dicial review.' WALRC expected that the term 'sufficient interest' would be interpreted in a liberal manner.

appropriate law, obedient corporations?

> Corporations have neither bodies to be punished nor souls to be condemned, they therefore do as they like,
>
> Lord Chancellor Thurlow

corporate wrongdoing. Wrongdoing by corporations has the potential to erupt into a serious social problem. There is some suggestion that this is already the event. Public awareness is the guide to that. Some recent American surveys, for example, suggest that the public perception of an unsafe motor car manufacturer may be worse than that of the individual who practices 'mugging'. A business which illegally fixes prices was thought to be a greater wrongdoer than the intrusive burglar.

If Chancellor Thurlow's observation on the character of the corporation is correct, (and few would disagree with it, at least in its latent state), then the traditional approach of the law toward corporate wrongdoing may well be off course. It may even unwittingly foster the absence of a corporate conscience.

This is the concern of the several authors of a recently published collection of essays with the inventive title 'Corrigible Corporations and Unruly Law'. The general theme of these essays suggests that we should be exploring for a more appropriate legal approach to the propensity of the corporation for wrongdoing in the hope that the corporation will become more conformist.

So how best may the law assist in keeping corporations within socially approved bounds?

fostering internal corporate responsibility. There is general concurrence among the authors that one should look to the development of internal corporate responsibility as opposed to the traditional external sanction approach of the law.

Take the company whose working operations may come into conflict with environmental law. The company which employs an environmental officer is not as likely to commit toxic waste as a company which does not employ such a person. So if the latter subsequently causes injury, the law, in addition to the traditional 'fine', might impose a measure of punitive damage or penalty – not for the breach of the environmental law but for the failure of the corporation to act responsibly in its internal structuring which would have lessened the possibility of such a breach.

Much of the behaviour of a company depends, of course, on the directors or board of managers. They control or are capable of controlling that behaviour. The concept of a 'public' director is suggested. That person would not be representative of the traditional classes or groups found in corporations such as shareholders, employees and the like but would be appointed to office to take account of 'public' issues; to be the conscience of the board on such matters. This is not dissimilar from recent urging for 'lay' or public representatives to occupy a role on professional boards responsible for the maintenance of proper conduct of members of a profession.

However, it is of little use having a responsible board of managers (whether supplemented or not by a 'public interest' member of their number) if, for instance, there is no internal system within the corporation whereby actual or potential law breaking by the corporation can be brought to the attention of the managers. Someone must 'blow the whistle'. There the law needs to protect the whistle blower from unfair dismissal, discrimination or other like abuses which might follow from the exposure.

But protecting the whistle blower may not be sufficient. There are vested interests at stake in a corporation when things go wrong or show every indication that they are about

to. Position, reputations and authority may be at stake. Self interest may dictate suppression. This results in communication blockage. That may even be of the collective conspiratorial type, orchestrated from the top or near to the top. A possible solution to overcome that is an internal corporate 'ombudsman' or at least a system whereby once a violation, actual or potential, is exposed there is an obligation to notify the reporter of the response of the corporation.

personal officer liability. In the main our law inflicts the sanctions attached to corporate wrongdoing on the corporation. Where sizeable 'profit' is at stake, monetary sanctions in the form of fines or penalties (even the sanction which indirectly results from adverse publicity) may not act as a deterrent to prevent wrongdoing. Merely to link the penalty with the size of the illicit profit may not be sufficient. So, one of the essays argues, violation of the law might be ultimately laid, at least in part, at the feet of the individual (the individual within the corporation whom the law might deem to be ultimately responsible for the violation). A recent United States case is instanced as an illustration. It concerned health laws. A corporation marketed foodstuffs. It stored these products in warehouses. The health authority had complained to the chief executive officer of the corporation about the unhygienic state of one of the warehouses. The chief executive officer gave directions for the warehouse to be put into an hygienic condition. He did not, however, follow those directions through. The remedial work was not done. The chief executive officer was charged with an offence. He was convicted and properly so, according to an appeal court. That court said that the officer had an obligation to ensure that measures to prevent or correct violations are implemented.

applying different forms of sanction. The imposition of a fine or penalty is the typical and traditional form of sanction to be levied at the errant corporation. But these can be passed on in the form of higher prices or even written off as yet another cost of business. What is more to the point there are studies which suggest that the exaction of a fine or penalty does not cause the corporation to change its habits. An empirical study of the impact of prosecutions for misleading advertising under the Australian Trade Practices Act (Andrew Hopkins – Canberra: Australian Institute of Criminology, 1978) is cited in one of the essays. The study found that in 40% of the cases where the offence had resulted from deficient operating procedures there was reason to suspect that no adequate changes had been made: the corporations were convicted and fined and accepted that fate without making any apparent effort to rectify the main cause of violation.

So alternative or additional forms of sanction are canvassed. These include probation orders (bonds), community service orders and compulsory adverse publicity orders.

As promising as these may seem at first strike, they have their difficulties. They are open to objections based upon uncertainty of impact, regulatory cost and of fostering a too intrusive control.

However, the essays urge that the anatomy of corporate wrongdoing is so diverse that effective sentencing requires courts and tribunals to be equipped with a range of available sanctions – not merely one.

white collar crime. Commercial law 'white collar' crime is said to follow the premise that the 'conduct of business is an endemically corrupt enterprise'. A biblical way of putting it is that 'as a nail sticketh between the joinings of the stone, so doth sin stick close to buying and selling'.

Not unsurprisingly it is suggested that the apparent fertility of 'white collar' crime is because it is easy and the risk of detection not great. Where the corporation itself is the transgressor it is suggested that, again, the system mode of the organisation lies at the root of the problem. Criminologists, it is sug-

gested, might be better served by looking at the organisational structure:

> "The major problem is that power is used and abused in ways that are hidden from sight or regarded as sacrosanct and beyond scrutiny."

As the editors of this work concede:

> "no programs have been proposed nor policy resolved; nevertheless (the) mission to challenge and suggest rather than prescribe should prove useful in the future direction of corporate regulation."

[Corrigible Corporations & Unruly Law; Trinity University Press]

chief justice Rose Bird

> Failure is an inability to come to terms with who you are and what life is about
>
> Chief Justice Rose Bird, address to NSW Women Lawyers Association, April 1986

election of judges. Rose Elizabeth Bird, the Chief Justice of the Californian Supreme Court, has had a remarkable career, not just because of her personal achievements, but also because of the campaign against her since her nomination as Chief Justice. The controversy surrounding Chief Justice Bird raises some fundamental issues about the system of nomination and subsequent election of judges which prevails in some states of the United States.

In February 1977 Chief Justice Bird became the first woman appointed to the Californian Supreme Court. She was nominated by the then governor, Edmund G ('Jerry') Brown Jr to succeed Donald Wright as Chief Justice. Chief Justice Bird was then Secretary of California's Department of Agriculture and Services, and had been the first woman to hold such a Cabinet-level position in the history of California. Her earlier career in law had been as a criminal lawyer. In 1966, Chief Justice Bird had become the first woman public defender in Santa Clara County in California.

More than half of the United States provide for some form of election of judges. Nearly all States have fixed term appointments for judges. Under amendments to the California Constitution made in 1934, judges are nominated by the governor and then undergo a confirmation election at subsequent State elections for the office of governor. Prior to the introduction of this system in 1934, Californian judges had to contest elections against other contenders for judicial office.

manipulation? In the 1978 gubernatorial election, Chief Justice Bird very narrowly won confirmation of her nomination two years earlier. She thus became the first justice who nearly lost a confirmation election in California, where no appellate court judge had even come close to defeat since the confirmation election system was started. Perhaps this was partly due to the publication, on election day, of a front page story in the Los Angeles Times asserting that the court had manipulated the timing of the release of an unpopular decision (*People v Tanner*) against the then 'use a gun, go to prison' law in order to assist Chief Justice Bird's election. That allegation was subsequently investigated by the Californian Commission on Judicial Performance. The Commission was satisfied that there was no improper delay but its conclusions were marred by a successful challenge to its right to conduct open hearings and report in full.

soft on crime? Since then, controversy surrounding Californian Supreme Court decisions has consistently centred upon the Chief Justice despite the fact that she is one of a bench of seven. Many critics of decisions of the Californian Supreme Court have continued to focus upon Chief Justice Bird, contending that she is 'soft on crime'. Her lack of previous judicial experience prior to her nomination was criticised, although at least eighteen United States Supreme Court justices, including Chief Justice Earl Warren, had had no previous judicial experience. Nonetheless Chief Justice Bird persisted with