an American multinational pharmaceutical manufacturer. The Baryulgil asbestos workers, members of Australia's most disadvantaged minority, no doubt would have regarded the legal system as an instrument of repression rather than one of justice.

A great deal of controversy has arisen over proposals for class actions and contingency fees in civil cases. While critics charge that class actions have the potential to paralyse Australian business, and that the introduction of contingency fees would transform the legal profession into a gaggle of ambulance chasers, there is little doubt that such innovations would significantly improve the positions of individual Australians in their conflict with large companies.

The use in Australia of cash rewards for information leading to the conviction of offenders dates back to the days of the bush-rangers. While the practice continues today for some of the more

serious conventional crimes, such as murder or robbery, it has yet to be used in the area of corporate crime. This is not the case in some overseas jurisdictions, however. In the United States, for example, the Internal Revenue Service offers informers a percentage of unpaid taxes recovered from tax evaders.

Few people would regard the spectre of a nation of informers with anything but distaste. It is, quite simply, un-Australian to dob someone in. These practices are nevertheless becoming institutionalised in Australia, at least with regard to small-time street offenders. The highly publicised operation NOAH, undertaken by Australian police forces and endorsed by the Prime Minister of Australia, invites citizens to inform on their neighbours for offences as petty as the simple possession of marijuana. If Australian governments embrace enforcement practices such as this for relatively trivial activities, they should have no difficulty in extending the practice to crimes which have cost Australian taxpayers hundreds of millions of dollars a year.

If the case studies in this volume have demonstrated one thing, it is that the primary task of confronting those who would seek to improve corporate crime control in Australia is to change public attitudes. There exists at present a general belief widespread in the business community, but also in the public at large, that substantive involvement by the State in business decisions is inappropriate. The medical profession has prevailed on the Commonwealth government to discontinue use of the very term "overservicing". The accounting profession has long delayed the adoption of uniform accounting standards. The insurance industry for years resisted the introduction of a "fit and proper person" test.

There nevertheless exists in Australia broad precedent for authoritative government involvement in the policy and practice of business organisations. Many regulatory statutes vest ordinary government authorities such as factory inspectorates and corporate affairs commissions with powers of entry, search, seizure and investigation which would make them the envy of Australian police forces. The National Companies and Securities Commission wields considerable power in the areas of company takeovers and share-market transactions. It may, for example, all but dictate the terms

of a takeover, and may freeze or reverse trading in a company's shares. No less an agency than the Reserve Bank of Australia, responsible for ensuring the health and stability of the nation's banking system, is formally empowered to seize gold held by a bank and to determine the proportion of a bank's funds which must be held in reserve. It may, in addition, march in and take over the operations of a bank. More commonly, the Reserve Bank exercises enormous powers of an informal nature. "We just ask banks to do certain things and they do them".³¹ This "vice regal influence by suasion"³² constitutes perhaps an extreme example, but it suggests that there is ample precedent for effective cooperation between government and industry in furtherance of the public interest.

To be sure, the price of effective corporate crime control is some limitation of freedom to do business. Similarly the price of public safety in traditional arenas of criminal justice has been some limitation of personal freedom. Elected governments have decided that the dangers posed to society by traffic in illicit drugs are sufficient to justify the interception of telephone communications. Similarly, they have decided that the toll of death and injury on the highways is sufficient to justify the introduction of random breath testing. Comparable choices can be made in the areas of occupational health and safety, environmental protection and corporate affairs.

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ACKNOWLEDGMENTS

The editors wish to thank the following for the use of copyright material as acknowledged in the text:

Chapter 1: Attorney-General's Department, Victoria, for McCabe, P.W., and Lafranchi, D.J., (1982) *Report of Inspectors Appointed to Investigate the Particular Affairs of Navillus Pty Ltd and 922 other companies*. Australian Government Publishing Service for Costigan, F. (1984) *Royal Commission on the Activities of the Federated Ship Painters and Dockers*, Final Report, Volume 1.

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Chapter 4: The *Courier-Mail* for articles on Russell Island, 21 March 1979 and 25 April 1984.

Chapter 5: Australian Government Publishing Service, for Woodward, A. (1982) *Report of the Royal Commission into Australian Meat Industry*.

Chapter 8: Media Council of Australia, for the Voluntary Advertising Code for Cigarettes in Australia (as it was then called and as it was then drawn in 1978).

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Chapter 13: Federated Ironworkers' Association of Australia for the text of reforms sought for BHP workers.

Chapter 14: The Australian Government Publishing Service for Baryulgil Report (1984) "The Effects of Asbestos Mining on the Baryulgil Community", *Report of the House of Representatives Standing Committee on Aboriginal Affairs*.

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Companies in Australia, like people in general, are capable of performing good works and of doing great evil. Some Australian companies, large and small, are capable of causing enormous harm. While they may not intend to do so, they can steal, poison, maim, even kill. The victims are not necessarily those who suffer the direct consequences. In addition to the workers, the consumers, creditors, investors and taxpayers all pay a price.

This book highlights the need for corporate responsibility in Australia. Fourteen studies have been edited by Peter Grabosky of the Institute of Criminology and Adam Sutton of the Office of Crime Statistics, the Attorney-General's Department, South Australia.