

Address by the Hon. Justice M. D. Kirby C.M.G.
Chairman of The Australian Law Reform Commission

AUSTRALIAN INSTITUTE OF CRIMINOLOGY
BOOK 'LAUNCH' - BRENT FISSE AND JOHN BRAITHWAITE
'THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS'
CANBERRA, 21 FEBRUARY 1984

PUBLICITY, CORPORATE OFFENDERS AND PUNISHMENT

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BOOK LAUNCHES

The launch of a book should be brief, informal and witty.

I have said in another place that the only book launcher I know truly worthy of the task is Gough Whitlam. He was asked to launch a book by Phillip Adams. He did so with his usual grace and style. Within days of doing so the book sold out, Mr Whitlam was appointed Ambassador to UNESCO and I found him there in December last, surrounded by admirers, holed up in the magnificent residence attached to the Australian Embassy to France. I cannot expect that a similar fate will await me for this effort. Indeed, I propose to test the impact of publicity by being long-winded, unamusing and serious. There are, of course, humorous aspects of the book committed to my charge. They include an obscure allusion to the 'entrails' of a 'luckless football team' of the University of Delaware Blue Hens (see p. viii).

I will start by dispensing with the formal bits. In case I forget, I hereby officially launch the book. I congratulate the authors, the corporate sponsors including the Australian Institute of Criminology. I am delighted to be here in the Institute for the first time since Professor Richard Harding took over as Director. He has my unbounded admiration and no-one can doubt his credentials in criminology and law reform. But to his predecessors who supported this important study by Fisse and Braithwaite must go thanks for reasons I will expand at inordinate length.

Let me not omit, in these formal remarks, my congratulations to the publishers, the State University of New York Press. The printing is fine and though I personally prefer footnotes at the bottom of the page rather than at the end of the book, I realise the losing battle which authors around the world are waging on this score. The index is excellent. In fact, my only complaint in the presentation is that the cover is inadequately racy. For this is that rare legal book — a truly interesting, fascinating study with plenty of gossip and what journalists are pleased to call 'background'. If not a coffee table book; it is the only legal text I can think of in recent years that can actually be recommended for the bed table. Fisse and Braithwaite are the Australian legal profession's answer to Agatha Christie. They are corporate sleuths. What they have found is well worth reading.

REFORMS NEEDED

Amongst the reforms which need 'very serious consideration' are:

- . empowering courts to include formal orders for paid correction advertisements to be lodged by companies on radio, television and in the print media;
- . provision for forms of 'probation' for companies, with examination on post-conviction conduct, such as internal discipline of responsible officers and reorganisation of management;
- . reform of defamation law to include procedures for rights of correction as a means of reducing impediments in criticism of corporations by consumer groups;
- . review of the law of contempt;
- . consideration of the introduction of some form of class action, so that proceedings can be brought on behalf of all persons affected by a 'mass produced' legal problem;
- . provision for the payment of criminal fines to be paid in some cases to private complainants in order to fund hard-pressed consumer protection voluntary agencies in Australia.

DISCIPLINING COMPANIES 'A PROBLEM'

The imposition of criminal or civil law disciplines on large corporations is a serious problem for the legal system for the reasons pointed out by Mr Fisse and Dr Braithwaite in their book.

It is just not possible to punish the corporation in the same way as you can punish a burglar or a mugger. Yet antisocial conduct by a corporate may affect many more people in more serious ways as this book shows. Indifference to methane in a mine may kill many minors. Indifference to the established dangers of asbestos may kill many workers and those who, in ignorance, use the product. Indifference to a fuel problem in a motor car may cause many cruel deaths when a crash ignites the fuel.

Yet in our traditional legal system, we can bring the accused to court; we can even in some places put him in the dock and arraign him before a jury. We can photograph him on his way to prison after conviction. We can confine his liberty. None of these things can so readily be done in the case of an errant company. Yet the stakes may be higher, the legitimate public concern may be greater and the need for the community to fight back may be more acute. These points are brought out vividly in this timely examination of corporate error and recalcitrance.

US AND AUSTRALIAN CASES

The new book by Fisse and Braithwaite is 'that rare legal book — with a touch of excitement, difficult to put down'. One could not say the same thing about Chitty on Contracts or Phipson on Evidence. But Fisse and Braithwaite have written a fascinating book because of their empirical approach. In the place of vague generalisations and broad allegations, they have engaged in painstaking discussions with companies, their employees past and present, judges and prosecutors. They have scoured newspapers, including in Japan, to see how disasters and mistakes by companies and their executives have resulted in adverse publicity. They have examined the stock exchange and trading figures to see whether there is an impact on the corporation equivalent to the impact that courts can have on the life of the individual. The sober conclusion is that, under present arrangements, there is relatively little impact. Sometimes an executive or two is sacked. Sometimes remedial action is taken. More often, in an air of injured self-righteousness, the corporation simply weathers the storm.

Among the 19 case studies which provide 'fascinating detail' on the impact of adverse publicity on corporate activities are a number of interesting local cases:

- a study of the Appin mine disaster in July 1979 involving the BHP subsidiary Australian Iron and Steel;

- . an examination of the removal of 'Asbestos' from the name of James Hardie Industries and the renaming, with the replacement of two large brass plates, of 'Asbestos House' as 'James Hardie House' in December 1979;
- . the impact of the \$100 000 fine on Sharp Australia, local subsidiary of Sharp Corporation of Japan, following a plea of guilty for the false advertising that 'every Sharp microwave oven is fully tested and approved by the Standards Association of Australia';
- . the inquiry into mistakes in Air New Zealand following the Erebus disaster.

In addition to the above cases, the book provides 'interesting insight' into a number of celebrated United States corporate misadventures:

- . the marketing of General Motors 'Corvair' in the 1960s, which was criticised in Ralph Nader's book 'Unsafe at Any Speed';
- . the unsuccessful criminal prosecution of the Ford Motor Company for reckless homicide in the marketing of its Pinto car, with a defective fuel system that would have cost \$11 a car to correct;
- . the Lockheed bribery scandal;
- . the antitrust action against IBM Corporation;
- . the boycott against Nestles in relation to the sale of breast milk substitute powders, especially to developing countries.

LEGAL GOSSIP

What make the book particularly easy to read are the fascinating 'behind-the-scenes' picture of boardroom reaction to the publicity which follows disasters, public complaints and judicial inquiries:

- . the action of General Motors, in responding to Ralph Nader's book on the dangers of the 'Corvair' included an investigation by their agents into Nader's private life. In the end, when this was disclosed, it secured an abject apology by GM's Chief Executive and the payment of nearly a quarter of a million dollars to Nader, which he ploughed back into 'monitoring' GM's conduct;
- . the press conference arranged by the judge immediately following the jury's acquittal of the Ford Motor Company in relation to the Pinto car. The jury explained that the prosecution had not proved the necessary 'recklessness' on the part of Ford. But the strict laws of evidence appear to have come to the rescue of Ford in keeping from the jury some highly damaging evidence;

- the discovery of an internal document of the Ford Motor Company where somebody had done the sums in an internal cost/benefit study in 1953 calculating that it was better to pay verdicts for 180 burn deaths and an equal number of burn injuries than to pay the costs of installing a fuel leakage device to reduce problems in the ill-fated Pinto;
- the indirect effect of publicity in the improvement of cancer-related coke ovens of BHP's Port Kembla works. According to the authors, the publicity and union protests secured little corporate impact. But they did jostle government authorities belatedly into action;
- the recall to Japan of the Australian-based executives of the Sharp Corporation following the imposition of the \$100 000 fine under the Trade Practices Act and the front page headline of the judge's denunciation of the 'attempt to swindle' the public of Australia. The tensions between the parent and Australian executives make fascinating reading;
- the Air New Zealand case and the impact on that company of Justice Mahon's accusation of 'an orchestrated litany of lies';
- the description of investigative journalism and the limitations on investigative journalists in Australia when compared with their American cousins who can rely on the First Amendment to the US Constitution and the less restrictive laws on defamation and contempt of court.

IMPORTANT REFORM WORK

The book by Fisse and Braithwaite is a very important text for legal reform. It shows Australian legal scholarship at its best. This is a legal text by two Australian lawyers which bring much credit on legal scholarship in Australia. First, it is intensely readable. Secondly, it is based on the empirical approach — not vague grumblings but a highly specific collection of fascinating detail on the operation of the legal system. Thirdly, it lifts our sights beyond Australia's concern by the equal presentation of a number of important and similar cases of corporate misconduct in the United States. In the age of multinational corporations, the capacity of local laws to discipline worldwide corporations is limited and probably diminishing. Fourthly, the book has a practical tone. The authors clearly realise that superficial calls for higher fines upon corporations and white collar criminals may be the newspaper editor's delight. But they may have very little impact on improving corporate citizenship and removing corporate abuse. It is so easy to step up the fines. It is rather more difficult to design sanctions and remedies that actually work — and even more difficult where the defendant is a company. Fifthly, this is a work with numerous suggestions for reform. Anyone who knows the authors will not be surprised. But so many lawyers write descriptions of the present law without tarrying for a moment to

offer suggestions for improvement. Here are many proposals for reform. They are proposals that will have the close attention of the Australian Law Reform Commission in a number of its related tasks. I hope they will have the attention of the Australian Institute of Criminology and of the Federal Attorney-General.

BOARDROOMS AND BEDROOMS

Since the Tasmanian Dams decision and the clarification of the corporations powers of the Commonwealth, the scope for comprehensive Federal legislation on the corporate offender is clearer than ever before. Before Federal authorities move to legislation, they should free themselves from the myth that bigger and bigger fines constitute, alone, an adequate and sensitive sanction against corporations. Those who design our future Federal corporate law should take Fisse and Braithwaite — the book that is — to bed with them. Quite apart from anything else, they will find it easy to read. It joins a distinguished and growing body of Australian legal texts on law reform. In that library, it will have an honoured place. I suspect it will also find its way into a few boardrooms.