THE STATUTORY INJUNCTION: AN ANALYSIS

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[*Statutory injunctions increasingly are being employed in legislative sanctioning schemes, particularly in so-called regulatory legislation. This appears to be a response to the accepted limitations of traditional criminal sanctions, especially against corporations. Invariably, however, little or no parliamentary guidance is given on the role of the injunction. In this article the author, using the injunction in the Trade Practices Act as a model, analyses the nature of the statutory injunction as a sanction and compares its principal features with those of other general sanctions.*]

I. *INTRODUCTION*

It is often stated that 'corporate crime' or the 'economic offence' is pervasive and costly to the community. As Stanton Wheeler has pointed out, 'it is now recognized that white-collar crime takes an enormous toll not only economically, where the total value of losses far exceeds the take from street crime, but also morally. White-collar crime often entails abuse of trust by those in positions of responsibility, thus rendering shaky that world of implicit agreements and shared understandings on which all enterprise depends.'[1] There has been considerable criticism of the traditional criminal and civil sanctions employed by the legislature to enforce the regulation of business misconduct. In the case of corporate offenders, in particular, there have been calls for a wider range of sanctions. Suggestions have ranged from fines in the form of corporate securities to restructuring or dissolving the offending corporation.[2]

In the United States, and to a lesser extent Canada, there is a long history of the use of the statutory injunction as a sanction in commercial regulatory legislation. The statutory injunction, and the variety of orders which have developed from it, have been seen as one of the principal weapons 'in a modern society with expanding regulation of complex economic and social affairs.'[3] The use of the injunction in this way has been described as 'one of the most striking procedural developments of this century'.[4]

In Australia, on the other hand, the statutory injunction played very little part

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[1] In Preface to Shapiro, S., *Wayward Capitalists: Target of the Securities and Exchange Commission* (1984) xi.

[2] See *e.g.* Fisse, B., 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions' (1983) 56 *Southern California Law Review* 1141; Fox, R., 'Corporate Sanctions: Scope for a New Eclecticism' (1982) 24 *Malaya Law Review* 26; Coffee, J., '"No Soul To Damn: No Body To Kick": An Unscandalized Inquiry Into the Problem of Corporate Punishment' (1981) 79 *Michigan Law Review* 386; Stone, C.,'The Place of Enterprise Liability in the Control of Corporate Conduct' (1980) 90 *Yale Law Journal* 1.

[3] 'Developments in the Law: Injunctions' (1965) 78 *Harvard Law Review*. 921, 994.

[4] Chayes, A.,'The Role of the Judge in Public Law Litigation' (1976) 89 *Harvard Law Review* 1281, 1292.

in legislative sanctioning schemes until it was included in the Trade Practices Act 1974 (Cth)[5]. Under section 80 of that Act an injunction can be granted 'on the application of the Minister, the Commission, or any other person' where 'a person has engaged, or is proposing to engage, in conduct' which contravenes the Act. Since 1974 the injunction has proved more popular and can be found in a variety of commercial and other legislation.[6] Injunctions in almost identical terms to the Trade Practices injunction have been included, for example, in the Foreign Takeovers Act 1975 (Cth),[7] the Companies (Victoria) Code 1981,[8] the Securities Industry (Victoria) Code 1981,[9] the Companies (Acquisition of Shares) (Application of Laws) Code 1981[10] and the Futures Industry (Victoria) Code 1981.[11]

Given the increasing willingness of the legislature to make use of the statutory injunction, it has become important to assess whether it is an appropriate sanction for its particular context. Despite its importance, there has been very little research into the nature of the statutory injunction and how such a sanction operates in practice.[12] This is consistent with Freiberg's recent claim that 'the intimate association of sanctions with the penal law has resulted in a gross neglect of the study of the nature and range of sanctions in the civil law.'[13]

It is the aim of this article to investigate the nature of the injunction and assess its features as a sanction. It is hoped that the analysis presented will provide a framework for more detailed discussions of the injunction in particular statutory contexts. Comparisons will be made with the statutory injunction employed in the Trade Practices Act 1974 (Cth) where the injunction is well established and commonly used. The article will analyse the nature of the injunction by identifying its five principal characteristics and comparing these with other sanctions provided in the Trade Practices Act.

II. *FEATURES OF THE STATUTORY INJUNCTION.*

An analysis of the injunction shows it to have five distinguishing features. These are that it is (i) discretionary, (ii) preventive, (iii) personal, (iv) flexible and (v) civil. These features and how they shape the nature of the injunction as a sanction will be considered in turn, with particular attention to the section 80 injunction.

5 'Mirror' legislation has also been passed in some States. See *e.g.* s. 34 Fair Trading Act 1985 (Vic.). Examples of earlier statutory injunctions can be found in the *Collusive Practices Act* 1965 (Vic.) s. 49; *Town and Country Planning Act* 1961 (Vic.) s. 49; *Conciliation and Arbitration Act* 1904 (Cth) s. 109.

6 For a list of such statutory injunctions, see Fox, R., and Freiberg, A., *Sentencing: State and Federal Law in Victoria* (1985) para. 10.403 and relevant footnotes.

7 S. 35.

8 S. 574.

9 S. 149.

10 S. 574 of the *Companies (Acquisition of Shares)* Act 1980 (Cth) has been incorporated into the *Companies (Acquisition of Shares) Code* 1980 (Vic.) by s. 5(1) of the latter Act and by s. 7(1) of the *Companies (Acquisition of Shares) (Application of Laws) Act* 1981 (Vic.).

11 S. 157.

12 Fiss, O., *The Civil Rights Injunction* (1978) is exceptional.

13 Freiberg, A., 'Reconceptualizing Sanctions' (1987) 25 *Criminology* 223, 224.

1. *Discretionary*

The injunction, like damages and the fine or pecuniary penalty, is employed as a general sanction in the Trade Practices Act. One feature which distinguishes the injunction from these other sanctions is its fundamentally discretionary nature. It will be shown in this part that historically such discretion has tended to subordinate the injunction to other sanctions and that the injunction's discretionary nature shifts power from the legislature to the judiciary.

The injunction has been described as 'pre-eminently a discretionary remedy'.[14] Its discretionary nature derives from its equitable origins. Although personal orders, including injunctions, were not unknown to the common law,[15] it was in the equitable jurisdiction that the injunction took root. Its original *raison d'etre* was to enable the Chancellor, by means of the so-called common injunction, to prevent the common law courts from enforcing inequities which resulted from the rigidity of their remedy-based system. The jurisdiction was thus supplementary to the common law: it arose only where the Chancellor believed there were deficiencies in the common law system. In his study of the history of injunctions in England before 1700, Raack concludes that 'the development of the injunction was, like the development of Chancery itself, due to the defects and omissions of the common law.'[16] The injunction was, in this sense, discretionary and the equity dispensed by the early Court of Chancery was 'extremely flexible, not fettered by definite rules or bound by precedent.'[17]

By the nineteenth century, use of the injunction was widespread 'entering alike into the miner's shaft and the merchant's counting house.'[18] The Chancellor's jurisdiction had long been institutionalised and the Courts of Equity had developed relatively fixed principles on how its discretion should be exercised. The effect of these principles, which have remained largely intact, was to maintain the injunction's role as a 'remedy of last resort'. Unless common law remedies could be shown to be inadequate, the equity court would not interfere. The passage of the Judicature Act in 1873, in which common law and equity were thereafter both administered in the High Court of Justice, could have been expected to end the traditional preference for common law remedies and procedures. But the injunction remains, formally at least, subordinated to common law remedies.[19]

It has been suggested that 'remedies are ranked' and that 'this notion of a hierarchy of remedies has been one of the hallmarks of our legal system'.[20] In such a hierarchy discretionary principles have assigned the injunction a low

[14] Evans, J., *de Smith's Judicial Review of Administrative Action* (4th ed. 1980) 437 (hereinafter referred to as de Smith).

[15] Meagher, R., Gummow, W., and Lehane, J., *Equity: Doctrines and Remedies* (2nd ed. 1984) para. 107. See also Raack, D., 'A History of Injunctions in England Before 1700' (1986) 61 *Indiana Law Review* 539, 544-50 where possible common law precursors to the injunction are traced.

[16] Raack, D., *op. cit.* 592.

[17] *Ibid.* 554.

[18] 'Eldon as a Law Reformer' 2 *Law Review* 282 quoted in Kerly's *An Historical Sketch of the Equity Jurisdiction of the Court of Chancery* (1890) 258.

[19] 'Developments in the Law: Injunctions' (1965) 78 *Harvard Law Review* 994, 998 (hereinafter referred to as 'Developments').

[20] Fiss, O., *op. cit.* 1.

ranking. In addition to the irreparable injury rule, other discretionary principles serve to subordinate the injunction. For example, the established discretionary principle that 'equity will not enjoin a crime' has the effect of deferring the injunction to criminal sanctions. The traditional limitation that equity would protect only property rights, although of doubtful validity today,[21] further constrained the injunction's availability.

As well as subordinating it to other sanctions, another significant consequence of the injunction's discretionary nature is its effect on what can be referred to as the distribution of power. As Freiberg has pointed out, 'the debate about sanctions is ultimately a debate about the use of power'.[22] In this respect discretion to apply a sanction allocates power to the sanctioning authority at the expense of the rule-making authority. In comparison with other sanctions such as damages, fines and imprisonment, the injunction's discretionary nature tends to decentralise the power to impose a sanction by giving greater authority to the court. This is particularly so in the case of interim or interlocutory injunctions, where the court's discretion arises upon the applicant satisfying the low threshold test that there is a 'serious question to be tried'. The difficulties lying in the way of a successful appeal against the exercise of discretion at first instance serve to further decentralise power to the individual judge making the initial decision.

It is in this sense that the injunction can be described as 'undemocratic' in comparison with other sanctions.[23] On occasion the courts themselves have expressed concern at this aspect of the injunction. For example, Lord Wilberforce in *Gouriet v. Union of Post Office Workers* stated that 'it may seem wrong that the courts, civil courts, should think fit, by granting injunctions . . . to do what Parliament has not done.'[24] Indeed it was this feature of the injunction which was the basis of the outcry against its use in labour disputes in the United States at the turn of the last century. The political outcry followed the celebrated *Debs* case.[25] In this case the United States Supreme Court affirmed the validity of an injunction against workers in the American Railway Union involved in a national railway strike. As Fiss points out, the case highlighted the potentially undemocratic nature of the injunction. 'The 1896 presidential campaign slogan raised in protest against *Debs*, "Government by Injunction", was in essence a protest against government by judiciary.'[26]

This discretionary feature may be modified in a statutory context. There would appear to be no constitutional barrier, for example, to the legislature eliminating entirely the court's discretion to grant or deny injunctions, thus making the injunction more akin to damages in this respect. An example of this was the Australian Industries Preservation Act 1906 (Cth), which was the original predecessor to the Trade Practices Act. Section 10(2) stated that, following a conviction under the Act, 'the justice before whom the trial takes place *shall*,

[21] Meagher *et al.*, *op. cit.* paras 2164-5.
[22] Freiberg, A., 'Reconceptualizing Sanctions' (1987) 25 *Criminology* 223, 225.
[23] Fiss, O., *op. cit.* 23-32.
[24] [1977] 3 All E.R. 70, 83. See also *Parry v. Crooks* (1980) 27 S.A.S.R. 1, 8.
[25] *In re Debs* 158 U.S. 564 (1895).
[26] Fiss, O., *op. cit.* 23. See also Mahan, C., 'Government by Injunction?' (1950) 52 *West Virginia Law Review* 217; Frankfurter, F. and Greene, N., *The Labor Injunction* (1930) ch.1.

upon application by or on behalf of the Attorney-General or any person thereto authorised by him, grant an injunction'.[27] In the one case considered under this section, Isaacs J. considered that the 'subsection makes it a matter of right to obtain the particular remedy and leaves no discretion to the Court.'[28]

Displacement of the courts' discretion will require a clear legislative intention to do so, however. Section 205 of the United States wartime Emergency Price Control Act 1942[29] provided that 'upon a showing by the Administrator that such a person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.' In *Hecht Co. v. Bowles*[30] the court rejected an argument that injunctions were mandatory under this section. It did not believe that 'such a major departure from [equity's] long tradition . . . should be lightly implied'[31] and held that as a matter of statutory interpretation, provided the court made 'any other order' an injunction need not be granted.[32] It is suggested that Australian courts could be expected to show a similar reluctance to lose discretion over a statutory injunction.

Section 80 of the Trade Practices Act clearly preserves the court's discretion. Under section 80(1) the Federal Court 'may' grant a final injunction. Section 80(2) is to the same effect for interim injunctions, although more elaborately expressed: interim injunctions may be granted 'where in the opinion of the Court it is desirable to do so'. Sections 80(4) and (5) actually extend the discretion by allowing the court to disregard the traditional requirements that there be a likelihood of a future breach and imminent danger of substantial damage. It was noted in one of the earliest decisions of the Full Federal Court under the Act that 'these words confer a judicial discretion of the widest kind upon the court.'[33]

2. *Preventive*

Halsbury states that the injunction primarily serves 'to prevent the infringement of public or private rights, either temporarily before the right had been scertained, or permanently after it had been ascertained.'[34] The preventive nature of the injunction is also referred to in the cases. For example, in *Carlton Illustrators v. Coleman & Co. Ltd* the court stated that the injunction differed from other sanctions in that it 'is not a remedy for past breaches but is a means for preventing future breaches.'[35]

The preventive nature of the injunction distinguishes it from other sanctions employed in the Trade Practices Act. Sanctions such as fines, pecuniary penalties and civil damages are preventive in the sense that their imposition may have a deterrent effect. But as sanctions they are not inherently preventive in that they

[27] Emphasis added.
[28] *The King and A-G v. Associated Northern Collieries (1912)* 14 C.L.R. 387, 666-7. See *Pelling v. Corfield* (1970) 123 C.L.R. 52 for discussion of this point in a criminal sentencing context.
[29] Ch.26 para. 205(a), 56 Stat. 23, 33.
[30] 321 U.S. 321 (1944).
[31] *Ibid.* 330.
[32] *Ibid.* 228-9.
[33] *World Series Cricket Pty Ltd v. Parish* [1977] A.T.P.R. 40-040, 17426.
[34] *Halsbury's Laws of England*, vol. 24, para. 1272.
[35] [1911] 1 K.B. 771, 782.

do not operate until the breach and resultant harm has occurred. The distinction is well made by Stone.[36] He distinguishes between what he calls 'Harm-Based Liability Rules' on the one hand and 'Standards' on the other. With Harm-Based Liability Rules 'the operation of the rule is triggered by harm; that is, the law stays its hand until the harm is done.'[37] Sanctions attached to these rules may be related to the amount of harm caused by the breach, as with damages for example, or independent of it as with fines, pecuniary penalties and imprisonment.[38] 'Standards' operate by 'detaching the law from harm as the trigger of liability'.[39]

Injunctions are described by Stone as falling within the 'standards' category. 'Instead of giving the actor the option of causing the harm and then, if caught, paying the damages or the penalty, [injunctions] are employed to prevent some harms from occurring in the first place.'[40] What makes the injunction preventive is, of course, not just the form of the order but the further coercive sanction lying behind it. A breach of an injunctive order is a civil contempt of court and as such the party in breach (the contemnor) may be imprisoned indefinitely. In the case of a corporate defendant, the company's assets may be sequestered or the officers involved imprisoned if the breach is wilful.[41] It appears that the court also has power to fine the contemnor.[42]

The injunction is not uniquely preventive. In *Gouriet v. Union of Post Office Workers*,[43] Lord Diplock drew attention to similarities with an order that a person be bound over to be of good behaviour (a binding-over order).[44] While there are admittedly many differences between binding-over orders and injunctions they both seek preventive action against threatened breaches of the criminal law.[45] Power, in his review of the Justices' preventive jurisdiction, points out that 'the equitable remedy of an injunction has much the same legal effect as a binding-over order for the same purpose.'[46]

This traditional view of the injunction as a preventive sanction has been challenged by Fiss. He argues that the injunction's preventiveness is generally overstated and that the injunction has been misunderstood in this respect.[47] He suggests that, when properly analysed, the injunction should be seen as similar to criminal sanctions. The injunction, he argues, should be seen as comprising two stages. The first is the issuance stage when the injunction is granted by the court. The second is the enforcement stage which is triggered by a breach of the court order. He then states that it is only the enforcement stage which can be appropri-

36 Stone, C., 'The Place of Enterprise Liability in the Control of Corporate Conduct' (1980) 90 *Yale Law Journal* 1.

37 *Ibid.* 12.

38 The latter are referred to by Stone as 'penalty liability in the Harm Based Liability Rule mode': see Stone, C., *op. cit.* 17.

39 *Ibid.*

40 *Ibid.*

41 *E.g.* r. 66.05(2) (b), (c) of the General Rules of Procedure in Civil Proceedings 1986 (Vic.) and *Heatons Transport (St. Helens) Ltd v. T.G.W.U.* [1973] A.C. 78.

42 *Mudginberri Station Pty Ltd v. A.M.I.E.U.* [1985] A.T.P.R. 40-580, 40-714.

43 [1978] A.C. 435.

44 *Ibid.* 97.

45 Williams, D., 'Preventive Justice and the Courts' (1977) *Criminal Law Review* 703, 709.

46 Power, P., '"An Honour and Almost a Singular One": A Review of the Justices Preventive Jurisdiction' (1981) *Monash University Law Review* 132.

47 Fiss, O., *op. cit.* 8-18.

ately compared with other sanctions. 'The enforcement phase can properly be compared to the damage action or criminal prosecution; all are retrospective in the sense that they are responsive to an antecedent wrong — a violation of a rule of conduct. The issuance phase of the injunctive process, on the other hand, should be compared with the promulgation of a rule of liability or a criminal prohibition: a past wrong is not a necessary condition for either, and the concern of each is to establish standards of future conduct.'[48]

On this analysis the injunction is not distinctively preventive. It is a view which has some judicial support. In *Gouriet*'s case, *supra*, Viscount Dilhorne expressly drew the analogy between criminal legislation and the injunctive order.

> An enactment by Parliament defining and creating a criminal offence amounts to an injunction by Parliament restraining the commission of the acts made criminal. If in addition to the enactment an injunction is granted in the civil courts to restrain persons from doing the acts already made criminal by Parliament, an injunction which does no more than embody the language of the statute, has that any greater potency than the injunction by Parliament contained in the Act? . . . Repetition is not enforcement. The granting of the injunction merely imposes a liability to a fine or imprisonment for contempt additional to the maximum Parliament has thought fit to prescribe on conviction for the same conduct.[49]

A similar approach was taken in an early Canadian case. In response to the Attorney-General's application for an injunction to enjoin a statutory breach, the court replied: 'You have an injunction from the highest Court in the land now standing in the books . . . When you have got that, why do you come to this Court for a further injunction?'[50]

To some extent the difference between this and the traditional analysis may be seen as one of degree. Fiss accepts that the issuance stage may be more preventive than other liability rules as a result of other features the injunctive order possesses. In particular, in comparison with other liability rules the injunction is 'individuated'. That is, it is addressed to clearly identified individuals and its requirements are specified in detail.[51] This may make it more effective than other liability rules. But Fiss's point is that the injunction is not inherently or uniquely preventive and that this needs to be taken into account when arguing for or against its use in a particular context.

The Fiss analysis, although generally helpful in the way it dissects the injunction, is not entirely satisfactory in this respect. This is because the issuance stage in fact does more than simply lay down a liability rule. It is intended to act itself as a sanction, enforcing other liability rules. And to fit in with his scheme Fiss distorts the nature of the contempt process. The contempt procedure is not a sanction specifically developed to enforce injunctions, but is part of a broader process available to protect the authority of the legal system itself. In the case of contempt, the proper analogy is not with criminal and civil sanctions, as Fiss suggests, but with the procedure for enforcement should the criminal or civil sanctions not be obeyed. If a fine is not paid, for example, imprisonment may be ordered in default.[52] Failure to comply with a damages

[48] *Ibid.* 9.
[49] *Supra* n. 43, 91.
[50] *A-G v. Wellington Colliery Co.* (1903) 10 B.C.R. 397, 399. Referred to in Sharpe, R., *Injunctions and Specific Performance* (1983) 133.
[51] Fiss, O., *op. cit.* 12
[52] Fox, R. and Freiberg, A., *Sentencing: State and Federal Law in Victoria* (1985) ch. 4.

order is subject to a variety of execution processes, including, in certain circumstances, imprisonment.[53]

Nor is it accurate in a practical sense to describe the injunctive order as simply establishing a potential liability. It will often have a significant impact on the defendant. Sutherland, in his seminal work on white collar crime, points out that the injunction has 'the attributes of punishment'. The United States antitrust statutory injunction was, he claimed, 'designed by legislatures and administrators to produce suffering. The suffering takes the form of public shame.'[54] This point was made by the United States Supreme Court in the following terms: 'The mere fact of the issuance of any sort of an injunction stigmatizes the defendants as having done or threatened to do some illegal or inequitable act of such a nature as to justify such extraordinary relief.'[55] Further, the injunctive order may not only result in significant legal costs, it may also be used as the basis of further proceedings against the defendant. Section 83 of the Trade Practices Act, for example, allows a finding of fact in injunction proceedings under the Act to be used in a later damages action by providing that the finding is *prima facie* evidence of the fact.

It is suggested that for these reasons the injunction can properly be described as inherently preventive. It should be noted at this stage, however, that section 80 appears to have modified the injunction's traditional preventive role. Subsection (4)(a) provides for an injunction to be granted 'whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind'. And subsection (4)(c) allows an injunction 'whether or not there is an imminent danger of substantial damage to any person'.[56] The breadth of this language would appear to allow the injunction to be used as a post-breach sanction where there is no proven likelihood that the breach will be repeated.[57]

3. *Personal*

The injunction is a personal remedy in that the essence of the order is a requirement that the defendant perform or refrain from performing specified conduct.[58] In this part it will be shown that this feature makes the injunction potentially attractive as a sanction against corporate defendants in particular.

Newman has pointed out that the personal nature of the injunction derived originally from canon law. The Chancellor 'patterned his remedies on the decrees of the canon law, which required the erring defendant to repair specifically the injury which he had caused. These were remedies which the common law courts felt themselves powerless to grant.'[59] The supplementary

[53] *Judgement Debt Recovery Act* 1984 (Vic.) s. 19.
[54] Sutherland, E., *White Collar Crime: The Uncut Version* (1983).
[55] *International Register Co. v. Recording Fare Register Co.* 151 F. 199 (1907) 202.
[56] S. 80(5) is in similar terms for mandatory injunctions.
[57] However, an examination of the cases indicates that the courts have, for the most part, accepted the traditional preventive role for the Trade Practices injunction. Some early attempts to forge a new role appear to have foundered: see the writer's article, 'Judicial Interpretation of the Injunction and Other Personal Orders Under the Trade Practices Act' in (1989) 17 *Australian Business Law Review* 48.
[58] Spry, I., *The Principles of Equitable Remedies* (3rd ed. 1984) 31-2
[59] Newman, R., *Equity and Law: A Comparative Study* (1961) 29.

nature of equity's jurisdiction required that its orders did not conflict with those of the common law. As Newman points out, 'the restriction of the decrees of the Court of Chancery to commands directed to the conscience of the defendant, and ordering his action or inaction, thus minimized the interference with the ordinary courts.'[60]

The injunction's personal application distinguishes it from the monetary sanctions employed in the Trade Practices Act. These are the fines or pecuniary penalties of section 79 and damages under section 82. Under these latter orders there is no continuing obligation to comply with the Act. Other sanctions which can be described as personal in this sense are the affirmative disclosure or corrective advertising orders available under section 80A, the divestiture order under section 81 and the broad range of orders under section 87.

For constitutional[61] as well as practical reasons, companies are the typical defendants in Trade Practices cases. The personal nature of the injunction operates in a significantly different fashion from monetary sanctions, which are the traditional legislative sanctions employed against companies. An examination of the differences reveals the injunction's potential for dealing with certain kinds of corporate misconduct.

In the case of a company, money sanctions, such as fines, pecuniary penalties and damages employed in the Trade Practices Act, are indirect and 'non-interventionist'. That is, they rely on the deterrent effect of the monetary payment to induce the company to comply with the law. The company is free to respond to the sanction as it sees fit. To use Stone's phrase, the law treats the company as a 'black box'. 'The liability generated is enterprise liability because the outside world remains indifferent to how the enterprise participants — its investors and managers, in particular — adapt to the law's threats and distribute among themselves the law-driven losses that occur. As far as the outside world is concerned, the enterprise's interior relationships remain a "black box".'[62] Thus the company is free, should it wish, to continue to break the law and absorb the monetary sanction. An economically rational entity may be expected to react in this manner if the gain from the unlawful activity exceeds the cost of the sanction. If this occurs the impact of the sanction may ultimately be borne by consumers in the form of higher prices, shareholders in the form of lower dividends or even employees in the form of retrenchments. The point is that the non-interventionist nature of monetary sanctions allows the company to make the response it chooses.

In contrast the injunction is a more 'interventionist' sanction. The company is not given a choice as to whether to take corrective measures but has imposed upon it an ongoing responsibility to comply with the order. Stone distinguishes between 'interventionist' and the 'black box' approach in the following terms: 'Where the enterprise-liability measures threaten to dun the company for a

60 *Ibid.*

61 The Trade Practices Act 1974 (Cth) is based, *inter alia*, on the 'corporations' power of the Commonwealth Constitution. See generally Taperell, G., Vermeesch, R. and Harland, D., *Trade Practices and Consumer Protection* (3rd ed. 1983) paras 221-36.

62 Stone, *op. cit.* 8.

money judgement at its doorstep, the interventionist measures breach the threshold to impose direct and selective constraints on how the investors and managers work out various internal relationships.'[63] Court orders under the United States antitrust and securities legislation are often more 'direct and selective' than the traditional prohibitory injunctive order, which still allows the company to determine how best to comply with it.[64]

As more is learnt of corporate misconduct, greater attention is being focused on the appropriateness of different sanctions to deal with this misconduct. Interventionist sanctions have been seen as providing a possible key to the effective control of organisational behaviour. Organisational theorists have examined the functioning of large companies and have developed models of their behaviour.[65] The traditional view of the company as a 'rational profit maximiser'[66] has been rejected as too narrow. Companies have been found to react to the 'total social environment and not merely to markets.'[67] This is one of the reasons that alternatives to monetary sanctions, which rely on a financial disincentive, are being suggested.

The reason for considering interventionist sanctions in particular is that such evidence as there is suggests that corporate misconduct may often result from a breakdown in a company's internal control or communication systems. This has been referred to as 'structural corporate misconduct'.[68] Hopkins' early study of companies fined under the Trade Practices Act revealed that 'of the 19 companies convicted, organisational defects were found to be present in fifteen cases.'[69] Typical defects included failure by management to check promotional material, to properly process public complaints and to ensure that sales personnel were properly informed.[70]

Various interventionist sanctions have been suggested as an appropriate legal response to structural misconduct.[71] Some of these suggestions find their basis in the personal operation of the injunction. For example, Fisse has recommended a 'punitive mandatory injunction' in which the court could require the company to take its own internal disciplinary proceedings and introduce preventive policies

63 *Ibid.*

64 These other orders are considered in the next part.

65 See note, 'Judicial Interpretation and Organization Theory: Changing Bureaucratic Behaviour and Policy' (1980) 89 *Yale Law Journal* 513; note, 'Stuctural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing' (1979) 89 *Yale Law Journal* 353. For an argument on the limitations of this approach, see Fisse, B., 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions'(1983) 56 *Southern Californian Law Review* 1141, 1159. Small companies do not present the same problems as corporate misconduct can more readily be attributed to particular individuals within the company and sanctions accordingly imposed on them.

66 *E.g.* note, 'Increasing Community Control Over Corporate Crime — a Problem in the Law of Sanctions' (1961) 71 *Yale Law Journal* 280, 282.

67 Elkins, J., 'Corporations and the Criminal Law: an Uneasy Alliance' (1976) 65 *Kentucky Law Journal* 73, 85.

68 Note, 'Structural Crime and Institutional Rehabilitation: a New Approach to Corporate Sentencing' (1979) 89 *Yale Law Journal* 353, 357-8. See generally Fisse, B., *op. cit.* 1157-9, where he explains and extends established corporate decision-making models.

69 Hopkins, A., *Prosecutions Under the Trade Practices Act* (1978) 21.

70 *Ibid.* 20-1.

71 Stone, C., *op. cit.*; Coffee, J., *op. cit.*; Fisse, B., *op. cit.*; and Fox, R., 'Corporate Sanctions: Scope For a New Eclecticism' (1982) 24 *Malaya Law Review* 26. See also Criminal Law and Penal Methods Reform Committee of South Australia, *Fourth Report: The Substantive Criminal Law* (1977) 359-61.

to avoid repetition of the misconduct.[72] And Coffee's suggestion of corporate probation was prompted by the injunction: 'frequently, the civil law has relied on a more direct strategy, the injunction, which can be framed to require, rather than simply encourage, internal reform.'[73]

In the fourteenth and fifteenth centuries equity assisted plaintiffs against powerful barons who overawed the local courts. It has been suggested that modern corporations are the contemporary barons threatening the efficacy of our legal system and that equity, through the statutory injunction, has once again the most appropriate response. 'Under circumstances that remind us of the time of Richard II, when his nobles overawed the local courts, legislatures have invoked the aid of courts of equity to prevent injuries to the public by wealthy and influential corporations.'[74]

4. *Flexible*

The discretionary and personal characteristics of the injunction combine to create a flexibility not always available in other sanctions. As Spry has put it, 'equitable principles have above all a distinctive ethical quality. They are of their nature of great width and elasticity and are capable of direct application, as opposed to application merely by analogy, in new circumstances as they arise from time to time'.[75] The flexibility and adaptability of the injunction developed originally as an essential part of equity's response to the rigidities in the common law system. Raack explains that near the end of the Thirteenth Century the equity in the common law courts began to decline. These courts were becoming 'rigid, technical and overly formal; they focused more often on the strict letter of the law, less often on equitable considerations.'[76] In contrast equity 'was extremely flexible, not fettered by definite rules or bound by precedent.'[77] Although equity itself entered a period of 'systemization' in the Seventeenth Century,[78] and developed principles just as the common law developed rules',[79] it nevertheless retained significant flexibility.

It is true that the injunction cannot be calibrated in the same manner as damages or fines to meet breaches of varying degrees of seriousness.[80] But it retains an adaptability to new demands that other sanctions do not have. This feature has been seen as particularly important in commercial legislation where 'it is desirable that statutory prohibitions be sufficiently broad to permit standards to change with changes in business practices and social attitudes.'[81] Criminal provisions may be too rigid for this purpose as the severity of criminal sanctions requires that the conduct proscribed be accurately defined and of general applica-

72 Fisse, B., *op. cit.* n. 65, 1221-6.
73 Coffee, J., *op. cit.* 448.
74 Mack, E., 'The Revival of Criminal Equity' (1903) 16 *Harvard Law Review* 389, 397.
75 Spry, I., *op. cit.* 1.
76 Raack, D., *op. cit.* 551.
77 *Ibid.* 554
78 Meagher *et al.*, *op. cit.* paras 114-7.
79 'Developments', *op. cit.* n. 19, 1017.
80 Bemporad, R., 'Injunctive Relief in S.E.C. Civil Actions: the Scope of Judicial Discretion' (1974) 10 *Columbia Journal of Law and Social Problems* 328, 363.
81 'Developments', *op. cit.* n. 19, 1017.

tion.[82] With injunctions, on the other hand, proscribed conduct may be defined in each particular case before the conduct in question is undertaken.[83]

The injunction's flexibility lies not only in its ability to vary proscriptions in changing circumstances, but also in the variety of forms the injunctive order may take. Use of this second kind of flexibility has been far more apparent in the United States than in Australia or England.[84] In the latter countries the injunctive orders are typically in simple prohibitory form. In addition to the usual preventive orders, United States courts have granted what have been referred to as 'reparative' and 'structural' injunctions.[85] The former 'seeks to eliminate the effects of a past wrong'.[86] For example, orders have been made requiring that documents which should have been lodged with the Securities and Exchange Commission, be so lodged.[87] It is noteworthy that a similar role was suggested by a member of the Australian National Companies and Securities Commission for the Companies Act injunction, although this has not as yet occurred.[88] 'Structural' injunctions are often complex orders which seek to restructure the respondent organisation in order to correct the past wrong and prevent future wrongs.[89]

In United States antitrust and securities cases the courts have also used the injunction as a basis for relief 'ancillary' to the injunction. They have built on traditional equitable remedies, such as the appointment of a receiver, to create a range of sanctions to combat legislative breaches by corporate defendants. This has included, for example, the appointment of court-approved directors and special counsel to detect and take action against wrongdoers within the corporation.[90] A senior enforcement official with the Securities and Exchange Commission described the flexibility created by these range of sanctions.

> It used to be that we were satisfied with merely going to court, obtaining a consent decree and leaving it up to the private bar to sue and obtain money damages. But we have found that in many cases this approach seems to be a waste of effort and detrimental to the interests of the investing public. As a result, we have been trying more and more to structure our remedies to fit the particular fact pattern presented.[91]

Australian courts have not attempted to use the injunction's flexibility in this way. The statutory injunction has a much longer history in the United States and its flexibility has been developed largely through the consent orders which the enforcement agencies have been able to obtain. Whether the introduction of consent orders into the Trade Practices Act[92] will assist a similar development in Australia remains to be seen. At this stage it is still the case, as de Smith points out, that the injunction's 'capacity for growth has not been fully exploited.'[93]

82 *Ibid.*
83 *Ibid.*
84 *Cf.* Spry, I., *op. cit.* 1-2.
85 See Fiss, O., *op. cit.* 9-11.
86 *Ibid.* 9.
87 See Sporkin, S., 'SEC Developments in Litigation and the Moulding of Remedies' (1974) 29 *The Business Lawyer* 121, 123.
88 See *C.C.H. Australian Company Law and Practice* vol.3, para. 55-751 quoting the comments of former Commissioner Mr A. Greenwood.
89 Fiss, O., *op. cit.* 9-10; Laycock, D., 'Injunctions and the Irreparable Injury Rule' (1979) 57 *Texas Law Review* 1065, 1073.
90 See Sporkin, S., *op. cit.*; Farrand, J., 'Ancillary Remedies in SEC Civil Enforcement Suits' (1976) 89 *Harvard Law Review* 1779.
91 Sporkin, S., *op. cit.* 122.
92 S. 80(1AA), introduced in 1986.
93 de Smith, *op. cit.* n. 14, 474.

5. *Civil*

The least distinctive but nonetheless important feature of the injunction is its 'civil' nature. Freiberg has argued persuasively that the distinction commonly drawn between civil and criminal sanctions is artificial and inconsistent.[94] Yet there remain differing 'instrumental and symbolic features' which follow from the choice of a civil rather than a criminal sanction.[95] For present purposes it needs to be asked how the civil nature of the injunction, both at equity and in the Trade Practices Act, affects its nature as a sanction.

Perhaps the most important consequence of its 'civil' nature is that fewer procedural safeguards are provided for the defendant both at and prior to the hearing. This means that civil sanctions are more easily obtained than criminal sanctions. In the Trade Practices Act the distinction between the pecuniary penalties available for a breach of Part IV of the Act, which are civil,[96] and the criminal fines for Part V,[97] is important in this respect. Freiberg has proposed this as an example of the legislature deliberately exploiting the distinction between criminal and civil sanctions to avoid the safeguards provided by criminal sanctions. 'Wherever conduct is seen as socially harmful and present techniques of state control inadequate, and where no tradition exists of the classification of the conduct as either civil or criminal, legislators are tempted to adopt that course which allows the defendant to muster the least resistance.'[98]

One of the procedural differences is the lighter burden of proof in civil cases. In an injunction application under the Trade Practices Act the applicant need only establish a breach of the Act on the balance of probabilities, not beyond reasonable doubt as is required for a fine. The matter is complicated, however, by the fact that a breach of the Act is potentially subject to both an injunction and a fine or pecuniary penalty. This was the concern expressed by Franki J. in *Peter Williamson Pty Ltd v. Capitol Motors Ltd*:[99]

> the applicant seeks only an injunction and clearly the standard of proof is the civil standard, namely the balance of probabilities. However a finding of a contravention of section 48 can, in appropriate proceedings, be visited with a penalty of up to $250,000 . . . This penalty is five times as great as that provided for a contravention of those sections of Pt V which constitute criminal offences, where any allegation of contravention is to be tested by the requirement that the court must be satisfied beyond reasonable doubt of the guilt of the accused.[1]

In *Trade Practices Commission v. B.M.W. Australia Ltd*[2] the court rejected an argument that, because the injunction sought to restrain criminal conduct, the appropriate standard of proof was beyond reasonable doubt.[3] It was nevertheless accepted in both cases that the court would 'pay regard to the gravity of the issues in considering the standard of proof.'[4]

94 Freiberg, A., 'The Civil Offence'(1983) (unpublished Master of Laws Thesis, Law Library, Monash University).
95 *Ibid.* 132.
96 Ss 77, 78.
97 S. 79.
98 Freiberg, A., *op. cit.* 132.
99 (1982) 1 T.P.R. 309.
1 *Ibid.* 314.
2 [1985] A.T.P.R. 40-620.
3 *Ibid.* 47,004.
4 *Peter Williamson Pty Ltd v. Capitol Motors Ltd*, (1982) 1 T.P.R. 309, 314. See also *Trade*

Another consequence flowing from its civil nature is that the respondent in an injunction application has greater obligations to disclose information than in criminal or even pecuniary penalty cases.

> The most important protections provided in the criminal process preserve its strictly adversarial character by forcing the prosecution to meet its heavy burden of proof without assistance from the accused. In contrast, the civil process places greater emphasis on the search for truth than on the protection of either party and thus affords the civil litigant only a thin shield against wide-ranging discovery. In general, civil procedure rejects criminal procedure's emphasis on adversarial protections when such protections interfere with the search for truth.[5]

This general rule is to some extent modified in the Trade Practices Act. Section 155 confers wide powers on the Trade Practices Commission to investigate prior to proceedings being instituted, possible breaches of the Act and for this purpose overrules the common law privilege against self-incrimination.[6] On the other hand, in *Trade Practices Commission v. George Weston Foods Ltd*[7] the court denied the Commission the right to discovery and answers to interrogatories in an action for pecuniary penalties on the basis that the disclosure may have exposed the defendant to a penalty. Similar reasoning would apply to Commission injunction applications. In *Refrigerated Express Lines (A/Asia) Pty Ltd v. Australian Meat and Livestock Corporation*,[8] it was held that this privilege did not extend generally to private injunction applications under the Act, although particular documents or answers may be privileged.

These are the most important of the safeguards which may protect the criminal but not the civil defendant. The traditional right to a jury trial in a criminal prosecution, for example, does not exist under the Act as all offences are triable summarily. Other points which should be noted, however, relate to rights of appeal and limitation periods. In *Thompson v. Mastertouch T.V. Service Pty Ltd*[9] the court affirmed the well established principle that there can be no appeal from acquittal of a Part V offence. In the case of injunction applications, in contrast, an appeal lies as of right to the Full Federal Court and by special leave to the High Court.[10] There is a 12 month limitation period for offences under Part V[11] and six years in the case of pecuniary penalties.[12] There is no limitation period specified for injunction applications, although delay may be taken into account by the court when exercising its discretion to grant or deny the injunction.

In conclusion, it can be seen that the civil nature of the injunction avoids some of the procedural barriers which must be overcome before criminal sanctions can be utilized. The injunction is, in this sense, more accessible than criminal sanctions. This feature is amplified in the case of the Trade Practices injunction, for which 'any person'[13] has standing to apply, whereas prosecutions for Part V

Practices Commission v. B.M.W. Australia Ltd. [1985] A.T.P.R. 40-620, 47 004. See also *R. v. Chamberlain* [1983] 2 V.R. 511.

5 Note, 'Using Equitable Powers to Coordinate Parallel Civil and Criminal Actions' (1985) 98 *Harvard Law Review* 1023, 1023.

6 See s. 155(7) and *Pyneboard v. Trade Practices Commission* (1983) 57 A.L.J.R. 236.

7 [1979] A.T.P.R. 40-114.

8 [1979] A.T.P.R. 40-137.

9 [1977] A.T.P.R. 40-027.

10 Federal Court of Australia Act 1976 (Cth), s. 24.

11 Crimes Act 1974 (Cth) s. 21.

12 Trade Practices Act 1974 (Cth) s. 77(2).

13 Except in the case of s. 50, where only the Trade Practices Commission or the Minister may apply.

offences require Ministerial consent and pecuniary penalties can only be brought by the Minister or the Trade Practices Commission.[14]

III. *CONCLUSION*

The injunction developed historically as a 'remedy of last resort', to be used only where other remedies proved inadequate. Although over time the courts have rendered this restriction much less stringent,[15] the injunction nevertheless formally retains its subordinated position in relation to common law and legislative sanctions. It has been pointed out that equity's historical origins in themselves provide no argument for a continued subordination of the injunction. 'In modern times there is no justification whatever for denying a better or more effective remedy merely because the better remedy would be one which, in former times, only the Court of Chancery could give.'[16] The injunction should thus be judged on its own merits. As Fiss states:

> the choice of remedy should not turn on generalized propositions — couched in the obscure but colorful language of history — about which remedies are favoured and which are disfavoured. It should instead turn upon an appreciation of the technical advantages of each remedy and a judgement . . . about the desirability of the allocation of power that is implicit in each remedial system.[17]

This examination of the injunction has attempted to show its distinctive features. Whether these features are appropriate in a particular legislative context requires futher study. To summarize, it has been seen that, firstly, the injunction's discretionary nature has the effect of decentralising power into the hands of the judiciary. As suggested above, the exercise of discretion has also tended to limit access to the injunction, although this has weakened over time. On the other hand, accessibility has been strengthened by its civil nature and, in the case of the Trade Practices injunction, by liberal standing requirements. The injunction has been shown to be a preventive sanction although a mild one in the sense that it is non-monetary. It is for this reason that the United States Supreme Court, in *Securities and Exchange Commission v. Capital Gains Research Bureau Inc.*, described it as 'a mild prophylactic'.[18]

But the injunction is also a harsh sanction in that it exposes the respondent to severe contempt penalties. Its decentralised and civil nature works to the disadvantage of contemnors by subjecting them to the possibility of severe penalties without the safeguards provided in the case of criminal sanctions. In *Keeley v. Brooking* the court referred to the contempt process as a threat to the principles of natural justice.[19] On the other hand, the injunction's personal and discretionary nature also lends it a flexibility not found in many other sanctions.

[14] See ss 163 and 77 respectively. A study by the writer of the use of the injunction by the Trade Practices Commission suggests that its accessibility is often a reason why the injunction is selected as a sanction by the T.P.C. It is there argued that this may be seen as an overuse of the injunction: see 'The Trade Practices Injunction: An Empirical Study of its Use by the Trade Practices Commission.'(1988) 14 *Monash University Law Review* 239.

[15] Spry, I., *op. cit.* 366-71.

[16] Newman, *op. cit.* 48.

[17] Fiss, O., *op. cit.* 91.

[18] 375 U.S. 180 (1963); 11 L ed 2d 237, 247 (1963).

[19] (1979) 53 A.L.J.R. 526.

This has been exploited far more in the United States than in Australia and particularly as a basis for developing 'interventionist' sanctions against corporate defendants.